STRENGTHENING THE EUROPEAN CIVIL JUDICIAL COOPERATION: THE PATRIMONIAL EFFECTS OF FAMILY RELATIONSHIPS

VERSO IL RAFFORZAMENTO DELLA COOPERAZIONE GIUDIZIARIA CIVILE NELL'UNIONE EUROPEA: GLI EFFETTI PATRIMONIALI DELLE RELAZIONI FAMILIARI

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Recibido: 12.01.2017 / Aceptado: 18.01.2017
DOI: https://doi.org/10.20318/cdt.2017.3621

Abstract: The present article offers a first overlook on the two recently adopted regulations on the civil judicial cooperation in the field of the matrimonial and the partnership property regimes. After a general and historical presentation, the article distinguishes between some EU «classical» normative solutions and the most important innovations enshrined in the regulations. The latter are duly scrutinised, with particular regard to the role of party autonomy, the connection with different pending cases, and the judicial margin of appreciation. The connecting factors for the determination of the jurisdiction and the applicable law are analysed, too. Finally, the article makes some comments on the enactment of enhanced cooperation in the fields of civil law affecting family law and its impact on the private parties.

Keywords: matrimonial property regime, partnership property regime, enhanced cooperation, party autonomy, EU civil judicial cooperation, family law.

Riassunto: Il presente contributo offre una prima analisi dei due recenti regolamenti sulla cooperazione giudiziaria civile in materia di regimi patrimoniali fra coniugi e di effetti patrimoniali delle unioni registrate. Dopo una presentazione di carattere generale e storico, si opera una prima distinzione fra alcune soluzioni oramai classiche nella materia, e talune importanti novità introdotte dai regolamenti. Queste ultime sono analizzate con maggior grado di dettaglio, concentrandosi soprattutto sul ruolo dell'autonomia delle parti, la connessione con altri procedimenti pendenti, e il margine di discrezionalità attribuito al giudice. Sono quindi esaminati i titoli di giurisdizione e i criteri di collegamento. Infine, sono presentate talune osservazioni sull'attuazione di cooperazioni rafforzate nell'ambito del diritto internazionale della famiglia, e il loro impatto sulle parti private.

Parole chiave: regime patrimoniale della famiglia, effetti patrimoniali delle unioni registrate, cooperazione rafforzata, autonomia della volontà, cooperazione giudiziaria civile, diritto di famiglia.

the organisation of the property regime. 1. The choice of the applicable law. 2. The agreements on the property regime. IX. The objective connecting factors and the most meaningful differences between marriage and registered partnership. 1. The law applicable to the matrimonial property regime. 2. The law applicable to the registered partnership property regime. X. The flexibility in the choice of law: the *lex (non) conveniens*. XI. Family law and enhanced cooperation: the only way on?

I. Introduction: the long way to the enhanced cooperation

1. On 24th June 2016 the European Parliament and the Council adopted two regulations enacting an enhanced cooperation on the patrimonial consequences of international family relationships. Regulation n. 2016/1103 on the matrimonial regimes[1], and regulation 2016/1104 on the patrimonial effects of registered partnerships[2] entered into force the twentieth day following that of their publication, but are applicable only as from the 29th January 2019. They represent the last achievement of the European Union in the area of the civil judicial cooperation.

2. The debates on the opportunity to implement EU uniform measures in these fields started with the 2005 Hague Programme[3], and a Green Paper followed the next year[4]. Notwithstanding the apparent urgency, the Commission presented two proposals only in year 2011[5]. After long debates within the Council and the European Parliament, finally, the former issued two compromise texts in November 2014, whose content still did not seem satisfying. In February 2015 the Council decided to freeze the discussions on the proposals, opening a "silent" period of reflection on the basis of the compromise texts of November 2014.

3. These reflections lead some Member States to strengthen their opposition to the adoption of the regulations. On 1st December 2015 Hungary and Poland issued a joint declaration, suggesting further amendments to the proposals, in order to overcome the possible difficulties hiding under the implicit recognition and the acceptance of unknown familiar institutions. On the same day, the United Kingdom confirmed its wish not to opt in, blaming the lack of clarity in the legal drafting, with particular regard to the multiple references to the respect of human rights. The day after, the lack of the unanimity within the Council (art. 81, para. 3 of the TFEU) prevented the adoption of the regulations.

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[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, in *OJ* L 183, 8 July 2016, p. 1.

[2] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, in *OJ* L 183, 8 July 2016, p. 30.

[3] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, in *OJ* C 198, 12 August 2005, p. 1.

[4] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (SEC(2006) 952), COM/2006/0400 final.

[5] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 16.3.2011, COM(2011) 126 final 2011/0059 (CNS); Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, Brussels, 16.3.2011, COM(2011) 127 final 2011/0060 (CNS). Further: A. Bonomi, «Les propositions du règlement de 2011 sur les régimes matrimoniaux et les effets patrimoniaux de parternariats enregistrés – Quelques remarques critiques», en A. Bonomi, C. Schmid (sous la dir.), *Droit international privé de la famille*, Genève, Zurich, Bale, Schulthess, 2013; C. Gonzáles Beilfuss, «The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships», *Yearbook of Private International Law*, 2011, p. 187; K. Denger, *Die europäische Vereinheitlichung des Internationalen Ehegüterrechts und des Internationalen Güterrechts für eingetragene Partnerschaften*, Tübingen, Mohr Siebeck, 2014; F.J. Garcia Mas, «Unión europea: perspectivas sobre regímenes económico matrimoniales y efectos patrimoniales de las uniones registradas», en M. Pereña Vicente, P. Delgado Martín, M. Heras Hernández (Coord.), *Nuevas orientaciones de derecho civil en Europa*, Navarra, Thomson Reuters-Aranzadi, 2015, p. 632.

4. On the same day, 17 Member States declared their interest in the enactment of an enhanced cooperation. The Commission presented two proposals in March[6], based on the compromise texts of November 2014, while the Council authorized the enhanced cooperation in June 2016[7]. 18 Member States within the Council approved the measures[8], without bringing any sensitive change to the last Commission's proposals[9]. The regulations are complete, i.e. establish rules on international jurisdiction, choice of law, recognition and enforcement of foreign judgments. The solutions envisaged therein are quite similar, except from important differences in the determination of the applicable law. The following pages present a first overview of the regulations, focussing on the most innovative solutions in the area of the civil judicial cooperation, and stressing, where needed, the most meaningful differences between the two regulations.

II. The scope of the two regulations

5. The regulations cannot interfere with the national definitions of marriage and registered partnership, and affect the sensitive issue of the international recognition of civil status. Nevertheless, their material scope of application must be defined, scrutinising the notions of marriage and registered partnership for the purposes of the regulations. The EU does not lay any duty to regulate or to recognise family *status* created abroad (whereas n. 64 of the regulation n. 2016/1103) and cannot offer a uniform solution. The interpreter must find a coherent solution, which can safeguard the rights of the parties without undermining national values.

1. The notion of marriage

6. Regulation n. 2016/1103 does not offer a definition of *marriage*. Whereas n. 17 states that it must be characterised according to the national laws of the Member States. This reference is at the same time not binding, nor enough clear. Which law is applicable to the characterisation of a relationship as a marriage for the purposes of the regulation? The issue is of the utmost importance, since the notion of marriage might vary, with particular regard to same-sex marriages, which are admitted by some Member States, prohibited by others. If the *lex fori* is applicable, the spouses incur the risk that their marriage is not recognised and that the judge refuses to hear the case on the matrimonial property regime. In the *lex loci actus* is applicable, the judge will have a legal duty to accept a foreign unknown *status* potentially conflicting with its public policy.

7. The reference to a Member State law leads us to suppose that marriages celebrated pursuant to a third country law or to religious laws can be scrutinised according to a law of a Member State. An example is the marriage with or between minors. This institution might not be accepted under public

[6] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 2.3.2016, COM(2016) 106 final 2016/0059 (CNS); Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, Brussels, 2.3.2016, COM(2016) 107 final 2016/0060 (CNS). Further: O. Feraci, «Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate», *Rivista di diritto internazionale*, 2016, p. 529.

[7] Council Decision (EU) 2016/954 of 9 June 2016, authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, in *OJ* L 159, 16 June 2016, p. 16.

[8] The States taking part to the enhanced cooperation are the same in the two regulations, and are the following: Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. The procedure for the adoption of the regulations may give rise to some criticism. Indeed, the Council Decision authorising the enhanced cooperation referred to a measure covering the patrimonial regimes of international couples, with particular regard to spouses and registered partners, but the EU approved two regulations. A doubt arises on the perfect correspondence between the authorization and its implementation. Nevertheless, the Council Decision does not mention the adoption of a single regulation, but only an enhanced cooperation. Although this is divided into two regulations, it does not seem possible to complain a fault of correspondence between the authorization and the regulations.

