

# CHANGING THE PAST: RETROACTIVE CHOICE OF LAW AND THE PROTECTION OF THIRD PARTIES IN THE EUROPEAN REGULATIONS ON PATRIMONIAL CONSEQUENCES OF MARRIAGES AND REGISTERED PARTNERSHIPS

## CAMBIANDO EL PASADO: ELECCIÓN RETROACTIVA DE LA LEY APLICABLE Y PROTECCIÓN DE TERCERAS PARTES EN LOS REGLAMENTOS EUROPEOS SOBRE LOS EFECTOS PATRIMONIALES DE LOS MATRIMONIOS Y DE LAS UNIONES REGISTRADAS

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**Abstract:** Two forthcoming EU Regulations are going to address, inter alia, the law applicable to the patrimonial consequences of marriages and registered partnerships. Under the Regulations, spouses and partners will not only be able to choose the applicable law but they are also granted the right to give their choice of law retroactive effect. Although the patrimonial consequences of marriages and partnerships are of relevance primarily to the spouses and registered partners, they may also directly affect the legal position of third parties. The aim of this paper is to identify and analyze the risks for third parties inherent in a retroactive change of the applicable law and the measures implemented in the Regulations to safeguard third party interests.

**Keywords:** matrimonial property regime, partnership property regime, applicable law, choice of law, retroactivity, third parties.

**Resumen:** Dos Reglamentos europeos regirán, entre otras cosas, la ley aplicable a los efectos patrimoniales de los matrimonios y de las uniones registradas. Según los Reglamentos, los cónyuges y los miembros de la unión además de poder elegir la ley aplicable tienen la posibilidad de dotar esta elección de efecto retroactivo. Aunque los efectos patrimoniales de los matrimonios y de las uniones registradas tienen relevancia ante todo para los cónyuges y los miembros de la unión registrada, pueden afectar directamente a la posición jurídica de terceras partes. El objetivo de este artículo es identificar y analizar los riesgos para terceros inherentes a un cambio retroactivo de la ley aplicable y las medidas implementadas en los Reglamentos para salvaguardar los intereses de terceras partes.

**Palabras clave:** régimen económico matrimonial, efectos patrimoniales de las uniones registradas, ley aplicable, elección de la ley aplicable, retroactividad, terceras partes.

**Summary:** I. Introduction. II. Effects of patrimonial family law on third parties. 1. Acquisition, disposition, and presumption of property rights. 2. Debts and representation. 3. Succession. III. Choice of law. 1. Eligible jurisdictions. 2. Material and formal validity. 3. Temporal effects:

prospective and retroactive choice of law. IV. Protection of third parties. 1. Protection from the application of an unreckoned law. 2. Protection from the loss of rights due to retroactive choice of law. V. Conclusion.

## I. Introduction

1. According to conventional wisdom, the past cannot be changed. Yet this proposition will soon hold untrue as regards the law applicable to patrimonial consequences of marriages and registered partnerships. In two forthcoming regulations<sup>1</sup>, the European Union has not only once again reasserted the principle of private autonomy in conflict of laws, a principle which permeates the international law of obligations, of divorce, maintenance, and succession<sup>2</sup>. Under the imminent regulations<sup>3</sup>, spouses and registered partners are also granted the right to give their choice of law retroactive effect. By virtue of the spouses' or registered partners' agreement, the patrimonial consequences of a marriage or partnership are governed by a different substantive law than before. This choice may not only have effect *ex nunc* or *pro futuro* from the point in time the agreement is concluded but also *ex tunc* or *pro praeteritum* in view of the time the marriage or partnership existed prior to the choice-of-law agreement.

2. The patrimonial consequences of marriages and partnerships are of relevance first and foremost to the spouses and registered partners, predominantly when the marriage or partnership ends by death, divorce, or dissolution. At the very core of this area of substantive law lie the distribution of property rights between spouses or partners due to marriage or partnership and the creation or absence of a marital estate or an estate of the partners. However, as property rights entitle *erga omnes*, their distribution may also prove significant beyond the bilateral relationships of marriage and partnership. The law of patrimonial consequences determines the management of the estate and how it will be divided and inherited at the end of the marriage or partnership. And even absent a community estate, the marital property regime may restrain a spouse's or registered partner's power of disposition or it may authorize the spouses or partners to represent each other. Moreover, under the law of patrimonial consequences, third parties may rely on presumptions of ownership based on the marriage or partnership.

3. Therefore, matrimonial property regimes and property consequences of registered partnerships have important and direct effects for third parties. A third party's rights, entitlements, and liability *vis-à-vis* one or both spouses or partners may depend on the substantive rules of the patrimonial regime. As a result, a third party may be disadvantaged legally by the application of one patrimonial regime compared to another. A change of the applicable law may hence result in a change of the substantive patrimonial property regime governing the marriage or partnership, with potentially detrimental effects for third parties. In particular, third parties may be adversely affected by a retroactive change of the applicable law, which the upcoming regulations explicitly provide for.

<sup>1</sup> 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, *OJEU* L 183, 8 July 2016, pp. 1-29; 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, *OJEU* L 183, 8 July 2016, pp. 30-56.

<sup>2</sup> H.-P. MANSEL, "Party autonomy, legal doctrine on choice of law, and the general section of the European conflict of laws", in S. LEIBLE (ed.), *General principles of European private international law*, Alphen aan den Rijn, Wolters Kluwer, 2016, pp. 131-169, especially pp. 141-148; G. RÜHL, "Rechtswahlfreiheit im europäischen Kollisionsrecht", in D. BAETGE/J. VON HEIN/M. VON HINDEN (eds.), *Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 2008, pp. 187-209.

