PARTY AUTONOMY AND THE LAW APPLICABLE TO THE MATRIMONIAL PROPERTY REGIMES IN EUROPE

LA AUTONOMÍA DE LA VOLUNTAD Y LA LEY APLICABLE A LOS REGÍMENES MATRIMONIALES EN EUROPA

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Recibido: 16.03.2018 / Aceptado: 12.04.2018
DOI: https://doi.org/10.20318/cdt.2018.4390

Abstract: In a private international law context reflecting significant divergences between the objective choice-of-law rules for matrimonial property regimes, the principle of party autonomy appears as a salutary solution, bringing certainty, predictability and simplicity, while satisfying also the spouses' substantial interests. The study focuses on the rules devoted to this principle by the European legislator in the (EU) Regulation no 2016/1103, attempting to outline its regime and insisting, particularly, on its admissibility and on the limitations that accompany its practical exercise. Providing a sufficient framework for discussion and helping to illustrate the implications of the European text, the rules of the Romanian Civil Code and of the 1978 Hague Convention on the law applicable to matrimonial property regimes will serve as a benchmark.

Keywords: matrimonial property regimes, EU Regulation no 2016/1103, autonomy of will, electio juris agreements, states with more than one legal system, change of the applicable law.

Resumen: En un contexto de derecho internacional privado que refleja divergencias significativas entre las reglas objetivas de elección de los regímenes matrimoniales, el principio de autonomía de las partes aparece como una solución saludable, aportando certeza, previsibilidad y simplicidad, al tiempo que satisface también los intereses sustanciales de los cónyuges. El estudio se centra en las normas dedicadas a este principio por el legislador europeo en el Reglamento (UE) n. ° 2016/1103, que intenta delinear su régimen e insistir, en particular, en su admisibilidad y en las limitaciones que acompañan a su ejercicio práctico. Proporcionar un marco suficiente para el debate y ayudar a ilustrar las implicaciones del texto europeo, las normas del Código Civil rumano y del Convenio de La Haya de 1978 sobre la ley aplicable a los regímenes matrimoniales de propiedad servirán como punto de referencia.

Palabras clave: regímenes económicos matrimoniales, Reglamento (UE) no 2016/1103, autonomía de la voluntad, acuerdo de elección de la ley aplicable, estados con diversos regímenes jurídicos, cambio de la ley aplicable

Summary: I. Introductory aspects – importance of the party autonomy. II. Partial uniformization of PIL for matrimonial property regimes in the EU Member States. 1. EU Regulation no 2016/1103 - introductory issues. 2. Limited uniformization among the EU Member States. 3. Universal application. III. The spouses' limited freedom to choose the applicable law. 1. Option in favour of the habitual residence law. 2. Option in favour of national law. 3. Dual nationality. 4. Differences between the Article 22 of the Regulation and the corresponding texts from the Romanian Civil Code or the Hague Convention. Implications. IV. Electio juris and States with more than one legal system. V. The unity of the chosen law. VI. Consent and substantial validity of the choice-of-law agreement. VII. Exteriorisation of the parties' choice and the law governing the form of the electio juris agreement. VIII. The moment of choice. IX. Change of the chosen law. 1. Admission of

the voluntary change of the chosen law. 2. The change of both the applicable law and of the matrimonial property regime. 3. Temporal effects of the newly chosen law. 4. Limitation of the effects of the newly chosen law and protection of the third parties. X. Conclusion.

I. Introduction

1. Importance of the party autonomy. Given the great diversity of substantive law provisions devoted to patrimonial family relationships by the Member States' legal systems[1] and the constant multiplication of family relationships with foreign element, the determination of the law governing the matrimonial property regimes is of particular importance today in the European Union. Several branches of law intersect in the field – marriage related effects, maintenance, property law, contracts, successions –, creating considerable difficulties when the objective connecting factors provided for each of these related categories must be articulated in order to arrive at coherent solutions. Because private international law norms dedicated to matrimonial property regimes are themselves in deep contradiction[2], the admission of the spouses' autonomy appears as a beneficent solution : it ensures predictability and legal certainty, while also satisfying the substantial interests of those involved[3]; it aids in bypassing some of the difficulties related to the implementation of the objective connecting factors, such as those generated by the determination of the habitual residence, by the change of the connecting factor (mobile conflict) or by the permanence or automatic mutability of the applicable law[4] ; it may also correct some of their inconveniences - such as an admission of the scission of the matrimonial property regime and of the applicable law, depending on the location of some of the family assets.