[9] Indeed, the 2016 proposals stem from five years discussion within the fields, and did not need further debates.

policy grounds according to the case-law of the European Court of Human Rights (ECtHR)[10], if a claim on the patrimonial consequences of the marriage arises in a Member State's court. This means that the *lex fori* is applicable and no effects of the marriage might be granted in the Member State.

8. The same conclusion is not true with regard to same-sex marriages (especially if celebrated in a Member State). The ECtHR has repeatedly affirmed that the homosexual affective relationships are included in the notion of family life, pursuant to art. 8 of the ECHR[11]. This characterisation does not impose to the States a duty to allow same-sex marriage within their jurisdiction[12], but the material scope of application of the regulation must include the same-sex marriages, in the states where there are provided for.

9. Which approach can be instaed suggested to the judge seating in a jurisdiction, which does not allow same-sex marriages, required to state on the patrimonial regime? The plain recognition is not always possible due to the classical issues raised by the unknown institution[13]. Moreover, some Member States expressly require the sexual difference of the spouses[14]: the court might have troubles recognising the unknown relationship apparently conflicting with its Constitution.

10. A coherent solution is still possible if we leave aside the problem of the recognition of civil status abroad. The marriage can be incidentally considered as a fact that causes the legal consequence of a patrimonial regime. The State cannot accept the foreign marriage as a *status* acquired abroad, but can consider it as a pure fact, occurred abroad, to which are attached patrimonial consequences. This solution is also consistent with whereas n. 54, recalling the principle of non-discrimination as envisaged in the Charter of Fundamental Rights of the European Union. Any refusal to take into consideration the foreign same-sex marriage as a fact only on the ground of sex or of sexual orientation might amount to a violation of the principle of non-discrimination.

11. Another solution is possible. The foreign marriage might be *downgraded* into a national same-sex registered partnership, provided for by the *lex fori*. Many Member States envisage this solution, as Italy, Germany and Austria, among others, and neighbour Countries, too, as for example Switzerland. This characterisation does not seem to infringe the right to family life as interpreted by the ECtHR, admitting the downgrade in purely internal situations (as in the *Hämäläinen* case). The solution presents some drawbacks, as the inconsistency with the legitimate expectations of the spouses and the non-uniform application of regulation n. 2016/1103, which are disregarded if the marriage is considered as a partnership. Nevertheless, this solution would grant at least a legal *status* to the couple and *a* positive regulation of the patrimonial regime. Still the scope of application of regulation n. 2016/1103 is variable, depending on the national law and aproach to foreign unknown institution.

12. Failing any EU competence in family law, it is not possible to impose a duty to accept foreign familiar *status* through regulations on the patrimonial regimes. The possible refusal to recognise a same-sex marriage is a persisting risk. The rule on the alternative jurisdiction (art. 9 of the regulation n. 2016/1103[15]) demonstrates this conclusion, since it considers the event of non-recognition of the marriage at stake by the State of the judge vested in the patrimonial regime claim. The regulation cannot grant the free circulation of familiar *status*.

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[10] European Commission of Human Rights, 7 July 1986, *Khan v. the United Kingdom*. Further, on marriages whose form can infringe the public policy: A. L. Calvo Caravaca, J. Carrascosa Gonzalez, «La celebración del matrimonio y sus efectos personales en el derecho internacional privado», in M. Yzquierdo Tolsada, M. Cuena Casas (Coord.), *Tratado de derecho de la familia*, vol. I, Navarra, Aranzadi, 2011, p. 1096.

[11] ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*; ECtHR, 23 June 2016, *Pajić v. Croatia*.

[12] ECtHR, 16 July 2014, *Hämäläinen v. Finland*; ECtHR, 1 July 2015, *Oliari and o. v. Italy*.

[13] Already K. von Savigny, *System des heutigen römischen Rechts*, vol. 8, Berlin, 1849, p. 39 resolved the issue of unknown foreign institutions through the public policy safeguard clause.

[14] This is for example the case of Hungary, Poland, Croatia and Slovakia.

[15] See *infra*, para. VII.

2. The definition of registered partnership

13. Art. 3, para. 1, l. a) of the regulation n. 2016/1104 defines the registered partnership as «the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation». This definition aims at clarifying the material scope of the regulation (whereas n. 17), and is general in order to be adapted to the Member States different disciplines[16]. Moreover, the regulation does not impose any duty to introduce the institution of the registered partnership in the national law. If the *lex fori* does not provide for it, the same issues as for the recognition of foreign same-sex marriages arise, and should be resolved through the same tools. The partnership should be considered at least as a fact, leaving aside the material recognition of it.

14. Another problem of characterization may arise. How should foreign heterosexuals unions be considered in Member States, where only same-sex registered partnership are provided for? This would be the case, for example, of Italy and Germany. The *upgrade* into a marriage undermines the legitimate expectations of the partners: if they wished to marry, they could have acceded to the marriage abroad[17]. Once more, there is the risk for non-recognition of the foreign relationship, it being an unknown institution, creating the risk to undermine the application of regulation n. 2016/1104.

15. The principle of non-discrimination (whereas n. 53 of the regulation n. 2016/1104) might offer a solution in this case, too. The refusal to recognize a heterosexual registered partnership amounts to an infringement of the principle of non-discrimination based on sexual orientation. Member States should treat different-sex partners as same-sex partners, if the national laws admit any form of registered partnership, included in the scope of the regulation.

III. Some classical solutions within the civil judicial cooperation

16. For many aspects, the new regulations take advantage of the well-established experience in the EU civil judicial cooperation. Some solutions envisaged are nowadays classic. First, the regulations have universal character in the determination both of the jurisdiction and the applicable law. This means that the subjective scope of application of the regulations is not limited, provided that a judge has jurisdiction according to the rules established by the regulations, while the applicable law can be that of a third Country.

17. Second, a limited party autonomy is admitted[18]; failing any choice by the parties involved, the regulations provide for a set of alternative rules on the jurisdiction and the determination of the applicable law.

18. Third, the connecting factor of the habitual residence has a prominence on the nationality, both for the determination of the jurisdiction and the applicable law, too. This is a general EU approach, which gives for granted that the habitual residence favours the integration of the persons concerned in the Member State of destination and strengthen the free movement within the EU[19]. The normative

[16] *Ex multis*: K. Boele-Woelki, A. Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, Cambridge, Intersentia, 2012.

[17] The same problem does not arise with the downgrade solution of same-sex marriages: if the future spouses lived in a State not admitting this institution (i.e., the receiving State), they might have concluded a registered partnership, failing any other possible legal form for the recognition of their relationship.

[18] See *infra*, para. V.

[19] M. Bogdan, «Private international law as component of the law of the forum», en *Collected Courses*, 2010, vol. 348, p. 65; N. Sauvage, «La dangereuse notion de "prévisibilité raisonnable" et l'exigence de sécurité juridique», *Revue du marché commun et de l'Union européenne*, 2012, p. 519; C. Kern, D. Glücker, «Das Neue Europäische Erbstatut und seine Aufnahme in der deutschen Literatur», *RabelsZ*, 2014, p. 309; A. Davì, A. Zanobetti, *Il nuovo diritto internazionale privato delle successioni*,

solution of the issues determined by the public policy, the overriding mandatory norms and the renvoi are classical, too, and find their background in regulation n. 593/2008 on the law applicable to contractual obligations.

19. Then, the rules on the coordination of actions and on the provisional measures have almost the same literal content as of those established by the regulation n. 44/2001. The (alleged) practical good experience[20] gained in the application of this regulation makes it appropriate to repeat the same rules in almost all the others EU measures on civil judicial cooperation. Consequently, there is no need to scrutinize them further in this contribution.

20. Finally, regulation n. 44/2001 clearly inspired the rules on the recognition and enforcement of foreign judgments, too. The recognition is automatic and the *exequatur* procedure is extremely simplified. The grounds for non-recognition /enforcement are the same as those established in the regulation n. 44/2001[21]. This represents a successful model, to be reproduced in every regulation enacted under art. 81 of the TFEU.

IV. New solutions in jurisdiction: the *typical* connections

21. The first rules on jurisdiction introduce a meaningful innovation comparing to the former regulations within the EU judicial cooperation. We can refer to them as to *typical connections*, since they automatically allocate the jurisdiction on claims on the patrimonial regimes to the judge deciding cases with different causes of action. These are: the annulment, the legal separation and the divorce of a marriage, the dissolution or the annulment of the registered partnership, the succession of one of the spouses or partners. If a Court is seised to decide a dispute on one of those causes, it assumes the jurisdiction on the patrimonial effect of the personal relationship, too.