<sup>3</sup> For an overview on the new provisions, see A. DUTTA, "Das neue internationale Güterrecht der Europäischen Union – ein Abriss der europäischen Güterrechtsverordnungen", *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2016, pp. 1973-1985; S. MARINO, "Strengthening the european civil judicial cooperation: the patrimonial effects of family relationships", *Cuadernos de Derecho Transnacional (CDT)*, vol. 9, n° 1, March 2017, pp. 265-284; D. MARTINY, "Die Anknüpfung güterrechtlicher Angelegenheiten nach den Europäischen Güterrechtsverordnungen", *Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW)* 2017, pp. 1-33; B. HEIDERHOFF, "Die EU-Güterrechtsverordnungen", *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2018, pp. 1-11.

4. The European legislator is aware of third-party consequences in international family law<sup>4</sup> and has made arrangements for the third party's protection. The tension between the interests of third parties and the spouses' and partners' private autonomy in choosing the applicable law is addressed in a number of the Regulations' provisions. The aim of this paper is to identify and analyze the risks for the third party's legal position and the measures implemented to safeguard it. The paper is structured as follows: first, the possible effects of matrimonial property regimes and property consequences of registered partnerships on third parties will be examined (II.). The relevant areas and conceptual distinctions in national substantive family laws will be outlined in a comparative overview. Second, the choice-of-law options under both Regulations will be introduced (III.). The focus here will be on the eligible jurisdictions and in particular on the retroactive choice of law. Against this background, third, the protective mechanisms envisaged in the Regulations will be introduced and evaluated (IV.).

5. When reference is made to 'the Regulations', both Regulation 2016/1103 on marriages and Regulation 2016/1104 on registered partnerships are encompassed. The Regulations' articles, for the most part, are identical but some important deviations, which will be pointed out in what follows, can be found also with regard to the topic at hand. When addressing the scopes of both Regulations at the same time, the terminological question of the appropriate nomenclature arises. Regulation 2016/1103 deals with matrimonial property regimes while Regulation 2016/1104 is concerned with property consequences of registered partnerships. A more general term has to be found that embraces both the matrimonial property regime and the property consequences of registered partnerships. Two Scottish authors, when confronted with the same terminological issue, had the following to say: "Once upon a time this subject was called 'matrimonial property law'. Now marriages can be either other-sex or same-sex, and same-sex couples (but not other-sex couples) can enter into civil partnerships which are almost the same as marriage. At the same time, cohabitation without marriage has grown. An umbrella term is needed for the legal area dealing with the patrimonial consequences of such relationships. We offer, tastelessly, 'sexual property law'"<sup>5</sup>. Notwithstanding matters of taste, however, the suggested terminology does not seem to be the most suitable choice. Instead, preference should be given to the admittedly somewhat clumsy but more precise and unambiguous term of 'patrimonial consequences of marriages and registered partnerships'. Patrimony, an English word of Latin derivation, describes the total of all personal and real entitlements, including movable and immovable property, belonging to a person.

## II. Effects of patrimonial family law on third parties

6. Due to the potential legal consequences, third parties are well advised to identify the regime applicable to the marriage or partnership when assessing the legal relationship to a person married or registered as a partner. Most national substantive family laws have established general legal effects of marriages and partnerships as well as a default statutory regime which governs a marriage or partnership<sup>6</sup>. The default statutory regime applies unless spouses or partners are allowed to and have opted for a non-standard regime by means of a pre- or postnuptial agreement. In very broad terms, we frequently find the community of property as the default statutory regime in national jurisdictions (especially in the Romanistic legal family) and less often separation of property as the default solution, sometimes (especially in the Germanic and Scandinavian legal families) in more or less strict variations<sup>7</sup>. In conse-

<sup>4</sup> See already recital 46 of Regulation 2016/1103 and recital 45 of Regulation 2016/1104.

<sup>5</sup> G.L. GRETTON/A.J.M. STEVENS, *Property, Trusts and Succession*, London, Bloomsbury, 3<sup>rd</sup> ed., 2017, para. 11.1.

<sup>6</sup> Exceptions are England and Wales (sec. 1 f. English Law Reform [Married Women and Tortfeasors] Act 1935) and Scotland (sec. 24 Scots Family Law Act 1985) where the general rules of property law and the law of obligations apply instead, which moves these legal systems close to those in which separation of property is the default statutory regime.

<sup>7</sup> For an overview, see W. PINTENS, "Matrimonial Property Law in Europe", in K. BOELE-WOELKI/J. MILES/J.M. SCHERPE (eds.), *The Future of Family Property in Europe*, Antwerpen, Intersentia, 2011, pp. 19-46; K. BOELE-WOELKI/F. FERRAND/C. GONZÁLEZ-BEILFUSS/M. JÄNTERÄ-JAREBORG/N. LOWE/D. MARTINY/W. PINTENS, *Principles of European Family Law Regarding Property Relations Between Spouses*, Antwerpen, Intersentia, 2013, pp. 11-18, 140 f., 144-147, 219, 221 f., 224-228; detailed national questionnaires can be found in K. BOELE-WOELKI/B. BRAAT/I. CURRY-SUMNER (eds.), *European Family Law in Action*,

quence, a change of the applicable law can result in a change of the applicable default statutory regime and thus in a change from community of property to separation of property and *vice versa*. Even if two legal systems both have established nominally the same default solution, the specific legal rules behind statutory default concepts of the same name are not necessarily congruent. As always, the outcome of individual cases depends on technical details which can differ significantly among the legal systems even if they generally adhere to the same category of default regime. Also, the general legal effects attached to marriages and partnerships may differ from jurisdiction to jurisdiction. Moreover, spouses and partners can modify the available statutory regimes to varying degrees in the different legal systems<sup>8</sup>.