2. The origins of party autonomy principle go way back in history: in France, Dumoulin admitted it for the matrimonial property regimes as early as 1525, long before its consecration in the field of contractual obligations[5]; in the middle of the nineteenth century, the French case-law was established in the view of allowing the spouses to designate the law governing their patrimonial relations[6]. Nowadays, the European countries largely admits the principle of autonomy of will, either directly through their national norms of private international law - as Article 15 of the German EGBGB, Article 19 of the Austrian IPRG, Article 30 of the Italian PIL Act, Article 49 of the Belgian Code of PIL -, or indirectly through the international conventions - like the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes (Articles 3 and 6)[7] in force in their territory.

[1] The situation is all the less satisfactory as, in general, the patrimonial family relationships with foreign element are governed by distinct choice-of-law rules of European or national origin, differentiating according to their specific nature (maintenance, matrimonial, succession).

[2] See "*Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States"*, 30 April 2003, Asser-Ucl Consortium commissioned by the Commission (available at http://ec.europa.eu/civiljustice/publications/docs/regimes/report_regimes_030703_fr.pdf, in French).

[3] Because the party autonomy is also accepted in matters of divorce, maintenance or successions, the spouses can opt for a law or laws that allow global optimization of their patrimonial situation.

[4] On these difficulties see, for example I. Viarengo, "The EU Proposal on matrimonial property regimes. Some general remarks", *Swiss Yearbook of PIL*, 2011, p. 199, at p. 210.

[5] See B. Audit, *Droit international privé*, Economica, 4e ed. 2008, p. 694, nº 862. G. Khairallah, "La volonté dans le droit international privé commun des régimes matrimoniaux", in *Mélanges en l'honneur de M. Revillard*, Defrénois, 2007, p. 197-208, at p. 199. B. Ancel, Y. Lequette, *Les grands arrêts de la jurisprudence française de droit international privé*, Dalloz, 4ème éd., 2001, nº 15, at p. 134 (*Zelcer* case). B. Ancel, "Les conclusions sur les statuts et coutumes locaux de DuMoulin, traduites en français", *Rev. crit. DIP*, 2011, p. 21, at p. 28 *et seq*. (nº 8 *et seq*).

[6] For details, see H. Gaudemet Tallon, "Les conflits de lois en matière de régimes matrimoniaux, tendances actuelles en droit comparé", *TCFDIP*, 1969-1971, p. 197 *et seq*.; as regards the various developments in the case-law and their analysis, see G. Khairallah, *op. cit*., p. 197-208.

[7] The Convention (available on www.hcch.net) entered into force on 1st September 1992 in three European countries: France, Luxembourg and the Netherlands. For a presentation, see M. Revillard, "La Convention de la Haye du 14 mars 1978 sur la loi applicable aux régimes matrimoniaux", *Défrenois*, 15.03.1992, nº 5, p. 257. Due to the weak ratification, the Hague Convention could only scarcely cover the inconveniences and difficulties in the field of private relations with foreign elements.

II. Partial uniformization of private international law for matrimonial property regimes in the EU Member States

1. The EU Regulation 2016/1103 - introductory issues

3. Continuing the efforts of unification of the EU Member States' private international law norms, the European legislator adopted in 2016, in accordance with Article 81(2)(c) TFEU, the Council Regulation nº 2016/1103 of 24 June 2016 implementing an enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[8]. It represents a materialization of the Hague Programme, "*Strengthening freedom, security and justice in the European Union"*[9], through which the European Council invited the Commission to present a *Green Paper on conflict of laws in matters concerning matrimonial property regimes*[10], stressing the need to adopt an instrument in this area, and of the Stockholm Programme, "*An open and secure Europe serving and protecting the citizens"*[11], which reiterated the need to extend the principle of mutual recognition also in the field of matrimonial property regimes, respecting the public policy and the national legal traditions in the field. The Regulation, which entered into force in July 2016 and will be applicable from 29 January 2019[12], purports at maintaining and developing the area of freedom, security and justice, facilitating the free movement of persons[13], as well as to the resolution of the difficulties faced by couples in Europe when it comes to the liquidation of their common property[14]; its adoption was all the more necessary as the other European Regulations on private international law exclude the issue of matrimonial property regimes from their scope of application[15].