22. Although already some measures adopted in the field of the civil judicial cooperation provide for similar connections between claims[22], arts. 4 and 5 of the new regulations represents the first case where the scope of application of a regulation is completely submitted to the connecting factors established by another regulation. Moreover, the connection is exclusive: if the rule is applicable, it is not possible to invoke any other connecting factor. Neither party autonomy is admissible, in order to choose a different judge having jurisdiction on the claims on the patrimonial regime.

23. The rule works almost automatically if a claim on succession of a spouse or a partner arises. The sole condition envisaged is a connection between the case on the succession and the issue on the patrimonial regime (arts. 4). This link can be very easily demonstrated, since the surviving spouse or partner will have a qualified interest in the claims on both matters. This rule aims at coordinating the regulation on successions and the two new regulations, since the death of one of the spouses or

Torino, UTET, 2014 p. 44. Still, the solution attracts also criticism, since it does not grant the respect of the cultural identity of the person concerned, which is better safeguarded by the nationality as a connecting factor: E. Jayme, «Identité culturelle et intégration: le droit international privé post moderne», en *Collected Courses*, 1995, vol. 251, p. 167; more recently: R. Lafuente Sánchez, «Hacia un sistema unitario europeo en materia de ley aplicable a las sucesiones internacionales», *Cuadernis de derecho transnacional*, 2013, p. 356.

[20] The rules have been subject to some criticism for their practical impact, especially concerning the *les alibi pendens*. Indeed, regulation n. 1215/2012 changes partially the discipline on the coordination of the actions. For comments and further references with regard to the 1968 Brussels Convention: F. Marongiu Buonaiuti, *Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile*, Napoli, Jovene Editore, 2008.

[21] In the field of the patrimonial consequences of family relationships, it has not been possible to provide for the automatic enforcement, as envisaged nowadays by regulation n. 1215/2012, because of the novelty of the subject-matter within the civil judicial cooperation. Lacking any practical experience, Member States did not feel at ease to venture into a very advanced approach of strength cooperation.

[22] Example thereof are the former art. 5, para. 2 of the regulation n. 44/2001, and art. 3, para. 1, l. c) and d) of regulation 4/2009 on the jurisdiction on maintenance obligations.

partners dissolves also their patrimonial regime. The same judge will decide every issue related to the patrimonial effect of that personal relationship, irrespective of its characterisation as a succession or as a patrimonial regime claim. The advantage of this solution is the inherent coherence of the decision to be issued, although it is not granted that the judge will apply the same law to both kind of claims. The drawbacks refer to the position of the surviving spouse or partner. Indeed, the court of the habitual residence or of the nationality of the deceased[23] might not grant a meaningful proximity to him/her. He/she should defend him/herself in a far jurisdiction both for the succession *and* for matters related to the patrimonial regime of the couple, too. The concentration of the cases may amount to a detriment for this party. This is particularly clear if the judge applies art. 6, para. 1, l. a) of the regulation n. 650/2012, since the transfer of jurisdiction is not subject to the consent of the parties in the proceeding on the succession: if the court of the State of citizenship of the deceased accepts the jurisdiction on succession, it automatically assumes the jurisdiction on the patrimonial regime of the couple, too. This is not the most proper judge for these cases, as demonstrated by the fact that the rules on jurisdiction in the regulations nn. 2016/1103 and 2016/1104 are not grounded on the habitual residence and/or the citizenship of one of the spouses/partners. This judge might even be exorbitant and not foreseeable for property regimes disputes.

24. Moreover, if the spouses or partners agreed on jurisdiction for future claims on their patrimonial relationships, their choice must be disregarded after the death of one of them because of the automatism of the typical connections.

25. The coordination between connected cases satisfies legitimate needs of coherence of the output and of reduction of costs. Nevertheless, such an automatism without exceptions does not consider other legitimate interests of the surviving partner and spouse. At least a partial self-determination might be proper in order to balance the different needs.

26. The connection with cases related to the dissolution of the marriage of the registered partnership is not automatic. Art. 5 of regulation n. 2016/1103 establishes that the Court seised on an application for divorce, legal separation or marriage annulment according to regulation n. 2201/2003 has jurisdiction to rule on matters of the matrimonial property regime arising in connection with the first claim. If the Court is seised under some of the grounds of jurisdiction listed in para. 2, the jurisdiction is extended only insofar as the spouses agree[24]. Art. 5 of regulation n. 2016/1104 always requires the agreement of the partners.

27. The preambles of the regulations do not offer any clue for the interpretation of these rules. Different reasons may justify the need to ascertain the consent of the couple. In matrimonial matters, the rules on jurisdiction referred to do not grant an effective proximity of the court and may even become exorbitant when the judge is vested in the patrimonial consequences of the (dissolution of the) marriage, too. The agreement of the spouses overcome this risk. In disputes regarding the partnership, failing any EU uniform measure, national law allocates the jurisdiction on its dissolution or annulment. Since it is not possible to foresee the outcomes of the application of national rules, the agreement

[23] The Regulation n. 650/2012 is already subject to many studies and commentaries, although it is applicable only since August 2015. Therefore I limit the references to a strictly selected choice: I. Rodríguez-Uría Suárez, «La ley aplicable a las sucesiones mortis causa en el Reglamento (UE) 650/2012», *InDret*, 2/2013, p. 26; J. Carrascosa Gonzalez, *El Reglamento Sucesorio Europeo 650/2012. Análisis crítico*, Granada, Comares, 2014; A. Davì, A. Zanobetti, *Il nuovo diritto internazionale privato delle successioni*, cit.; A. Dutta, «Verordung (EU) Nr. 650/2012 des Europäischen Parlaments und des Rates vom 4. Juli 2012», en J. von Hein (hrgst.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10. Internationales Privatrecht I*, München, Beck, 2015; A. Bonomi, P. Wautelet (sous la dir.), *Le droit européen des successions*, Bruxelles, Bruylant, 2016; A.L. Calvo Caravaca, A. Davì, H.P. Mansel (eds.), *The EU Succession Regulation. A Commentary*, Cambridge, Cambridge Academic, 2016.

[24] These criteria are the following: the habitual residence of the applicant in the last year, or in the last six months, if he/she is a citizen of that Member State; the conversion of legal separation into divorce; the residual jurisdiction to be determined according to national law.

is required. Failing the consent of the couple, the connection is not possible and the other rules on jurisdiction are applicable.

28. The automatism persists only in matrimonial matters, insofar as the court has jurisdiction pursuant to the other connecting factors listed in art. 3 of the regulation n. 2201/2003. In these cases, the connection does not produce the same drawbacks as in succession matters: indeed, the proceeding on matrimonial matters involves only the spouses, any third party not being concerned[25], and the extension of the jurisdiction might not come to a surprise. It is to be expected that the applicant claims on matrimonial matters and on the patrimonial regime in one single judicial action, saving time and procedural costs.

V. The role of party autonomy in the choice of court

29. The regulations admit a limited party autonomy in the determination of the jurisdiction (arts. 7). Many conditions must be fulfilled. The choice is admissible to the extent that the case falls under the scope of arts. 6 of the regulations, i.e. if the typical connections do not operate. The effectiveness of the prorogation of jurisdiction can consequently be ascertained only *in limine litis*, since it is not possible to know in advance if a case on succession or on the dissolution of the marriage or the partnership will arise. If it does, the choice of court must be disregarded. If it does not, the chosen court can assume jurisdiction. This combined effect does not favour the predictability.

30. Arts. 7 of the regulations limit the category of judges, to which the parties can attribute jurisdiction, too. Unlike regulation n. 4/2009, the new regulations do not provide for a list of eligible courts, but longs for linking the jurisdiction to the applicable law. Within the scope of the regulation n. 2016/1103, the alternatives are the following: - spouses choose the law applicable and the court having jurisdiction within the same Member State; - spouses agree on the jurisdiction of the judge whose State law is applicable pursuant to art. 26, para. 1, l. a) or b), failing any agreement on the choice of law; - spouses determine the jurisdiction of the judge of the place of celebration of the marriage. Only this possibility does not link the law applicable and the jurisdiction, since the place of celebration of the marriage is not a connecting factor in the conflict-of-law.

31. Art. 7 of the regulation n. 2016/1104 establishes a similar rule, where the law of the place of celebration of the marriage is substituted by the law under which the registered partnership has been created[26].

32. Such limitations may be subject to criticism. First, there is only one possibility for the parties to determine the court having jurisdiction without any connection with the applicable law. Moreover, the allocation of jurisdiction to this court might not be particularly interesting for the parties, because the couple might have lost every contact with the State of celebration of the marriage or the State under whose law the partnership has been created.