7. Therefore, the application of one substantive law instead of another can improve or, more important for the purposes of this paper, deteriorate the legal situation of third parties. Whereas a third party may hold certain rights and entitlements according to one substantive law, the opposite may be true when another substantive law is applicable. In consequence, a deliberate change of the applicable law, especially if bestowed with retroactive effect, can result *a priori* in the loss of rights for third parties. The following sub-sections will present an overview of areas of substantive family law which may prove relevant for the third party's legal position. To appreciate the resulting conflict-of-laws problems (III. and IV.), it suffices to demonstrate the conceptual distinctions between community property and separation of property relevant for third parties and to exemplify differences within legal systems which nominally have established the same default statutory regime; comprehensive and detailed studies of the various national laws can be found elsewhere<sup>9</sup>. For the purposes of this paper, only the structural issues resulting from the transition between applicable laws need to be exposed. When contrasting community property with separation of property, this paper will refer to the *Principles of European Family Law Regarding Property Relations Between Spouses* prepared by the Commission on European Family Law (CEFL Principles). These Principles, based on comparative research, were drafted as a restatement of European marriage law<sup>10</sup>. Their aim is to reflect a common core of the various European national legal systems and to provide further comparative references.

## 1. Acquisition, disposition, and presumption of property rights

8. The aforementioned differences between the national legal systems have their most significant impact perhaps on the acquisition of property rights by spouses and partners. Under regimes of community property, assets acquired generally do not fall into the personal property of the individual spouse or partner involved in the transaction but rather fall into the community<sup>11</sup>. In consequence, both spouses or partners own the whole estate together. Almost everywhere, this rule applies only for property that was acquired during the marriage or partnership and makes exceptions for property which has a particularly close and personal connection with one spouse or partner<sup>12</sup>. In contrast, the starting point of systems with separation of property as the default statutory regime is that property is owned separately by the spouses or partners<sup>13</sup>. This is also the case where the regime of separation of property takes the form of a participation in acquisitions: only at the end of the regime, the acquisitions of each spouse or partner are determined and valued, and claims for compensation (typically in money) arise if one

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*Volume IV: Property Relations between Spouses*, Antwerpen, Intersentia, 2009; comprehensive national reports have been published in German in R. SÜSS/G. RING (eds.), *Eherecht in Europa*, Bonn, zerb, 3<sup>rd</sup> ed., 2017; see also A. BONOMI/M. STEINER, *Les Régimes matrimoniaux en droit comparé et en droit international privé*, Geneva, Droz, 2006.

<sup>8</sup> On the role of private autonomy in national family laws, see the national reports in J.M. SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, Oxford, Hart, 2012; see also the answers to question 15 and 191-201 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 237-244, 1131-1242.

<sup>9</sup> See the specialized comparative volumes BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, and SÜSS/RING, *Eherecht in Europa*, 2017, above, n. 7.

<sup>10</sup> BOELE-WOELKI/FERRANDI/GONZÁLEZ-BEILFUSS/JÄNTERÄ-JAREBORG/LOWE/MARTINY/PINTENS, *Principles of European Family Law Regarding Property Relations Between Spouses*, 2013, above, n. 7, pp. vi, 8, 26 f., 34.

<sup>11</sup> CEFL Principles 4:34-4:36.

<sup>12</sup> CEFL Principle 4:35, pp. 224-228.

<sup>13</sup> CEFL Principle 4:17, pp. 144-147.

spouse's or partner's acquisitions exceed the value of those of the other. Under strict regimes of separation of property, by contrast, no compensation is owed.

**9.** In consequence, the allocation of property rights between spouses and partners and the number of owners depends on the applicable regime of patrimonial relations. A spouse or partner can be a (co-)owner of a particular movable or immovable belonging to the community estate under one regime, while he or she does not have any proprietary rights in that specific asset under another regime. The ramifications for third parties show in two contexts in particular: first, the prospects of third parties, who hold claims against a spouse or partner, depend on the distribution of proprietary rights. A claim often has economic value only if the debtor holds property that the creditor eventually can avail him- or herself of. The applicable regime therefore may decide whether the debtor remains empty-handed or receives what he or she is owed. Second, a spouse or partner may be the sole owner of a specific asset under one regime, whereas he or she is bound by the restrictions of community property under the other. In such cases, a third party who intends to acquire ownership from the spouse or partner may be prevented from doing so because of the parallel co-ownership in the community estate of the other spouse or partner and the requirement of his or her joint administration<sup>14</sup>. Therefore, the matrimonial regime or the property consequences of the registered partnership may demand the other spouse's or partner's agreement for the property to pass to the third party.

**10.** In both contexts, presumptions of ownership may prove decisive for third parties when the allocation of property rights between the spouses or partners is not certain. Again, a look at the national legal systems reveals that different presumptions are made depending on the regime governing the patrimonial relations. In systems of separation of property, there often is a rebuttable presumption established according to which assets belong to spouses or partners in equal parts<sup>15</sup>. A spouse or partner liable to a third party thus cannot escape foreclosure by asserting that an economically valuable asset exclusively belongs to the other spouse or partner. Where a regime of community property applies, it is rebuttably presumed that assets are community property<sup>16</sup>. But also within the same category of regime, the national legal systems show deviations from one another. Some national laws distinguish between presumptions for movables and immovables, the scope of the presumption is not the same everywhere, the standards of proof necessary to rebut a presumption vary, and some jurisdictions provide for no particular presumptions in their matrimonial regimes at all<sup>17</sup>.