2. Limited uniformization among the EU Member States

4. Unfortunately, this instrument is only partially successful. In fact, similar to the Regulation nº 1259/2010 on the law applicable to divorce and legal separation, the Regulation nº 2016/1103 was adopted through the implementation of the enhanced cooperation mechanism provided by the Article 20(1) TFEU, which allows those Member States wishing to increase their integration and the attainment of the

[8] OJ L 183, 8.7.2016. For an overview of the Regulation, S. Godechot Patris, „Commentaire du règlement du 24 juin 2016 relatif au régimes matrimoniaux : le changement dans la continuité", *Recueil Dalloz,* 17.11.2016, nº 39, p. 2292. H. Peroz, „Le nouveau règlement européen sur les régimes matrimoniaux", *JCP N*, n°29, 22.07.2016, 1241. See also I. Viarengo, *op. cit*., p. 199 *et seq*.; C. Bridge, „Le nouveau droit communautaire des régimes matrimoniaux (Loi applicable et limitation des risques d'insécurité juridique)", *LPA*, 9.10.2017, n° 129w1, p. 9 *et seq.*; S. Marino, "Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships", *CDT*, March 2017, Vol. 9, nº 1, pp. 265-284.

[9] JO C 53, 3.3.2005, p. 1.

[10] *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 400 final.*

[11] JO C 115, 4.5.2010, p. 1.

[12] The transitional provisions are contained in Article 69 of the Regulation: "*1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3. 2. If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date shall be recognised and enforced in accordance with Chapter IV as long as the rules of jurisdiction applied comply with those set out in Chapter II. 3. Chapter III shall apply only to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019*".

[13] On the objectives and the potential advantages of this instrument, see C.V.M. Clarkson, „Matrimonial property on divorce : all change in Europe", *J. of PIL*, 2009, p. 421, at p. 424-425.

[14] These difficulties were highlighted by *the Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition,* published by the Commission on 17 June 2006. See also the 2010 *EU Citizenship Report: Dismantling the obstacles to EU citizens' rights*, adopted on 27 October 2010, COM (2010) 0603, also referred to in Recital 8 of the Preamble of the Regulation 2016/1103, stating that uncertainties about the patrimonial situation of international couples are a significant obstacle in the everyday life of European citizens in the context of the exercise of their rights under European law.

[15] See Regulation 1215/2012 (Article 1(2)(a)), Regulation 593/2008 (Article 1(2)(c)), Regulation 1259/2010 (Article 1(2)(e)). Concerning the articulation of the rules on inheritance and on matrimonial property regimes, see D.A. Popescu, *Ghid de drept internațional privat* în *materia succesiunilor*, Magic Print, 2014, p. 16-18.

objectives set by the Union to adopt, after authorization by the Council of Ministers[16], uniform legal acts that will be binding only on them, and not on the other non-participating Member States. Although the choice of law rules set out in the *Proposal for a Regulation on matrimonial property regimes* have not been so innovative as to give rise to serious reservations from a significant number of Member States[17], in fact the Regulation was intended to be applicable also to the matrimonial regime of same-sex married couples and this was a source of discontent. Also, the Commission has also presented in the same legislative package a *Proposal for a Regulation on the patrimonial effects of registered partnerships*[18]; because this latter Proposal raises delicate problems for the European Member States that follow a traditional family perspective - including Romania[19] -, threatening the required consensus, the solution of the enhanced cooperation was a necessary compromise[20].

3. Universal application

5. Even if the Regulation replaces the rules of private international law on matrimonial property regimes only in Member States where it is binding[21], the rules of its Chapter III (Applicable law) enjoy universal application (Article 20) and will apply regardless of whether the designated law belongs to a Member State bound by the Regulation, to a non-participating Member State to the enhanced cooperation or to a non-European State. Thus, subject to the requirements of the international jurisdiction of the courts or authorities of the Member States bound by the Regulation, the newly consecrated choice-of-law rules will be taken into account irrespective of the nationality or the habitual residence of the spouses[22].

6. Subject delimitation. Following a trend that is currently reflected by the European Regulations in the field of private international law of family and successions[23], the European legislator favours the party autonomy principle also for matrimonial property regimes. This study will analyse the related texts in the (EU) Regulation 2016/1103, trying to clearly outline the regime of this principle from the point of view of its admissibility, but also as regards the limits imposed to its operation. The solutions found in the Articles 2590 and 2591 of the Romanian Civil Code[24] and in the Article 3 of the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes[25] will be conside-

[16] This authorization is granted when it is shown that the objectives pursued through such enhanced cooperation cannot be attained within a reasonable period by the Union as a whole, by applying the relevant provisions of the Treaties (Article 20 (2) TEU).

[17] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM/2011/0126 final.

[18] See COM (2011) 126 final and COM (2011)127 final.