33. Second, the regulations aim at the convergence of the applicable law and the *forum* as a limit to the parties' autonomy. The preambles of the regulations do not further justify this target. The idea behind this rule can be the simplification resulting from the application of the *lex fori*. Nevertheless, the application of the foreign law is a general difficulty in cross-border situations[27]: if the European civil

[25] Only exceptional circumstances lead to consider the interest of third parties in the civil *status* of a couple (CJEU 13 October 2016, case C-294/15, *Mikołajczyk*, ECLI:EU:C:2016:772), but still not all the grounds of jurisdiction provided for by art. 3 of the regulation n. 2201/2003 are applicable.

[26] Further on this connecting factor, *infra*, para. IX, 2.

[27] P. Ivaldi, «In tema di applicazione giudiziale del diritto straniero», *Rivista di diritto internazionale privato e processuale*, 2010, p. 585; I. Queirolo, «Conoscenza del diritto straniero e contraddizioni della giurisprudenza italiana», *Rivista di diritto internazionale privato e processuale*, 2010, p. 603.

judicial cooperation aims at bypassing it through the convergence of *forum* and *ius*, bilateral rules on the choice of law, as established in the regulations, do not have any sense. The resolution of the conflict of the laws could follow the method of the general application of the *lex fori*[28], as it already happens in some Member States in areas not covered by EU law. Classical private international law's methods do not justify such an approach.

34. Before the choice of the court, the parties must determine the applicable law. If the couple agrees at the same time on the applicable law and on the jurisdiction, they must consider only the possible alternatives left by arts. 22 of the regulations. Failing the choice of law, spouses and partner must verify if the connecting factors provided for by arts. 26 are fulfilled. This examination could not be easy for private parties not expert in EU law: for example, they might suppose that a public certification of the residence is the sole evidence needed to prove any connecting factor grounded on the habitual residence. In the field of registered partnerships, the rule is only apparently easier[29]. The mistake in the determination of the applicable law, or in the agreement on the choice of law, can have tremendous consequences. The judge of the State of the alleged first habitual residence –or wrongly chosen by the parties– will declare expressly the lack of jurisdiction and indirectly the inapplicability of the law expected by the parties, it not fulfilling the conditions provided for in arts. 22 and 26. The parties might start a new case by another court. However, the first judgment can circulate within Member States, and all its parts bind the judge second seised, too[30]. This means that the latter court cannot apply the law expected by the parties, because the first judgment declares that it is not one of those listed in art. 22 or 26 of the regulations. Furthermore, it the first judgment establishes which court has jurisdiction pursuant to art. 6, the second court seised is under a duty to assume jurisdiction, because it cannot review the foreign binding decision. The second court would not be free to examine its jurisdiction.

35. Therefore, it must be welcome that the spouses cannot agree on the jurisdiction of the judge most closely connected at the time of conclusion of the marriage, the third connecting factor provided for in art. 26. The determination of the closest connection could be difficult for the spouses in a fragmented situation and the risk for mistake is high.

36. If the agreement on the court is based on arts. 26 of the regulations, a meaningful connection between the judge and the case might lack. Indeed, the connecting factors in arts. 26 refer to a past time, the celebration of the marriage or the conclusion of the partnership, and the couple may have lost every contact with that place. Such a choice might not be convenient for the parties.

37. The numerous conditions and drawbacks of this method of allocation of the jurisdiction make party autonomy a theoretical possibility rather than a practical opportunity for the parties to organise their patrimonial relationships.

38. The jurisdiction based on the appearance of the defendant is linked to the application of the *lex fori*, too (arts. 8). The sole difference with the express choice is due to the impossibility to seise the judge of the place of the celebration of the marriage. If the defendant appears only in order to contest jurisdiction, the court cannot assume the competence to hear the case. The usefulness of the rules is the absence of any formality and the possibility to accept the jurisdiction immediately after the submission of the application.

[28] P. Picone, «Il metodo dell'applicazione generalizzata della *lex fori*», en P. Picone (a cura di), *La riforma italiana del diritto internazionale privato*, Milano, 1998, p. 371.

[29] See *infra*, para. IX, 2.

[30] CJEU 12 November 2012, case C-456/11, *Gothaer Allgemeine Versicherung AG*, ECLI:EU:C:2012:719.

VI. The other rules for the determination of the jurisdiction

1. The matrimonial property regime

A) The alternative grounds of jurisdiction

39. Failing any choice of court, the regulations provide for objective rules of jurisdiction. As in the other EU regulations on civil judicial cooperation, the rules aim at satisfying the need of proximity between the judge and the case, granting the predictability of the jurisdiction.

40. Art. 6 of the regulation n. 2016/1103 provides for four alternative grounds of jurisdiction *á cascade*, and three of them are based on the habitual residence. These are the common habitual residence of the spouses; the last habitual common residence, insofar as one of the spouses still resides there; the habitual residence of the respondent; the common nationality. In all the cases, the relevant moment in order to establish the connecting factors is the time the court is seised. This grants the closest possible proximity between the claim and the judge. Moreover, the same grounds of jurisdiction appear also among those established by art. 3, para. 1 of the regulation n. 2201/2003, attributing to the same court the jurisdiction on the dissolution of the marriage and on its patrimonial consequences. When the typical connection cannot operate, still the convergence is possible[31].

B) The subsidiary jurisdiction

41. Notwithstanding the broad grounds of jurisdiction, if a couple has close connections with third countries, or the situation is very fragmented, art. 6 may fail to determine a competent court within the EU. This may happen, for example, if the couple has never had a common habitual residence in a Member State, lives apart, the respondent is habitually resident in a third country and the spouses do not have a common nationality. In an increasingly moving environment as the area of freedom, security and justice, these situations are not rare. Therefore, arts. 10 and 11 establish residual grounds of jurisdiction, very similar to arts. 10 and 11 of regulation n. 650/2012[32].

42. Under art. 10 on subsidiary jurisdiction, if it is not possible to determine the jurisdiction of a court of a Member State pursuant to the other rules on jurisdiction, the judge of the State where the immovable property of one or both spouses is located is vested in the claims related to that property.

43. This rule fragments the international jurisdiction: more judges can have jurisdiction on a small part of the claim, if the spouses have immovable property in more than one Member State. Moreover, it does not consider the need of coordination with possible third countries pending cases. Since the situation is slightly connected with the EU, the court in a third country may assume jurisdiction on the claim. At the same time, a case –or more cases– may arise within a jurisdiction in the European Union. The coordination of different pending cases might be difficult, since it depends on national laws, lacking

[31] Art. 5 and art. 6 are partially overlapping: even without the typical connection, the convergence of the jurisdiction can be realised thanks to the use of the same grounds of jurisdiction. Nevertheless, art. 5 can avoid fraudulent situations. We might suppose a spouse applying to the judge of the common nationality in order to obtain divorce, and to the court of the common habitual residence for claims related to the patrimonial regime. Failing the rule on the typical connection, two procedures will continue. The classical rule on the connection of pending actions might be applicable, but it does not grant the result of the reunification of the claims. The *lis alibi pendens* is not applicable because the claims have not the same cause of action. This situation is indeed possible, but also very rare in practice: the spouse filling two claims is also operating to his/her detriment, since he/she must defend him/herself in two courts. The typical connections avoid these abusive behaviours concentrating immediately the jurisdiction.

[32] A. Bonomi, «Article 10», en *Le droit européen des successions*, cit., p. 229; F. Marongiu Buonaiuti, «Article 10. Subsidiary jurisdiction», in A.L. Calvo Caravaca, A. Davì, H.P. Mansel (eds.), *The EU Succession Regulation*, cit., p. 186.

any EU uniform rule[33]. Furthermore, the recognition and the enforcement of a judgment issued in a third country is not granted, because it depends on national rules, too. There is the risk for non-recognition of the general judgment on the matrimonial regime issued in a third country, lacking any international coordination and generating inconsistencies in the patrimonial organisation of the couple. These effects do not seem justified due to the faint connections with the EU of the case. Therefore, the rule can be useful only to the extent that a dispute arises on the rights on the immovable property, between spouses or against a third party. Indeed, the court is close to the situation, it being able to collect and evaluate easily any evidence, and the final decision can be enforced in the State where the property is located and/or automatically recognized in other Member States.

C) The *forum necessitatis*

44. The last residual ground of jurisdiction is the *forum necessitatis*. This rule was first introduced in an EU measure in art. 7 of the regulation n. 4/2009[34]. It implements the right to a fair trial, allocating the jurisdiction into a court of a Member State[35], insofar as it results impossible to claim in a third country under objective circumstances. The application of this rule is subject to the same conditions provided for in art. 11 of the regulation 650/2012.

45. It is interesting to recall that the ECtHR has recently made clear that the *forum necessitatis* is subject to a national margin of appreciation. Courts may not assume jurisdiction although the case presents strong connections with the State, provided that the refusal to hear the case is duly justified[36]. The rule is an *extrema ratio* option, if the applicant or the parties have no other possibility to claim. The mere fact that the applicable law does not offer a positive solution to the claim, or do not provide for a reasonable restoration of the damages, might not amount to *exceptional* circumstances fulfilling the *impossibility* of the action.