**11.** At the core of the concept of ownership lies the idea of being empowered to dispose of an asset *ad libitum*. Spouses and partners, however, may be subject to restrictions in their ownership rights. Such restrictions may follow from the statutory regime, e.g., when assets fall into the community property and a transaction requires joint administration from both spouses or partners<sup>18</sup>. Yet, even where no community property exists, i.e. in regimes of separation of property, the spouses and partners may be relieved of the absolute right to dispose over their personal property due to the general legal effects of marriage and partnership. Such restrictions may apply to the family home or to household goods, or they may restrict a spouse or partner to dispose of their personal estate on the whole<sup>19</sup>. These restrictions, varying in their scope in the national laws, have the purpose to protect the economic basis of the family. Third parties are affected by such restrictions when contracting with a spouse or partner in a transaction which is subject to such restrictions. Depending on the applicable law, the transaction may be valid or invalid.

<sup>14</sup> CEFL Principle 4:44, pp. 274-277.

<sup>15</sup> CEFL Principle 4:20.

<sup>16</sup> CEFL Principle 4:39.

<sup>17</sup> See the answers to questions 29, 65, 101, 135, and 167 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 389-395, 639 f., 801-803, 925-928, 1075 f.

<sup>18</sup> See above, para. 9.

<sup>19</sup> CEFL Principles 4:5 f., pp. 63-75; see also the answers to questions 10 f. in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 175-206.

## 2. Debts and representation

12. The distinction between regimes of community property and separation of property is also relevant with regard to debts entered into by spouses or partners. Under separation of property, debts incurred by one spouse or partner generally are his or her personal debts<sup>20</sup>. The creditor, a third party, generally can only sue the specific debtor who entered into the obligation and the debts can only be recovered from the debtor's personal assets. In contrast, under the national systems of community property, spouses and partners may incur community debts<sup>21</sup>. This is the case, of course, where both spouses or partners have jointly entered into the obligation. But community debts may also arise where only one spouse or partner acted. In many legal systems, the rule applies when a spouse or partner contracted to meet the needs of the family, especially when expenses are incurred for the family's subsistence, the maintenance and education of the family's children, health care expenses, and expenses incurred because of the administration of the common property<sup>22</sup>. Such debts, although contracted by one spouse or partner only, can be recovered both from the debtor's personal assets as well as from the common assets<sup>23</sup>. Some national legal systems have actually established a presumption that a debt incurred by a spouse or partner is a community debt, unless the personal character of the debt is proven<sup>24</sup>.

13. Closely related to the idea of community debts is the spouses' and partners' authority to bind the other spouse or partner *vis-à-vis* third parties in specific contractual settings such as daily life transactions with regard to the joint household and other family needs. This concept of a mutual authority to obligate also the significant other can be found in most legal systems irrespective of the applicable regime as a general legal effect of marriage and partnership<sup>25</sup>. Usually, the authority does not depend on the spouses' or partners' consent but is conferred upon every spouse and partner by law. In some legal systems, this *ex lege* authority is construed as a form of agent authority, although, contrary to the general principles of agency, spouses and partners do not have to disclose that they are acting as agents for the legal effects of joint liability to apply<sup>26</sup>. In some jurisdictions, spouses and partners can also represent each other when one spouse or partner is incapable of acting personally, due to illness, mental incapacity, or absence<sup>27</sup>. Again, the national legal systems show differences in important details as regards the requirements and scopes of the authority.

## 3. Succession

14. Moreover, the patrimonial consequences of marriages and partnerships may also have an impact on third parties with regard to succession. Under German law, for instance, the regime of participation in acquisitions can lead to an increase of the surviving spouse's or partner's intestate inheritance by an additional quarter of the deceased's estate (§ 1371(1) German Civil Code [*Bürgerliches Gesetzbuch*]

<sup>20</sup> CEFL Principle 4:21, pp. 165 f.; see also the answers to questions 66 f., 102 f., and 136 f. in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 641-645, 805-808, 929-933.

<sup>21</sup> CEFL Principle 4:40, pp. 248-252.

<sup>22</sup> See the answers to questions 30 f. in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 397-409.

<sup>23</sup> CEFL Principle 4:42, pp. 260-262; see also the answers to questions 33 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 419-424.

<sup>24</sup> BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 403-405 (Belgium, France, and Hungary).

<sup>25</sup> See the answers to questions 7, 9, and 13 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 129-137, 157-174, 217-226. But see also CEFL Principle 4:7, p. 85.

<sup>26</sup> See the answers to question 13 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 217-226.

<sup>27</sup> CEFL Principle 4:7, p. 81; see also the answers to question 13 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 217-226.

– BGB])<sup>28</sup>. Accordingly, the proportional right to the inheritance of other legal heirs, e.g. of children or siblings – third parties in the present context, is reduced. The rules on intestate succession also affect the legitime, a right to a compulsory portion of the inheritance, which is derived from the (hypothetical) intestate inheritance share and from which the deceased cannot disinherit his or her children, parents, or spouse or partner without sufficient legal cause (§ 2303 BGB).