[19] For concerns from this point of view in Poland and in Hungary, see P. Twardoch, „Le règlement européen en matière de régimes matrimoniaux de la perspective du droit polonais", *Rev. Crit. DIP*, 2016, p. 465, at. p. 466-468.

[20] See S. Marino, *op. cit*., p. 266-267. K. Boele-Woelki, „Property relations of international couples in Europe: the interaction between unifying and harmonizing instruments", in H. Kronke, K. Thorn (eds), *Grenzen überwinden - Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70*, Gieseking, 2012, p. 63, at p. 67.

[21] There is a list of these States in the recital 8 of the Preamble: Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxemburg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden; Cyprus also joined these promoter States; other Member States can join the enhanced cooperation, after expressing their own will (by addressing the Commission), and based on a decision adopted by the Council, according to Article 331(1)TFEU.

[22] From this point of view, the solutions in the Regulation are also of interest for couples in which at least one of the spouses has Romanian nationality or is residing in Romania and whose patrimonial situation is susceptible to be analysed in a Member State where the Regulation is applicable, and also for public notaries who will draft matrimonial conventions or for lawyers who will advise such couples.

[23] See Article 5 of Regulation 1259/2010; See Article 22 of Regulation 650/2012, Article 15 of Regulation 4/2009, which refers to the 2007 Hague Protocol. Regarding this evolution, see E. Jayme, "Party Autonomy in International Family and Successions Law", *Swiss Yearbook of PIL*, 2009, p. 3 *et seq*.

[24] For a presentation, see v. C. Jugastru, „Convenția de alegere a legii aplicabile – construcție specifică raporturilor de drept privat cu element de extraneitate", *Revista Universul Juridic*, nr. 11, November 2016, p. 62-76, at p. 64-67.

[25] According to its Article 62(2), the Regulation shall take precedence, in relations between the Member States, over the conventions concluded between them, insofar as such conventions concern matters governed by the Regulation; as the contracting States of the 1978 Hague Convention are also EU Member States bound by the Regulation and the object of the Convention overlaps (in terms of conflict-of-laws provisions) with that of the Regulation, the latter will prevail in the future.

red a comparative benchmark; they will provide a sufficiently wide-ranging framework for discussion and will permit a better illustration of the novelties brought by the European legislator in this area and of their practical consequences.

III. The spouses' limited freedom to choose the applicable law

7. In accordance with Article 22 of the Regulation, spouses may designate the law applicable to their matrimonial property regime[26]. The admission of this autonomy can be easily justified be the need to allow more flexibility in the resolution of the conflicts of laws (compared with the objective connecting factors) and to enhance the legal certainty – the spouses being able to determine beforehand the law governing their matrimonial regime and to organise better their relations[27]. The chosen law will cover a large number of issues, such as the classification of property of either or both spouses into different categories during and after marriage, the transfer of property from one category to the other one, the responsibility of one spouse for liabilities and debts of the other spouse, the powers, rights and obligations of either or both spouses with regard to property, the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property, the effects of the matrimonial property regime on a legal relationship between a spouse and third parties, the material validity of a matrimonial property agreement [28]; its intervention will in principle be censored only on the basis of the international public policy exception (Article 31), which will very rarely intervene in practice, or of the internationally mandatory rules of the forum (Article 30)[29].

As in the Article 2590 of the Romanian Civil Code or in the Article 3 of the 1978 Hague Convention, the spouses' freedom is not unlimited, as it is for international contracts; on the contrary, the spouses (or future spouses) may only designate the law of a State with which they have significant connections[30].

[26] The solution is explained in the recital 45 of the Preamble: "*To facilitate to spouses the management of their property, this Regulation should authorise them to choose the law applicable to their matrimonial property regime, regardless of the nature or location of the property, among the laws with which they have close links because of habitual residence or their nationality. This choice may be made at any moment, before the marriage, at the time of conclusion of the marriage or during the course of the marriage*".

[27] A special attention should be paid to the law applicable to the succession. In fact, in practice, the dissociation between the *lex successionis* and the law governing the matrimonial property regime may lead to important incoherencies (on which, see A. Bonomi, "Article 1", in A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du règlement nº 650/2012 du 4 juillet 2012*, Bruylant, 2013, p. 85-86). See also M. Álvarez Torné, „The dissolution of the matrimonial property regime and the succession rights of the surviving spouse", *Cornell Law Faculty Working Papers*, 2007, available at http://scholarship.law.cornell.edu/clsops_papers/27; J. Gray, P. Quinzá Redondo „Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession", *F&R* November 2013, available at : www.bjutijdschriften.nl. A unique law to govern both inheritance and matrimonial regime is a result that could be obtained in most of the cases through a judicious selection, even if both the Regulation 650/2012 or the Regulation 2016/1103 provide only for a limited choice of law.