2. The partnership property regime

46. Regulation n. 2016/1104 establishes the same rules. A meaningful difference appears in art. 6, which envisages a fifth ground of jurisdiction, the judge of the Member State under whose law the registered partnership was created. Consequently, the residual grounds of jurisdiction have a more limited scope of application: if the law applied to the creation of the partnership is that of a Member State, arts. 10 and 11 are not applicable.

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[33] D. Sagot-Duvauroux, *Les règles européennes de compétence directe en matière de successions internationales*, en H. Péroz É. Fongaro (sous le dir.), *Droit patrimonial européen de la famille*, a cura di Fongaro, Paris, LexisNexis, 2013, p. 24.

[34] P. Beaumont, «International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity», *RablelsZ*, 2009, p. 540; F. Pocar, «La disciplina comunitaria della giurisdizione in tema di alimenti: il regolamento 4/2009», en M. C. Baruffi, R. Cafari Panico (a cura di), *Le nuove competenze comunitarie. Obbligazioni alimentari e successioni*, Padova, CEDAM, 2009, p. 13; F. Pocar, I. Viarengo, «Il regolamento (CE) n. 4/2009», *Rivista di diritto internazionale privato e processuale*, 2009, p. 810; S. Marino, «Il difficile coordinamento delle fonti nella cooperazione giudiziaria in materia di obbligazioni alimentari», *Contratto e Impresa/Europa*, 2010, p. 380; F. Ferrand, «The Council Regulation (EC) no 4/2009 of 18 december 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations», en B. Campuzano Diaz, M. Czepelak, A. Rodriguez Benot, Á. Rodriguez Vazquez (eds.), *Latest developments in EU Private international law*, Cambridge, Antwerp, Portland, Intersentia, 2011, p. 93; F. Villatta, «Obblighi alimentari e rapporti di famiglia secondo il regolamento n. 4/2009», *Rivista di diritto internazionale privato e processuale*, 2011, p. 817.

[35] M. Álvarez Torné, *La autoridad competente en materia de sucesiones internacionales. El nuovo regolamento de la UE,* Madrid, Barcelona, Buenos Aires, São Paulo, Marcial Pons, 2013, p. 179; D.P. Fernández Arroyo, «La tendance à la limitation de la compétence judiciaire à l'épreuve du droit d'accès à la justice», en L. d'Avout, D. Bureau, H. Muir-Watt (sous la dir.), *Les relations privées internationales. Mélanges en l'honneur du Professeur Bernard Audit,* Paris, LGDJ, 2014, p. 304; A.L. Calvo Caravaca, J. Carrascosa González, *Derecho internacional privado,* vol. II, Granada, Comares, 2016, p. 668; F. Salerno, «Il vincolo al rispetto dei diritti dell'uomo nel sistema delle fonti del diritto internazionale privato», *Diritti umani e diritto internazionale*, 2014, p. 559.

[36] ECtHR 12 June 2016, *Nait-Liman v. Switzerland*.

VII. The judicial margin of appreciation in the determination of the jurisdiction

47. A very meaningful innovation is the introduction of a judicial margin of appreciation in the acceptance of the jurisdiction[37]. Under arts. 9, on the *alternative jurisdiction*, if a court of the Member State has jurisdiction on the claim on the patrimonial regime, it may decline jurisdiction, if the *lex fori* does not provide for the institution of the registered partnership, or does not recognise the marriage at stake.

48. This is a very important safeguard clause in order to avoid a denial of justice for spouses and partners and to a violation to their fundamental rights, too. If the personal relationship cannot produce any legal effect, the judge might dismiss the case on the ground of the non-existence of the marriage or of the partnership, or, even worse, decide that no patrimonial obligations exist between them. The refusal to attribute any relevance to the personal relationship would infringe the right to a family life; the dismissal of the case on the assets or the declaration of inexistence of any reciprocal obligation may undermine the rights to property of the couple. Arts. 9 aim at balancing the rights and the expectations of the parties and the judicial duty to apply the law. The court may decline the jurisdiction without undue delay, i.e. without suggesting any position or solution on the regime. A refusal to assume jurisdiction based on the impossibility to decide has less drawbacks for the parties involved, because it does not contain any consideration on the merits of the case, with particular regard to the existence and the effects of the personal relationship. Spouses and partners are able to start proceeding in another Member State, without a foreign decision stating on their *status* and jeopardising their patrimonial regime. A new proceeding on the merit must be restarted, but at least the parties involved will not be «followed» within the EU by a detrimental decision stating –even if incidentally– that their personal relationship does not exist, or –definitively– that there are not patrimonial obligations among them. After the refusal to hear the case, the ordinary rules on the choice of court or on the allocation of the jurisdiction are applicable.

49. In some circumstances, it is not possible to decline the jurisdiction pursuant to arts. 9. First, if a decision on the dissolution or annulment of a registered partnership or on divorce, legal separation or marriage annulment is capable of being recognised in the *forum*, the court is not allowed to refer to the alternative jurisdiction. Indeed, if it is possible to accept that a partnership or a marriage has existed, it is also possible from the logical and the legal points of view to state on the dissolution of the patrimonial regime.

50. Second, within the scope of regulation n. 2016/1104, the first court must have jurisdiction pursuant to the typical connections, or the objective rules of jurisdiction. It is not possible to exercise the margin of appreciation, if the partners agreed on jurisdiction, or if the seised court sits in the State under whose law the partnership was created. Indeed in both cases, the *lex fori* will provide for the institution of registered partnership[38]. The same is not true in the field of the matrimonial property regimes and art. 9 of regulation n. 2016/1103 refers also to arts. 7 and 8 on the choice of court.

51. For its purpose, the alternative competence must be welcome as a last-sort tool, if the couple risks seeing their personal and property rights undermined. This is not a theoretical case when people move within the EU almost without barriers and face the legislative fragmentation due to the national exclusive competences. This situation cannot amount to a denial of justice or to a violation of human rights, especially in the field of patrimonial relationships, and the jurisdiction must be allocated to an effective court.

[37] The innovation is extremely important even in the theoretical perspective. Indeed, the EU institutions, with particular regard to the Court of Justice, seemed hostile to the introduction of a margin of appreciation to the judge (CJEU 1 March 2005, *Owusu*, case C-281/02, EU:C:2005:120). Instead, the restrictive approach followed in the CJEU case-law might be due to a strictly literal interpretation of the rules contained in the 1968 Brussels Convention and in the regulation n. 44/2001.

[38] See *infra*, par. VIII.

VIII. The role of party autonomy in the organisation of the property regime

1. The choice of the applicable law

52. The regulations introduce the possibility to choose the applicable law, subject to material and formal conditions. Although some national laws already admit a limited party autonomy[39], it amounts to meaningful innovation in many Member States, due to a traditional approach that does not favour the self-determination of the parties in family law[40]. The change of the applicable law is subject to the same rules.

53. Spouses and partners can agree on the application of one of the laws listed in arts. 22 of the regulations. The party autonomy is not as free as in international contract law, where parties can choose any State law. In family law the lists aim at granting a connection between the case and the applicable law. Parties can choose among the law of the State of habitual residence or nationality of one or both the partners or the spouses at the time of the conclusion of the agreement. Regulation n. 2016/1104 adds the possibility to choose the law of the State under whose law the registered partnership was created. Such a choice has the effect to strengthen the legal certainty, since this is the law applicable failing any choice, too (art. 26). The specular rule does not appear in regulation n. 2016/1103 most probably because the connecting factor is not provided for as the applicable law failing a choice[41].

54. Art. 22 of the regulation n. 2016/1104 makes clear that the applicable law must recognize property consequences to the registered partnerships. The effects of a wrong choice are not regulated. The designation should be materially invalid and be disregarded; art. 26 determines the applicable law.

55. The same rule is not provided for in regulation n. 2016/1103, although similar problems of recognition of the *status* and its effects may arise. The wrong choice can be corrected only if the *lex fori* and the *lex causae* correspond. The tool is the rule on the alternative jurisdiction. After the transfer of jurisdiction, or failing the coincidence, a judge, seating in a State recognising the marriage at stake, might not apply the *lex causae*, not recognising the marriage, because it produces effects contrary to public policy of the State where the court sits. Once more, the non-recognition of the personal relationship and the consequent patrimonial effects can infringe the human rights to family life and to property of the spouses.