15. Whether the increase of the surviving spouse's or partner's inheritance share by a quarter should be classified as a matter of succession law or as a matter of the patrimonial relations has been a subject of debate<sup>29</sup>, both under the national conflict-of-laws rules and under the Succession Regulation<sup>30</sup>. A definite answer on the line of demarcation in European private international law cannot be drawn from the forthcoming Regulations either and there is certainly the risk that courts from different member states will reach disparate results in the qualification process. Since the purpose of § 1371(1) BGB, however, is not to implement a deceased spouse's or partner's hypothetical testamentary will but rather the flat-rate equalization of accrued gains when marriage or partnership end by death, a strong case can be made in favour of characterizing the provision as a matter of the patrimonial relations, not of succession law<sup>31</sup>.

### III. Choice of law

16. With the adoption of the Regulations on the patrimonial consequences of marriages and registered partnerships, the European Union continues to promote party autonomy in conflict of laws. The parties' competence to designate the applicable law has emerged as a cornerstone of European legislation on private international law<sup>32</sup>. Party autonomy is not confined to the international law of obligations but has been assigned a firm place also in international succession and family law<sup>33</sup>. The Regulations proceed with this principle also for patrimonial consequences. Only absent a choice of law by the spouses or partners, Arts. 26 of the Regulations determine the applicable law according to objective connecting factors.

#### 1. Eligible jurisdictions

17. According to Arts. 22(1) of the Regulations, spouses and partners can choose the applicable law prior to or after entering marriage or partnership. The eligible jurisdictions, however, are signifi-

<sup>28</sup> See the answer for German law on question 6 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 121 f.

<sup>29</sup> M. WELLER, in A.-L. CALVO CARAVACA/A. DAVI/H.-P. MANSEL (eds.), *The EU Succession Regulation – A Commentary*, Cambridge, Cambridge University Press, 2016, Art. 1, para. 36; MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, “Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession”, *Rebels Zeitschrift für ausländisches und internationales Privatrecht (RebelsZ)* 74 (2010), pp. 522-720, paras. 322-325.

<sup>30</sup> Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJEU* L 201, 27 July 2012, pp. 107-134.

<sup>31</sup> P. MANKOWSKI, “Das erbrechtliche Viertel nach § 1371 Abs. BGB im deutschen und europäischen Internationalen Privatrecht”, *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV)* 2014, pp. 121-129, 127. This is also the position of the German *Bundesgerichtshof* with regard to German private international law: ruling of 13 May 2015 – IV ZB 30/14, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 205, 289 = *Neue Juristische Wochenschrift (NJW)* 2015, 2185, paras. 20-36.

<sup>32</sup> For the theoretical underpinnings of party autonomy in private international law, see J. BASEDOW, “Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts”, *Rebels Zeitschrift für ausländisches und internationales Privatrecht (RebelsZ)* 75 (2011), pp. 32-59; M. LEHMANN, “Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws”, *Vanderbilt Journal of Transnational Law* 41 (2008), pp. 381-434; H.E. YNTEMA, “‘Autonomy’ in Choice of Law”, *The American Journal of Comparative Law* 1 (1952), pp. 341-358.

<sup>33</sup> See the references above, n. 2. Specifically on international family law, D. HENRICH, “Zur Privatautonomie im europäischen internationalen Familienrecht”, in: A.-L. VERBEKE/J.M. SCHERPE/C. DECLERCK/T. HELMS/P. SENAEBE (eds.), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens*, vol. 1, Cambridge, Intersentia, 2012, pp. 701-713; see also the contributions to A. PANET/H. FULCHIRON/P. WAUTELET (eds.), *L'autonomie de la volonté dans les relations familiales internationales*, Brussels, Bruylant, 2017.

cantly curtailed, ensuring a sufficient link between the marriage or partnership and the applicable law. The parties can select the law of the state where one or both spouses or partners are habitually resident at the time the agreement is concluded (lit. a) or the law of a state of nationality of either spouse or partner at the time the agreement is concluded (lit. b). For spouses and partners with dual or multiple citizenships the laws of all states of citizenship shall be eligible<sup>34</sup>. Additionally, pursuant to Art. 22(1) lit. c of Regulation 2016/1104 partners can elect the law of the state under whose law the registered partnership was created. Art. 22(1) of Regulation 2016/1104 also states that a choice of law by registered partners is only valid if the chosen legal system attaches property consequences to the institution of the registered partnership. As recital 44 sent. 2 of Regulation 2016/1104 points out, the rationale behind this rule is to protect the registered partners from a ‘legal vacuum’.

**18.** Some of the jurisdictions eligible under Arts. 22(1) of the Regulations coincide with the jurisdictions which govern the patrimonial relations in marriages and registered partnerships if the spouses or registered partners refrain from concluding a choice-of-law agreement. If, e.g., the spouses after entering marriage take up habitual residence in the same state, the application of this state’s law follows from Art. 26(1) lit. a of Regulation 2016/1103 without the need of a choice of law. Likewise, a registered partners’ choice according to Art. 22(1) lit. c of Regulation 2016/1104 of the law of the state under whose law the registered partnership was created may appear unnecessary in light of Art. 26(1) of Regulation 2016/1104 which designates the state under whose law the partnership was created as the objective connecting factor. Nevertheless, the choice of the law that would also be applicable in the absence of a choice under Arts. 26(1) of the Regulations can have the purpose of preventing the application of the escape clauses in Art. 26(3) of Regulation 2016/1103 and Art. 26(2) of Regulation 2016/1104 and thus enhance legal certainty with regard to the applicable law<sup>35</sup>.