[28] See Article 27 of the Regulation. As regards the material validity of a matrimonial property agreement, some delicate issues may appear in practice because it may also contain provisions pertaining to successions or to maintenance obligations (on the possible difficulties of characterisation of the different provisions found in a marriage contract, see. P. Twardoch, *op. cit*, p. 472). If their actual characterisation is not one of matrimonial property regime, the spouses' option as to the applicable law might be very well invalidated when it was not made according to the corresponding rules found in the article 22 of the (EU) regulation no 650/2012 or in the article 8 of the 2007 Hague Protocol on the law applicable to maintenance obligations (even if in this last case the risks for invalidation are less important, in regard to the similarity of options available to spouses under the Protocol and under the Regulation 2016/1103). This is why, when drafting the matrimonial property agreement, the public notary must pay a special attention to the chosen law and, particularly, to the respect of the options available to spouses according to the European or international instruments that may pretend application to the different provisions of that matrimonial property agreement.

[29] In comparative law, the statutory provisions on possessory rights over the matrimonial home are frequently characterised as internationally mandatory rules (*lois de police*) and, having due regard to this, the Regulation allows, in its Article 30, for a minimal intrusion of the law of the State of the spouses' habitual residence, who may limit the parties' autonomy in international cases.

[30] See recital 45 of the Preamble; see C. Bridge, *op. cit*., nº 10.

1. Option in favour of law of the State of the habitual residence of either spouse

8. Firstly, taking into account the links and the integration into a particular social environment, the Regulation admits an option in favour of the law of the State of the habitual residence of any spouse or future spouse at the time of the election (and not at the time of marriage) [31]. This solution is a little more liberal than the one found in the field of divorce, where the European legislator admitted only the choice in favour of the law of the State where the spouses have a common habitual residence or of the State where they had their last habitual residence[32].

The objective of certainty prevails over the proximity, thus any change of this indirect connecting factor during marriage is irrelevant. The option will remain valid even if at the time of the regime's dissolution none of the spouses lives in the State whose law was elected[33].

The concept of "habitual residence" does not receive a legal definition in the Regulation. It was, however, object to the interpretation of the European Court of Justice in the context of the analysis of Article 8 of the (EU) Regulation nº 2201/2003, where the Court has stated that it must be given an autonomous definition, combining objective and subjective aspects; the habitual residence corresponds to the place that reflects the person's integration into a particular social and family environment and should be determined by taking into account all the relevant factual circumstances which constitute it[34]. These guidelines and the factors precisely indicated by the Court to be considered – like the person's intentions, the duration, regularity, conditions and reasons for stay on the territory of a State, the nationality, the professional and economic ties, the family and social relationships in a State – should be followed (*mutatis mutandis*) also by the legal practitioners or public notaries who assists the spouses in matrimonial regime cases.

2. Option in favour of nationality law

9. Secondly, the Regulation allows to the spouses to opt for the national law of any of them at the time of the election; this law is considered to best reflect the identity or the origin of the spouse in question and perhaps also of the couple (although the nationality need not be the same). The solution has an indisputable practical interest: on the one hand, the change of nationality will not affect the validity of the spouses' option; on the other hand, since it is more difficult and probably less frequent for persons to change their nationality than the habitual residence, at least at the first sight, this alternative ensures a real and sufficient connection between the chosen law and the situation of the spouses that travel frequently.

3. Dual nationality

10. When one of the spouses has dual or multiple nationalities, the principle of autonomy of will normally requires that any of the nationality laws in question might be chosen. Some difficulties may however arise since, first, the Recital 50 of the Preamble excludes "*the question of how to consider a person having multiple nationalities"* from the scope of the Regulation and refers to the national law[35]

[31] The same solution - the reference to the habitual residence, and not to the domicile - is also enshrined in the Romanian Civil Code or in the Hague Convention. On the interpretation of the habitual residence and its relation with the domicile, respectively with the nationality, see D.A. Popescu, *Ghid..*, *op. cit*., p. 62-68.

[32] See article 5 (1) (a) and (b) of the Rome III Regulation.

[33] The solution is expressly stipulated in the Article 2596 (3) of the Civil Code and in the Article 7(1) of the Hague Convention; in the Regulation, it can be indirectly deduced from its Article 22.