56. Arts. 22, para. 3 establish the non-retroactivity of the choice: the law will be applied as from the date of the agreement. This temporal effect is particularly relevant if the choice is subsequent to the marriage, or if the agreement on the applicable law is changed. Indeed, the non-retroactivity safeguards the rights and the legitimate expectations of third parties, who entered into a legal relationship with the couple, because the applicable law does not change toward them. The time-line distinction before/after the agreement is easier in theory than in practice: until the day of the agreement one law is applicable; afterwards it changes, but the patrimonial relationships and the assets are always the same. A possible

[39] The website: http://eur-lex.europa.eu/n-lex/index_en offers a brief comparative perspective. For example, the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, in force in France, Luxembourg and the Netherlands, lists five possible different laws that can be chosen by the spouses as the applicable law to their matrimonial property regime (art. 3; A. Bonomi, M. Steiner (sous la dir.), *Les régimes matrimoniaux en droit comparé et en droit international privé*, Genève, Droz, 2006). In Italy, art. 30 of the Law n. 218/95 offers four possible alternatives (I. Viarengo, *Autonomia della volontà e rapporti patrimoniali tra coniugi nel diritto internazionale privato*, Padova, CEDAM, 1996). These systems can be considered as very liberal in a comparative perspective. Spanish law is slightly more restrictive: the choice of law is possible insofar as the spouses do not share a common nationality (art. 9.2 of the Codigo Civil), although admitting in this case four possible alternatives (A. L. Calvo Caravaca, J. Carrascosa Gonzalez, «La celebración del matrimonio», cit., p. 1094).

[40] For example, Hungarian law does not provide for any possibility to choose the applicable law.

[41] Regulation n. 2016/1103 does never refer to the law of the State under whose law the marriage has been concluded. Nevertheless, it is possible to agree on the jurisdiction to the judge of the State of celebration of the marriage. The two criteria (law applicable/place of celebration) do not coincide, but might produce the same practical result, i.e. the individuation of the same law. Consequently, it is not clear why the choice of court is admissible, while the agreement on the applicable law is not possible.

way to manage this sensitive situation is the theoretical distinction of the property in two assets, regulated by different laws, as the French Cour de Cassation has already done in application of the national law[42].

57. Partners and spouses may agree on the retroactive effects of their choice of law, without affecting the rights of third parties. In this case, a difficult distinction of assets is required, too: the chosen law regulates the entire regime, while the relationships with third parties might be subject to a different law if their rights might be jeopardised. Nevertheless, the retroactive effect of the choice of applicable law might be a convenient solution for the spouses and the partners, due to the consequent uniformity of the regulation of the regime.

58. The parties have four or five possible alternatives, among whose they can find a convenient regulation of their relationship. Although the lists of possible eligible laws aim at granting a meaningful requirement of proximity[43], the connecting factors refer also to only one of the spouses or partners: it is not granted that the applicable law has the closest connection with the couple and with family life. This means that the chosen law is convenient *because* of the consent of the parties involved, and not because of proximity reasons.

59. The most meaningful difference between regulation n. 593/2008 on contractual obligations and the new regulations resides in the requirements provided for by the latter for the formal validity of the agreements[44]. According to arts. 23 of regulations nn. 2016/1103 and 2016/1104, the choice shall be expressed in writing, dated and signed by the spouses or by the partners. Additional formal requirements must be respected, if established by the law of the Member State: of the common habitual residence, or of the habitual residence of any of the spouses or partners, or where one of them habitually resides, if the other is habitually resident in a third country. Before concluding the agreement on the choice of law, parties must ascertain the law applicable to the formal validity, which does not necessarily coincide with the applicable law[45]. This requirement may amount to a hindrance for the exercise of party autonomy due to the difficulties to manage the possible conflict of different laws, and to determine the law applicable to the formal validity and its content.

60. The consent and the material validity must be assessed under the applicable law, if the choice were valid, reproducing the same rule envisaged in art. 10 of the regulation n. 593/2008.

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[42] Cass civ., 1ere, 12 April 2012, en *Recueil Dalloz*, 2012, p. 1125. Further on the French approach: J. Foyer, «Le changement de régime matrimonial en droit international privé, entre régles internes et régles internationales», en *Liber amicorum Mélanges en l'honneur du professeur Gérard Champenois*, Paris, Defrénois, 2012, p. 273.

[43] Some scholars challenge the suitability of party autonomy as a tool aimed at granting a close connection between the factual situation and the applicable law: P. Lagarde, «Le principe de proximité dans le droit international privé contemporain», en *Collected Courses*, 1986, vol. 196, p. 63; S.M. Carbone, *Autonomia privata e commercio internazionale*, Milano, Giuffrè, 2014, p. 50; D.P. Fernández Arroyo, «La tendance à la limitation», cit., p. 301.a.

[44] Due to the strict formal requirements, and failing any express rule, the tacit and the implicit choice of law seems to be not admissible, neither in *limine litis*. This might complicate the determination of the applicable law when the situation is particularly fragmented, or the spouses have multiple common nationalities but feel more connected with one of the States. The issue is not new due to the formal requirements envisaged in the other regulations in family law, as for example regulation n. 1259/2010: T. Azzi, «La volonté tacite en droit international privé», *Travaux du Comité français de droit international privé*, 2010-2012, p. 165; A. Devers, M. Fargé, «Le nouveau droit international privé du divorce – À propos du règlement Rome III sur la loi applicable au divorce», *Droit de famille*, 2012, p. 17; M. Andrae, «Zur Form der Rechtswahl für eheliche Beziehungen», en N. Witzleb, R. Ellger, P. Mankowski, H. Merkt, O. Remien (hrgst.), *Festschrift für Dieter Martiny zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 2014, p. 8; I. Rodríguez-Uría Suárez, «La ley aplicable», cit., p. 275; A.L. Calvo Caravaca, J. Carrascosa González, *Derecho internacional privado*, cit., p. 575; U.P. Gruber, «Die konkludente Rechtswahl in Familienrecht», *IPRax*, 2014, p. 55; D. Solomon, «Die allgemeine Kollisionsnorm (Art. 21, 22 EuErbVO)», en A. Dutta, S. Herrler (hrgst.), *Die Europäische Erbrechtsverordnung*, München, Beck, 2014, p. 40; T. Helms, «Konkludente Wahl des auf die Ehescheidung anwendbaren Rechts?», *IPRax*, 2014, p. 334. The Oberlandesgericht Hamm, 7 May 2013, II-3 UF 267/12, *IPRax*, 2014, p. 349 accepted an implicit choice of law within the scope of regulation n. 1259/2010 notwithstanding the lack of any express rule.

[45] In particular, the convergence between the applicable law and the law regulating the formal validity of the agreement on the choice of law is only casual, if spouses or partners agree on the law of the citizenship of one of them, or if partners choose the law of the creation of the relationship. The uniformity is easier to achieve if the choice falls on the law of the common habitual residence or of the habitual residence of one of the spouses or partners.

2. The agreements on the property regime

61. Since the agreement on choice of law is not encouraged, it could be easier for the parties to conclude a matrimonial or partnership property agreement pursuant to arts. 25 of the regulations. These are defined as any agreement between spouses or partners by which they organise their property regime. The requirements for the formal validity are the same as those established for the agreement on the choice of law, but if the law applicable to the regime provides for further requirements, these must be fulfilled. The applicable law regulates the material validity (arts. 27). Although these rules, too, do not encourage party autonomy[46], the advantage in concluding a property agreement (instead of an agreement on the applicable law) is due to its content: parties decide directly the organization of their relationship and not only the relevant legal system. The tool can be extremely useful if the applicable law favours private autonomy, for instance establishing a set of regimes, among which the couple can choose: the property agreement may refer directly to one of those.

62. Still, it is quite logical that the requirements are similar in the two cases. Indeed, the conclusion of a property agreement cannot amount to an evasion of the limits established for the choice of law, i.e. to the selection of any regime provided for by any national law, despite the lack of connections with the situation, or to a completely free determination of the reciprocal obligations between spouses or partners. The rules on the validity are very similar, because the property agreement must find its basis in a legal system. Consequently, the parties benefit of the margin of autonomy admitted by the *lex causae*.

63. These provisions lead us to submit that the choice of a property regime does not amount automatically to a tacit choice of law: this perspective would favour abusive agreements. If that were the case, every agreement could be validly concluded, since it would imply a tacit choice of the law, which allows that kind of private arrangements between spouses or partners. Nevertheless, under some circumstances the agreement on the property regime may amount to an implicit choice of law and the consent of the parties should be respected. This is the case if: - the agreement of the parties is formally and materially valid[47]; - it refers univocally to one legal system; - its law is listed in arts. 22 of the regulations. Only an express clause on the applicable law is missing. In this case, the non-consideration of the implicit but clear will of the parties would undermine their legitimate expectations, the rights and the obligations between each other and with third parties, too, if the couple has always behaved according to that law. The omission of a clear clause containing the express choice should not have such deleterious consequences.