**19.** Furthermore, deviations of the jurisdictions eligible for choice of law from the law found through objective connecting factors can arise if the spouses or registered partners exercise their private autonomy at a later point in time during their marriage or partnership. The reason is that the objective connecting factors laid down in Arts. 26(1) of the Regulations consistently relate to the beginning of the marriage or registered partnership: the spouses’ first common habitual residence after the conclusion of the marriage, their common nationality at the time of the conclusion of the marriage, or the closest connection at the time of the conclusion of the marriage; the state under whose law the registered partnership was created. These objective factors are not dynamic but static. When the personal circumstances of the spouses and registered partners subsequently change, e.g. by relocation to another state or a change of citizenship, the applicable law objectively determined by Arts. 26(1) of the Regulations remains the same. Yet, new possibilities to exercise private autonomy may arise. In this situation, a choice of law may adapt the applicable law to the spouses’ or registered partners’ new situation.

## 2. Material and formal validity

**20.** The material validity and the formal validity of a choice-of-law agreement between spouses or partners are addressed in Arts. 23 and 24 of the Regulations. For material validity, Arts. 24 of the Regulations refer to the law which applies if the choice-of-law agreement is valid. In exceptional cases, a spouse or partner may refer to the law of his or her habitual residence to establish a lack of consent.

**21.** The minimum requirements for formal validity of choice-of-law agreements between spouses or partners are laid down in Arts. 23(1) of the Regulations. The agreement has to be made in writing,

<sup>34</sup> DUTTA, above, n. 3, p. 1977.

<sup>35</sup> DUTTA, above, n. 3, p. 1981. It is worth noting, however, that the escape clause of Art. 26(3) of Regulation 2016/1103 only allows to disregard the objective connection established in Art. 26(1) lit. a of Regulation 2016/1103, although the need for the application of a law with a closer relation to the facts of the case may likewise arise when the original objective connection was based on Art. 26(1) lit. b or c of Regulation 2016/1103 for they also relate to the beginning of the marriage; see HEIDERHOFF, above, n. 3, p. 6.



it has to be dated and signed by both partners or spouses. Additional formal requirements of the law of the spouses' or partners' state of habitual residence may be invoked by the conflict-of-laws rules of Arts. 23(2)-(4) of the Regulations. If this state's law has established formal requirements for matrimonial and partnership property agreements, the same requirements can also apply to the choice-of-law agreement. In consequence, the choice-of-law agreement may depend on the involvement of a notary or demand registration in the matrimonial or partnership property register<sup>36</sup>. If the choice-of-law agreement is invalid for formal or material reasons, Arts. 26 of the Regulations determine the applicable law through objective connecting factors.

### 3. Temporal effects: prospective and retroactive choice of law

**22.** The temporal effects of a choice-of-law agreement are addressed in Arts. 22(2) of the Regulations. The provisions establish a rule of interpretation according to which, absent a spouses' or registered partners' contrary agreement, a choice of law has prospective effect only. It follows that the provisions address the choice of law at a point in time after the marriage or registered partnership were entered into because only then the question of the temporal effects of a choice-of-law agreement arises; a choice-of-law before or at the time of marriage or the creation of partnership inherently can have prospective effect only. When drafting Arts. 22(2) of the Regulations, the European legislator obviously primarily had couples in mind who at some point in their marriage or partnership change their personal circumstances in an aspect which is relevant for the Regulations, i.e. by changing their citizenship or, more frequently, relocating their habitual residence to another state. The mobility of couples within the area of freedom, security, and justice is referred to in the recitals as the major motive for the enactment of the Regulations<sup>37</sup>. Dynamic couples should then be given the opportunity to adapt the law applicable to the patrimonial consequences of their marriage or partnership to their current personal circumstances.

**23.** The presumably unwanted upshot of a prospective choice of law, however, is that the current matrimonial regime or the regime governing the patrimonial relations in a registered partnership ends when the choice-of-law agreement takes effect. It should be recalled that a change of the applicable law can result in a change of the applicable default statutory regime<sup>38</sup>. All national substantive family laws provide for rules which necessitate the dissolution and, as the case may be, liquidation of a regime that ceases to govern a marriage or partnership<sup>39</sup>. If a marriage or partnership subsists, albeit under a different regime, liquidation typically will not lie in the spouses' and partners' interest and will be considered an undesirable complication.

**24.** The Regulations' recitals do not mention the often unwelcome consequences of a prospective choice-of-law agreement in this context but it can be presumed that these consequences were the legislative motive for enabling the spouses and partners to endow their choice of law with retroactive effect. The permissibility of a retroactive change of the applicable law is expressed indirectly in the rule of interpretation of Arts. 22(2) of the Regulations, which would be unnecessary if the parties could only change the applicable law for the future, and is also addressed in Arts. 22(3) and recitals 45/46 of the Regulations. Through a retroactive change, spouses and partners can avoid the temporal division of the law applicable to the patrimonial consequences of their marriage or partnership. Even though the marriage or partnership has been governed for a certain period of time by one substantive national law, the spouses' or partners' exercise of private autonomy therefore can not only set the course for the future

<sup>36</sup> For the formal requirements of pre- and postnuptial agreements under substantive national laws, see the answers on questions 193 f. in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 1151-1169.

<sup>37</sup> See recitals 1, 32, and 43 of Regulation 2016/1103 and recitals 1, 32, and 42 of Regulation 2016/1104.

<sup>38</sup> See above, para. 6.

<sup>39</sup> CEFL Principle 4:24 lit. c, pp. 175 f.; CEFL Principle 4:49 lit. c, pp. 308 f.; see also the answers to question 43, 78, 114, and 148 in BOELE-WOELKI/BRAAT/CURRY-SUMNER, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, above, n. 7, pp. 495-503, 687-699, 981-985.

but also modify the legal framework for the time already passed. A liquidation of the regime can thus be prevented.