[34] See, for example, ECJ, 2 April 2009, C-523/07, *A* ; ECJ, 22 December 2010, C 497/10, *Mercredi*. In the previous case-law, see ECJ, 15 September 1994, C-452/93, *P Magdalena Fernández v Commission* : „*habitual residence ... is the place in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining such residence, all the factual circumstances which constitute it must be taken into account*". See R. Lamont, "Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law", *J. of PIL*, 2007, p. 261-281.

[35] Recital 50 of the Preamble states: „...w*here this Regulation refers to nationality as a connecting factor, the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, international Conventions, in full observance of the general*

and, secondly, each State sets out in this field a series of objective rules giving mandatory prevalence to only one of the nationalities in presence (either the forum nationality or the nationality of the closest connection)[36]. In the Regulation, such a restrictive solution – the spouses' possibility to choose only one of the different nationality laws of each of them – may seem justified by proximity considerations; however, this argument is not very convincing since in the Article 22 the European legislator did not rigorously and loyally follow the proximity: in fact, the legal text barely states that spouses can choose the law of the State of the nationality of either of them at the time of the election, disregarding the fact that later, at the moment of the dissolution of the matrimonial property regime, this nationality may no longer be held by any of the spouses and, consequently, that the case may no longer be connected with the designated law.

Despite the 'disturbance' caused by the presence of this Recital 50, we think that the spouses' possibility to choose any of the nationality laws of either of them is still open. In fact, the same Recital states that the application of national rules for resolving the conflict of citizenship depends on the "*full observance of the general principles of the Union*"; in its case-law, the European Court of Justice refused to establish a hierarchy between the various nationalities of different Member States that a person may have and censured, in accordance with the principles of non-discrimination and free movement, the national rules providing for restrictive solutions[37]. Also, the Recital 50 final affirms that the application of the States' rules on dual nationality *"should have no effect on the validity of a choice of law made in accordance with this Regulation"*; inspired by the desire to ensure a greater predictability and certainty as regards the applicable law and the full respect of the parties' will, this text clearly favours the spouses' possibility to choose any of the national laws of either of them.

This last solution is also able to ensure regulatory consistency across the European Union. For example, in matters of international successions, the Article 22(1) of the Regulation nº 650/2012 clearly provides that: "*A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death*". For the international divorces, the articulation of the Article 5 of the Regulation 1259/2010 with its Recital 22 was more delicate; however, the doctrine considers that under Article 5, the designation of the applicable law is made pursuant to the parties' intentions (subjective connecting factor) and not directly based on the objective connecting factor of nationality, as claimed by Recital 22 ("*Where this Regulation refers to nationality as a connecting factor for the application of the law of a State…*"), so that the solution provided by this last text - the application of the law of the forum to resolve the conflict of nationalities - would not be operative[38]. In our view, a *mutatis mutandis* interpretation may also be followed as regards the relationship between Article 22 of the Regulation nº 2016/1103 and the Recital 50 of its Preamble, as an additional argument in favour of allowing the choice of any of the spouses' nationality law as the law governing their matrimonial property regime.

principles of the Union. This consideration should have no effect on the validity of a choice of law made in accordance with this Regulation". The same difficulty is generated by the Recital 22 of the (EU) Regulation nº 1259/2010, drafted in similar terms. See P. Hammje, „Le nouveau règlement (UE) nº 1259/2010 du Conseil du 20 décembre 2010 mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps", *Rev. crit. DIP*, 2011, p. 291, at p. 317-318 ; C. Gonzalez Beilfuss, „The Rome III Regulation in the law applicable to divorce and legal separation : much ado about little", in A. Bonomi, C. Schmid (coord.), *Droit international privé de la famille - Les développements récents en Suisse et en Europe*, Schulthess, 2014, p. 29, at p. 41. S. De Vido, « The relevance of double nationality to conflict-of-laws issues relating to divorce and legal separation in Europe", *CDT*, March 2012, Vol. 4, Nº 1, pp. 222-232.

[36] For Romania, see Article 2568(2) C. Civ.

[37] See ECJ, 2 October 2003, C-148/02, *Garcia Avello,* in which the European Court of Justice held that, in the light of the European integration - placing the nationals of the different Member States on an equal footing- , the systematic favour granted by a Member State to his own nationality over the nationality of another Member State when solving the dual nationality conflicts is discriminatory and infringes the provisions of the Treaty. See also ECJ, 16 July 2009, C-168/08, *Hadadi*, in which the Court of Justice held that the European Union law „*preclude the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case*" (para. 43).