IX. The objective connecting factors and the most meaningful differences between marriage and registered partnership

1. The law applicable to the matrimonial property regime

64. Failing any choice, art. 26 of the regulation n. 2016/1103 provides for a list of alternative factors *á cascade*, implementing a quite classical method in the field of the EU civil judicial cooperation. These are the spouses' first common habitual residence after the conclusion of the marriage, or their

[46] A set of alternative connecting factors materially oriented would allow stating the formal and the material validity of the agreement in most of cases. The approach seems to be opposite from the Italian or the Spanish current legislation, where private international law encourages the *favor validitatis* in cross-border situations (M. P. Diago Diago, *Pactos o capitulaciones matrimoniales en derecho internacional privado*, Zaragoza, El Justicia de Aragón, 1999; A. L. Calvo Caravaca, J. Carrascosa González, E. Castellanos Ruiz, *Derecho de familia internacional*, Colex, Madrid, 2008; G. Conetti, S. Tonolo, F. Vismara, *Manuale di diritto internazionale privato*, Torino, Giappichelli, 2015, p. 154; F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale - Vol. II: Statuto personale e diritti reali*, Torino, UTET, 2016, p. 86).

[47] This condition is easily satisfied due to the convergence of the rules on the formal and the material validity of the agreement on the choice of law and the property regime agreement.

common nationality, or the closest connection with the spouses. The last two elements must be scrutinized at the time of the conclusion of the marriage.

65. Notwithstanding the clear formulation of the provision, the connecting factors might rise some interpretative difficulties. For example, when must the first common habitual residence be established? Immediately after the celebration of the marriage, or even years after? Let us suppose that the spouses have always lived apart and they re-join after the retirement. If this is the place of their first habitual residence after the marriage, the law of that State is applicable. This solution promotes the proximity between the case and the applicable law, it being very strictly connected with the family life. Nevertheless, it jeopardises the stability and the predictability of the applicable law. Indeed, if a dispute arises before the family reunification, the applicable law must be determined pursuant to the other connecting factors, failing any (first) common habitual residence; if the dispute arises afterwards, the law of the habitual residence is applicable. Furthermore, this law applies to situations and relationships created before the family reunification, too, which become controversial afterwards. This outcome may amount to a surprise for third parties. Instead, if the first residence must be established shortly after the celebration of the marriage, the rule would grant the stability of the applicable law: this is determined by art. 26, para. 1, l. b) or c) even after the family reunification. The drawback of this solution is that it prevents the application of the law of the (newly created) common habitual residence, to which the family life is currently strictly connected. The spouses might rely on its application.

66. Art. 26, para. 2 is the sole rule within the EU civil judicial cooperation regulating the issue of the multiple common nationalities. In that case, the connecting factor is not applicable. This solution complies with the CJEU case-law, to the extent that it implements the principle that there is not a prevalence of one citizenship over the others[48], but it does not codify its implications. These can be summarized in the equal relevance of all the citizenships in order to select the applicable law (case *García Avello*) and to allocate the jurisdiction (case *Hadadi*). On the opposite, art. 26, para. 2 of the regulation n. 2016/1103 establishes the irrelevance of the common multiple nationalities. Two reasons apparently justify this choice. First, unlike jurisdiction, one applicable law must be determined. Without any criteria on the prevalence of the citizenship, two or more laws are applicable to the whole claim, which is objectively impossible. Second, if the spouses have multiple nationalities, most probably any of them presents a close connection with the couple. Despite these reasons, the rule looks like a refusal to deal with such sensitive situations, just rejecting the connecting factor. The solution of the case *Hadadi* could have been adapted[49]: the multiple common nationalities can all operate as connecting factors, leaving a margin of party autonomy to the spouses. Failing the consent on the application of one the laws of the States of the common nationalities, the connecting factor is not applicable. Such an interpretation is impossible under art. 26, para. 2.

67. The last connecting factor is the principle of proximity at the time of the marriage. The judge must evaluate every relevant factual and legal element in a very fragmented situation. In the opinion of the present author, the multiple common citizenships may come back into play in the determination of this strict connection. In particular, the spouses might prove that they feel a particular strong link

[48] CJEU 7 July 1992, case C-369/90, *Micheletti*, ECLI:EU:C:1992:295; CJEU 2 October 2003, case C-148/02, *García Avello*, ECLI:EU:C:2003:539; CJEU 16 July 2009, case C-168/08, *Hadadi,* ECLI:EU:C:2009:474. For some further reflections of this sort of EU indifference to the rules on the attribution of the citizenship and the multiple nationalities: R. Hüter, «Zur internationalen Zuständigkeit des Scheidungsgerichts bei doppelter Staatsangehörigkeit der Ehegatten», *European Law Reporter*, 2009, p. 351; J. Dilger, «EuEheVO: Identische Doppelstaater und forum patriae (Art. 3 Abs. 1 lit. b)», *IPRax*, 2010, p. 54; W. Hau, «Doppelte Staatsangehörigkeit im europäischen Eheverfahrensrecht», *IPRax*, 2010 p. 50; P. Lagarde, «L'application du règlement Bruxelles II bis en cas de double nationalité», *Revue trimestrielle de droit européen*, 2010, p. 770; P. Maestre Casas, «Doble nacionalidad y forum patriae en divorcios internacionales (Notas a la STJUE de 16 de julio 2009, Hadadi, As. C-168/08)», *Cuadernos de derecho transnacional*, 2010, p. 290; A. Fuchs, «Mehrstaater im Internationalen Privatrecht», en *Festschrift für Dieter Martiny*, cit., p. 303.

[49] Indeed, at the very end, one judge must be seised, and the situation of multiple pending claims should be avoided through the rules on the *lis alibi pendens*.

with the State of one of their common nationalities, overcoming the impossibility to choose it once the dispute arises[50].

68. It being the last connecting factor, most probably the proximity will be quite faint, but the opposite risk is not to find any law applicable to the matrimonial property regime, which of course cannot be accepted.

2. The law applicable to the registered partnership property regime

69. Art. 26 of the regulation n. 2016/1104 establishes only one connecting factor: the law under which the relationship was created. The rule assumes that the *lex loci actus* admits the creation of a partnership pursuant to a different law. The rule grants the stability, since the applicable law does not change during the relationship.

70. No relevance is attributed to the laws of the common habitual residence and of the common nationality. The reasons for the difference with the matrimonial property regimes are not clear. Whereas n. 48 of the regulation n. 2016/1104 refers to the predictability of the connecting factor and to the legal certainty, but regulation n. 2016/1103 promotes the same values, despite offering completely different solutions.

71. Some difficulties arise in the interpretation of the range of this connecting factor. Which is the law pursuant to which the partnership has been created? Two interpretative problems arise.

72. How must this law be determined? If any mention is contained in the public act or document certifying the registration, the court can make use of this express indication, insofar as its national law recognizes and accepts the effects of public documents issued abroad. Failing it, national private international law must be applied. However, should the court apply the *lex fori*, or the law of the place of registration? In the latter case, the application of the same law in both States safeguards the stability of the personal relationship and its effects. In the former, the court is free to determine applicable to the case, it being one of its principal duties. The outcomes converge to the extent that the applicable law according to the *lex fori* is the *lex loci actus*.

73. Neither the meaning of *creation of a partnership* is clear. Is the rule referring to the formal validity, to the material validity, to the capacity of the partners, to the consent? If the national conflict-of-laws rules provide for different connecting factors for each of these issues, or if multiple alternative factors are established[51], the law applicable to the creation –and therefore to the patrimonial consequences– of the partnership cannot be univocally determined. Finally, if the multiple connecting factors must be applied simultaneously, partners incur the risk not to find any law applicable to their property regime, since two or more laws should be applied to the same case. The indirect reference to the national law included in art. 26 of the regulation n. 2016/1104 might therefore complicate the determination of the applicable law. Nevertheless, in a comparative perspective, national law allows the registration of *national* partnerships producing the effects provided for by the State of registration[52]. Moreover, many issues might be regulated by the *lex loci actus*, according to the State of registration

[50] Spouses are free to agree on the application of one of their citizenships, but this entails the respect of the strict formal validity requirements seen *supra*, para. VIII, 1. In the envisaged case a formal agreement would not be necessary, it being enough to declare the couple's will to the seised judge.

[51] This is the case of art. 32*ter*, para. 3 of the Italian Law n. 218/95, granting the *favor validitatis*. Moreover, art. 32*ter* provides for a different connecting factor on the capacity and the requirements, characterising the Italian rules on the preclusions to accede to the institution as internationally mandatory.