#### IV. Protection of third parties

25. The flip-side of the advantages a retroactive choice of law has for the spouses and partners is the disadvantageous position which may result for third parties. The change of the applicable law, also with regard to the past, can lead to a retroactive change of the applicable default statutory regime governing the patrimonial consequences. In other cases, the category of the statutory regime will remain the same but the retroactively applicable law may nevertheless exhibit differences from the previously applicable law. In such circumstances, as illustrated above (II.), the change of the applicable rules can have detrimental effects on third parties who potentially lose rights which they held before the retroactive change occurred as a result of the formerly applicable regime. Indeed, it is entirely conceivable that spouses or partners agree on the retroactive change of the law applicable to the patrimonial consequences with the intention of improving their legal situation *vis-à-vis* a third party, although the more frequent (and legitimate) motive presumably is to avoid the otherwise necessary liquidation of the regime. Whatever the spouses' or partners' objective pursued with a retroactive change of the applicable law may be, the position of third parties merits consideration<sup>40</sup>. To some extent, national substantive laws may offer protection to third parties in such situations, e.g. through the principles of *bona fide* purchase. The European legislator, however, apparently saw the need for a uniform minimum standard of protection. When examining the mechanisms employed by the Regulations to safeguard third party interests, two approaches have to be distinguished: the Regulations aim to protect third parties from the application of a law they could not have foreseen (1.) and from a potential loss of rights (2.).

##### 1. Protection from the application of an unreckoned law

26. The headings of Arts. 28 of the Regulations read: "Effects in respect of third parties". According to Arts. 28(1) of the Regulations, the law applicable to the patrimonial consequences of a marriage or partnership may not be invoked by a spouse or partner against a third party in a dispute between the third party and either or both of the spouses or partners unless the third party knew or, in the exercise of due diligence, should have known of that law. As reflected by the requirement of the third party's knowledge or possible knowledge, the purpose of the provisions is to prevent the application of a law that the third party could not have expected. The quintessential scenario for the rule to apply therefore is a married or registered couple habitually residing in one state whereas the law applicable to the patrimonial consequences of their marriage or partnership is the law of a foreign state.

27. Arts. 28 of the Regulations are not restricted to the protection of third parties where spouses or partners have chosen the applicable law but likewise apply in cases of the determination of the applicable law by objective connecting factors pursuant to Arts. 26 of the Regulations. If according to Arts. 28(1) of the Regulations the applicable law cannot be invoked against the third party, Arts. 28(3) of the Regulations determine the law which applies instead: the law applicable to the transaction between a spouse or partner and the third party or the *lex rei sitae*<sup>41</sup>.

28. The requirement of the third party's actual or potential knowledge does not relate to the content of the applicable law but to the fact that this law applies. How this subjective requirement is to be construed, i.e. under which circumstances actual knowledge is or should be present in the exercise

<sup>40</sup> cf. recital 46 of Regulation 2016/1103 and recital 45 of Regulation 2016/1104. On third party interests in the international law of patrimonial consequences before the Regulations were passed D. MARTINY, "The Effects of Marital Property Agreements in Respect of Third Parties", in: A.-L. VERBEKE/J.M. SCHERPE/C. DECLERCK/T. HELMS/P. SENAEVE (eds.), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens*, vol. 1, Cambridge, Intersentia, 2012, pp. 903-927, 915-927.

<sup>41</sup> On the order of precedence between the two substitute connections, see HEIDERHOFF, above, n. 3, p. 8.

of due diligence, has not been further specified in the Regulations and requires an autonomous interpretation<sup>42</sup>. The outcome of a substantial number of cases, however, will not depend on the understanding of this criterion: Arts. 28(2) of the Regulations establish legal fictions of the third party's knowledge in certain situations. Fictions, unlike rebuttable presumptions, do not assume a certain state of facts until the opposite is proven, they rather assume or create facts *ex lege*. Broadly speaking, the legal fictions set up in Arts. 28(2) of the Regulations apply if the transaction is closely connected to the applicable law or if the property regime governing the marriage or partnership has been registered under the law which is applicable to the transaction.

## 2. Protection from the loss of rights due to retroactive choice of law

**29.** More specifically addressed to the third party's protection in cases of a retroactive choice of law are Arts. 22(3) of the Regulations<sup>43</sup>. According to the provisions, the retroactive change of the applicable law pursuant to Arts. 22(1) of the Regulations shall not adversely affect the rights of third parties deriving from that law. There are two possible ways in which the provisions' legal consequence could be understood. According to a conflict-of-laws interpretation, the law applicable before the retroactive change was made continues to apply in regard to the third party's rights. The result would be a division of the applicable law: generally, the subsequently chosen law governs the past, present, and future patrimonial consequences *inter partes*, i.e. between the spouses and partners, but regarding the specific issue of the third party's right the formerly applicable law still applies. A pure conflict-of-laws interpretation is also the prevailing construction of the similar in purpose Art. 3(2) sent. 2 Rome I Regulation<sup>44</sup>, dealing with a subsequent choice of the law applicable to a contract and the effects on third parties<sup>45</sup>. A further distinction in the applicable law would have to be drawn between adverse and beneficial effects of the choice of law for third parties, as Arts. 22(3) of the Regulations only aim to prevent that the third party is negatively affected. If the third party gains a right in consequence of the retroactive choice of law, the subsequently chosen law would apply in that regard. The wording of Arts. 22(3) of the Regulations, however, rather implies a substantive law understanding according to which rights vested in third parties are sustained despite the retroactive change of the applicable law<sup>46</sup>. The coexistence of more than one applicable law hence can be avoided. Rights *in rem* which the subsequently chosen law does not know will be adapted according to Arts. 29 of the Regulations to the closest equivalent right.