[38] See P. Hammje, *op. cit.,* nº 26, p. 318; C. Gonzalez Beilfuss, *op. cit*., p. 40. J. Basedow, „Le rattachement à la nationalité et les conflits de nationalités en droit de l'Union européenne", *Rev. Crit. DIP*, 2010, p. 427, at p. 446.

4. Differences between the Article 22 of the Regulation and the corresponding texts from the Romanian Civil Code or the Hague Convention. Implications

11. Accepting the two alternatives enshrined today in the Regulation, the Romanian Civil Code and the 1978 Hague Convention provide each also a third one: the Article 2590 C. Civ. admits the option in favour of the law of the State of the first common habitual residence of the spouses after the celebration of marriage, while Article 3 of the Hague Convention allows a choice in favour of the law of the first State where one of the spouses establishes his or her new habitual residence after marriage.

A question may arise concerning the reason considered by the European legislator when abandoning this additional option, although the Hague Convention was of course considered as a comparative reference. The explanation is simple: in practice, it is possible that the choice of the law governing the matrimonial property regime intervenes before the celebration of the marriage, while later one of the spouses (or both of them, in case of the Romanian Civil Code) fails to settle its (their) habitual residence in the State whose law has been selected; in order to avoid that the spouses' possible option is being deprived of effects on this basis, with all the adverse consequences from the point of view of legal certainty, the European legislator has suppressed this alternative. This does not mean that the advantages conferred by Article 2590(c) C. Civ. or Article 3(2)(c) of the Hague Convention would disappear completely within the framework of the European Regulation; on the contrary, they are present via the possibility of amending the choice of the applicable law, provided by the Regulation.

12. More importantly, this difference of solutions raises also the question of the implications of the narrower set of options in the context of the Regulation, when a matrimonial convention, concluded under Article 2590 (c) C. Civ., will be examined in a State where the Regulation is applicable. In particular, it is possible for example for two Romanian (future) spouses, both habitually resident in Romania, but owning property abroad, to conclude a matrimonial convention before the celebration of the marriage, by which they choose the Spanish law of the state where both will establish their habitual residence after the marriage. If they later settle in Spain, a country where the question of the law governing their matrimonial property regime will eventually be raised, it is not obvious that the *electio juris* agreement, contradicting the provisions of the Article 22 of the Regulation, will be effective. Consequently, the public notaries concluding the matrimonial convention will have to inform the future spouses both on its limited spatial effectiveness, but also on the available alternatives, the simplest of them being the replication of the *electio juris* agreement after their displacement in Spain (or in another State where the Regulation nº 2016/1103 is applicable) in order for the parties' will to enjoy full effectiveness.

IV. *Electio juris* and States with more than one system of law

13. If the law to be designated belongs to a plurilegislative State organized on a territorial basis (such as Spain, United Kingdom, Canada, USA)[39] or on a personal basis (such as Lebanon, Syria, Iran, India)[40], a number of difficulties may arise despite the fact that, following the models encountered in other European private international law Regulations[41], the Regulation nº 2016/1103 enshrines a series of rules on the possible conflicts that may appear, helping to identify, within the specified legal order, the relevant infra-state sub-system of law[42].

[39] Territorial plurilegislative systems of law belong to States in whose territory the rules applicable to matrimonial property regimes are not unified and, on the contrary, specific, autonomous body of rules are applied in each political entity or territorial unit - see B. Audit, *op. cit.*, p. 245 *et seq*., nº 296 *et seq*.

[40] Within the framework of plurilegislative personal systems of law, different sets of rules regarding the matrimonial property regimes apply within the territory of the State concerned according to personal criteria (usually, the membership of an ethnic or religious community); see B. Audit, *op. cit*., p. 248, nº 302 *et seq*.

[41] See Rome I Regulation (Article 22), Rome II Regulation (Article 25), Rome III Regulation (Articles 14-16), Rome IV Regulation (Articles 36-38).

[42] These rules are similar (but not identical) to the ones found in Articles 16, 17 and 19 of the 1978 Hague Convention. Specially, Article 18 provides that rules established by the Convention should not be applied to solve the interterritorial conflicts in cases with no foreign element ("*where the law of no other State is applicable by virtue of the Convention*").

For territorial conflicts, Article 33 of the Regulation establishes the principle of the application of the internal conflict-of-laws rules of the State whose legal order has been designated by the Regulation; in subsidiary, it consecrates direct solutions that can be used in the absence of such rules. For interpersonal conflicts, Article 34 establish the application of internal conflict-of-laws rules in force in the State concerned; in the exceptional hypothesis of their absence, it was provided, as a secondary solution, the direct application of substantive rules of the legal sub-system or set of rules with which the spouses have the closest connection[43].