[52] Art. 32*quinquies* of the Italian law n. 218/95 demonstrates the difficulties to accept the application of a foreign law. The partnership concluded abroad by two Italian citizens can produce only the effects provided for by the Italian law, i.e. the foreign partnership is converted into an Italian one.

conflict-of-laws rules, and promoting the validity of the partnership. Therefore, in many cases the law applied for the creation of the partnership can correspond to the law of the place of registration.

74. Finally, the possible conflict among multiple registrations under different laws is not considered. In this case, too, it is impossible to determine the application of one law. The European Parliament report on the original 2011 Commissions' proposal suggested giving priority to the last registration[53]. Failing any express rule in the final text of the regulations, this criterion cannot be applied. The prevalence will depend on national law, jeopardising the uniformity in the application of the regulation.

75. The rules on the allocation of jurisdiction and the connecting factors do not favour the convergence of *forum* and *ius*. This result is achieved only if the spouses have not changed their first common habitual residence, or, failing it, the (single) common nationality; in the partnership property regimes, the convergence on the law that have created the relationship results only in very fragmented situations or after the prorogation of jurisdiction. This approach makes the limitations to party autonomy longing for this convergence even less understandable.

X. The flexibility in the choice of law: the *lex (non) conveniens*

76. Another meaningful innovation is the margin of appreciation left to the judge when determining the applicable law. The rule can be considered as a *lex non conveniens* clause for its analogies with the common law *forum non conveniens* method (art. 26, para. 3 of regulation n. 2016/1103; art. 26, para. 2 of regulation n. 2016/1104).

77. Different conditions frame the margin of appreciation of the judge. First, it can overcome only the application of the law of the first habitual common residence of the spouses[54], or the law pursuant to which the partnership has been created. Second, the last common habitual residence of the spouses has been lasting longer than the first common habitual residence. This condition becomes a requirement of long-lasting residence in the field of the partnership property regime[55]. Third, the spouses or the partners must have relied on the application of this law. If these requirements are fulfilled, by way of exception and after the application of either spouse, the judge may decide to apply the law of the State of the last common habitual residence of the spouses or of the partners. The application is retroactive, unless the parties disagree. In the latter case, the law applies as from the establishment of the last common habitual residence.

78. The rule seeks to promote the legitimate expectations of the parties according to a criterion of proximity. Indeed, the couple might have lost any substantial contact with the State of the law determined according to art. 26, para. 1, and its application might come to a surprise. It is therefore possible to overcome it.

79. In matrimonial properties disputes it is possible to disregard only the law of the first habitual residence. Indeed, the rule targets a more strictly connected applicable law from the substantial point of view, although it is not necessary that the last common habitual residence is also the current one. Therefore, its application would amount to a non-sense when the law must be determined pursuant to art. 26, para. 1, l. b) and c) of the regulation.

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[53] We need to recall that the connecting factor was the place of registration, and not the law applied for the creation of the partnership.

[54] Therefore, this rule cannot resolve the difficulties in the determination of the first common habitual residence of the spouses, seen *supra*, para. IX, 1. There must be a common habitual residence after the celebration of the marriage in order to bypass its application.

[55] This divergence depends on the fact that the first common habitual residence is not a connecting factor in the partnership property regimes.

80. If the *lex non conveniens* applies, the coincidence between *forum* and *ius* is achieved to the extent that the last common habitual residence corresponds to the current one.

81. The rule includes the evaluation of the behaviour of the parties. This might grant the achievement of their legitimate expectations. Spouses and partners must prove that they have arranged or planned the organization of their patrimonial relationship according to the law of the last common habitual residence. The parties may invoke different elements, as the registration or the transcription in public registers or documents of their property regime, the fulfilment of every kind of publicity according to that law, the former application of the same law between them, or in legal relationships entered in with third parties. The conclusion of a patrimonial property agreement may be an evidence, too. Indeed, the *lex non conveniens* clause does not apply if the couple has concluded such an agreement before establishing its last common habitual residence (art. 26, para. 3, c. IV of regulation n. 2016/1103; art. 26, para. 2, c. IV of regulation n. 2016/1104). It is supposed that the spouses or the partners might have changed their agreement if they expected the application of the law of the newly established common habitual residence. If they have not modified their previous arrangements, they wish their regime to be regulated by the law of the first habitual residence, or they do not expect the application of the law of the last habitual residence. In both cases, it would make no sense to change the applicable law: this would undermine the expectations of the parties and the validity of their property agreement. On the contrary, the conclusion of a property agreement after the establishment of the new common habitual residence, according to this law, is a reasonable evidence of the planning of the parties.

82. The application of the law of the last common habitual residence cannot undermine the rights of third parties determined according to art. 26, para. 1. In this case, too, it is necessary to distinguish two assets. Controversial issues on the applicable law are likely to arise only with regard to relationships concluded and performed before the establishment of the last common habitual residence, but contested afterwards. Instead, after the modification of the habitual residence, the couple plans its patrimonial relationships with third parties, too, pursuant to the law of the last common habitual residence. Therefore, there is no need to protect third parties, since there is no change of the expected applicable law (from the law of the first to the law of the last common habitual residence).

83. The *lex non conveniens* clause must be applied by way of exception and after the request of either spouse or partner. The consent of the other party is not required, but is implicitly contained in the expectations of the parties: the couple must have relied on the application of that law, and its non-application should have detrimental effects for both. Nevertheless, if either spouse or partner contests the application of the law of the last common habitual residence, the judge is under a duty to scrutinise the past behaviour of the contesting party in order to state if he/she relied on its application. Failing this proof, it is not possible to shift into the application of this law.

84. The judicial margin of appreciation overcomes the typical drawbacks of the rigid connecting factors. The promotion of the legitimate expectations of the parties does not only amount to a subjective or psychological satisfaction, but it can better grant fundamental rights of the parties, as the right to property and the right to a family life. The *bona fide* organization of the patrimonial regime pursuant to the law of the last common habitual residence might be dismantled by the application of a different law. This outcome does not protect any legitimate interest and must be overcome by this flexibility clause.

XI. Family law and enhanced cooperation: the only way on?

85. The present article aimed at offering a first overview of the most interesting rules within the two new regulations on the patrimonial consequences of personal relationships. The EU legislator has introduced some new tools within the traditional methods of private international law. Some of

those innovations can be subject to criticism, as the automatism of the typical connection, some can be welcome, as the judicial margin of appreciation, some are doubtful, as the convergence of *forum* and *ius* as a limit of the choice of court. The practical application of the regulations will help understanding their impact.

86. In conclusion, a last doubt arises. These regulations represent the second implementation of an enhanced cooperation in civil judicial cooperation affecting family law, after the regulation n. 1259/2010[56]. On the opposite, civil and commercial law do not seem to rise difficulties in the approval of different regulation, even when establishing uniform rules of civil procedure[57].

87. The most probable reason of the difficulties in reaching the unanimity could be the too small "common core" in the Member States family law, which prevents the achievement of a satisfying unanimous agreement on these topics. Member States do not seem ready to renounce to their typical institutions in national law, scaring that the civil judicial cooperation would amount to a loss for the national traditions.

87. The Commission paves the way to the adhesion of the other Member States, which should be convinced by the number of practical benefits stemming from the application of the regulations. However, with due respect, it is hard to imagine such a broad positive effect, following the experience of the regulation 1259/2010: only three[58] more States adhered after its adoption. Failing a progressive *consensus*, the EU's civil cooperation policy risks to become a sort of jigsaw, where every Member State decides if to *opt in* a regulation. This result risks undermining the very same nature of an *area of freedom, security and justice* as a uniform and coordinated legal space.

[56] The implementation of the enhanced cooperation within the civil judicial cooperation is subject to many critics. The most controversial issue is due to the fact that such a method may preserve the fragmentation of the EU legal area, instead of unifying and approaching the national legal systems: I. Ottaviano, «La prima cooperazione rafforzata dell'Unione europea: una disciplina comune in materia di legge applicabile a separazioni e divorzi transnazionali», *Diritto dell'Unione europea*, 2011, p. 113; F. Pocar, «Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato», *Rivista di diritto internazionale privato e processuale*, 2011, p. 297; O. Feraci, *op. cit.*, p. 532.

[57] The most meaningful example is the Regulation (EU) No 655/2014 of the European Parliament and of the Council, of 15 May 2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters in *OJ* L 189, 27 June 2014, p. 59. The regulation provides for an autonomous procedure in order to obtain a provisional and protective measure to be automatically recognized and enforced in all Member States: S. Marino, «La circolazione dell'ordinanza europea di sequestro conservativo dei depositi bancari», *Rivista di diritto internazionale*, 2014, p. 1181; P. Franzina, A. Leandro (a cura di), *Il sequestro europeo di conti bancari – Regolamento (UE) n. 655/2014 del 15 maggio 2014*, Milano, Giuffrè, 2015.

[58] These are Lituania, Greece and Estonia.