**30.** In the application of Arts. 22(3) of the Regulations, courts will have to compare the legal position of a third party under the previously applicable regime to the party's situation under the subsequently chosen law. The provisions do not stipulate a general comparison of favourability. Rather, as the provisions' wording suggests, the third party's specific rights under both legal systems have to

<sup>42</sup> cf. J. WEBER, "Sachenrecht und Verkehrsschutz aus der Perspektive der Europäischen Güterrechtsverordnungen", *Rheinische Notar-Zeitschrift (RNotZ)* 2017, pp. 365-371, 370.

<sup>43</sup> A closely related rule also exists in Art. 26(3) sub-sec. 3 of Regulation 1103/2016 and Art. 26(2) sub-sec. 3 of Regulation 1104/2016. In the respective sub-secs. 1 of the provisions, we find escape clauses for the objective connection. The escape clauses allow the application of a law different from the one that applies according to the regular objective connecting factors. As mentioned above (para. 19), the objective connecting factors all relate to a point in time at or shortly after the conclusion of marriage or registered partnership, and these connections are static. Therefore, as the actually living conditions of a dynamic couple change, the formerly determined law may not fit the spouses' or partners' personal circumstances anymore, e.g. when they have relocated to a different country, lived there for decades, and even have obtained this state's nationality. Here, the escape clauses, if you will, can update the connection and determine that the patrimonial consequences of marriage or partnership are governed by a more suitable law. According to sub-secs. 2 of the provisions, the escape clauses determine the applicable law with retroactive effect unless a spouse or partner disagrees. Therefore, in its legal consequence, the application of the escape clauses is closely related to a retroactive choice of law and entails the same potentially detrimental effects for third parties. Art. 26(3) sub-sec. 3 of Regulation 1103/2016 and Art. 26(2) sub-sec. 3 of Regulation 1104/2016 therefore, similar in function to Arts. 22(3) of the Regulations, establish that third parties do not lose their rights in consequence of the application of the escape clause.

<sup>44</sup> Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJEU* L 177, 4 July 2008, pp. 6-16.

<sup>45</sup> P. MANKOWSKI, in: U. MAGNUS/P. MANKOWSKI (eds.), *European Commentaries on Private International Law, Volume II, Rome I Regulation*, Cologne, Otto Schmidt, 2017, Art. 3, paras. 340-343 with further references.

<sup>46</sup> WEBER, above, n. 42, p. 369.

be compared. All rights which the third party held under the formerly applicable law but not under the newly chosen law are sustained. It is submitted that ‘rights’ should be understood in a broad sense, encompassing all favourable legal positions for third parties in the context of the patrimonial consequences as described above (II.). Hereby included are rights in the law of obligations and in property law as well as rights relevant in enforcement proceedings.

**31.** This understanding of Arts. 22(3) of the Regulations is not shaken in a relevant way by the German language version of the provision either. Indeed, we here find the wording: “Eine rückwirkende Änderung des anzuwendenden Rechts nach Absatz 2 darf die Ansprüche Dritter, die sich aus diesem Recht ableiten, nicht beeinträchtigen.” The term *Ansprüche* translates to claims in the sense of the law of obligations; the conceptual dichotomy between proprietary rights and rights in the law of obligations (claims) traditionally is held in high esteem in German legal doctrine. Yet, the German language version of the provision obviously is an outlier. Similarly to the English version, the French text of Arts. 22(3) of the Regulations refers to *droits* whereas the Italian employs the word *diritti* and the Spanish uses *derechos*. It can be concluded that the diction of the German language version of Arts. 22(3) of the Regulations presumably is the result of a mistake in translation and the rule has to be reinterpreted to also include proprietary rights and not only claims in the law of obligations.

**32.** The application of Arts. 22(3) of the Regulations may further raise the question of how far a right has to be advanced to be covered by the provision. Is it enough that the foundation for the right’s creation has been laid or does the right have to be fully vested in the third party with all conditions for its creation entirely fulfilled? The Regulations’ recitals emphasize the need for the third party’s protection which could be in favour of a generous interpretation. Yet, legal certainty may require that rights have to be fully developed to be eligible for protection. In any case, the prospective inheritance shares of third parties depending on the patrimonial consequences of marriages and partnerships<sup>47</sup> clearly fall outside the provisions’ scope. Titles of inheritance are created only upon the deceased’s passing. Before the event of death, relatives merely have a precarious expectancy that cannot obtain protection by Arts. 22(3) of the Regulations.

## V. Conclusion

**33.** The European Union has strengthened the choice-of-law options for spouses and partners with regard to the patrimonial consequences of marriages and registered partnerships. Moreover, the European legislator has allowed for a retroactive choice to be made. Changing the past, however, may come at the price of legal certainty, stability, and predictability. Expectations may be frustrated, even final and binding court decisions rendered under the formerly applicable law may be deprived subsequently of their legal basis. Changing the past may also come at the expense of third parties. Given the differences among the national substantive laws, third parties could lose rights vested in them under the previously applicable law. For this reason, the Regulations have introduced two layers of protection in favour of third parties. One to prevent the application of an unexpected substantive law, the other within the applicable substantive law against the loss of rights. Both layers of protection raise issues of interpretation which undoubtedly will cause litigation in the member states participating in the enhanced cooperation and which eventually will reach the European Court of Justice.

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<sup>47</sup> See above, paras. 14 f.