14. The first question is how to proceed when spouses generally designate the law of a territorially plurilegislative State (such as the United States, Switzerland, Spain) and not the law of a specific territorial unit (e.g. California or Louisiana). Normally, in accordance with Article 33(1), in order to determine the relevant territorial unit whose rules of law are to apply, the "*internal conflict-of-laws rules of that State*", insofar as they exist, will be taken into account [44]. However, when these rules are not unified but, on the contrary, they differ at the level of each territorial unit, the situation gets complicated; the subsequent problem is to know whether Article 33(1) will be operative (and eventually in what form) or whether, oppositely, this remission to the internal rules will be overcome by the uniform rules established by the European legislator in the Article 33(2) of the Regulation.

In matters of international successions, the doctrine advocates the application of the internal conflict-of-laws rules not of the State, but of the territorial unit whose law is designated by the Regulation[45]. In our opinion, such a solution may be implemented only if the spouses opted for the law of the State of the habitual residence of one or of both of them, but not for their nationality law. In these latter cases, this solution is likely to lead to deadlocks, because it does not allow to establish which federate State or territorial unit's rules will be considered for the inter-territorial conflict-of-laws; for example, it does not allow to determine how to proceed when neither of spouses resides in United States and the American law, the national law of one of them, has been chosen as the law applicable to the matrimonial property regime. For reasons of simplicity, but also of coherence in solutions, we would recommend in these cases the direct recourse to the subsidiary rules provided in the Article 33(2) of the Regulation : the application of the substantive law of the territorial unit in which the spouses or one of them have their habitual residence, when the law of the State of the habitual residence is chosen, and respectively, the application of the law of the territorial unit with which the spouses have the closest connection, when they opted for the national law (of one or both of them)[46].

15. Another problem is to know how effective are the *electio juris* agreements by which the spouses directly designate, as the law governing their matrimonial property regime, the law of a specific territorial unit of the State on whose territory one or both of them have their habitual residence at the time of election or whose nationality one or both of them have at the time of the election.

Normally, the content of Article 33 does not make a distinction with regards to whether the applicable law is designated by the parties or it is established on the basis of objective criteria from the Article 26 of the Regulation; thus, this text should be given indisputable application, including in the hypothesis under discussion.

[43] Quasi-identical solutions are to be found in the field of international successions - see *mutatis mutandis* Articles 36 and 37 of the Regulation nº 650/2012. On the contrary, the European legislator distanced from the more simpler solutions retained in Article 22(1) of the Rome I Regulation or in the Article 25(1) of the Rome II Regulation.

[44] For a discussion regarding the articulation of the European Regulations on matrimonial regimes and successions and the Spanish legal system, see J.L. Iglesias Buigues, „La remisión a la ley española en materia sucesoria y de régimen económico matrimonial ", *CDT*, March 2018, Vol. 10, Nº 1, pp. 233-247.

[45] In matters of succession, for the interpretation of Article 36 of the Regulation nº 650/2012, see A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 556, nº 9.

[46] Regarding the solutions of the 1978 Hague Convention, see M. Revillard, *op. cit.,* nº 48; this author clearly states that if the inter-territorial system of law designated by the Convention lacks unified internal conflict-of-laws rules, shall be directly applied the subsidiary solutions of the Convention and not the choice-of-law rules set up by one of the federate States in discussion. Similarly, with regard to the solutions adopted in general on inter-territorial conflicts of laws in the Hague Conventions, see B. Audit, *op. cit.,* p. 248, nº 300. Generally, see D. Bureau, H. Muir-Watt, *Droit international privé*, Puf, 2007, Tome I (partie générale), p. 513, nº 513.

ISSN 1989-4570 - www.uc3m.es/cdt - DOI: https://doi.org/10.20318/cdt.2018.4390

In particular, when internal inter-territorial choice-of-law rules of the designated State allow such an option, the *electio juris* agreement would be perfectly effective. Where such designation is not possible nor permitted by the internal choice-of-law rules of the State concerned, the spouses' option risks to be censured when it leads to different solutions than those required by the domestic choice-of-law rules of the State concerned[47]; therefore, in such cases, the counselling role of the public notary assisting the spouses proves to be extremely important. Finally, when the State concerned has no rules of inter-territorial conflict and the solutions from Article 33(2) of the Regulation have to be considered, a distinction must be made. If the law applicable to the matrimonial property regime is determined on the basis of the habitual residence criterion (Article 22(1)(a) of the Regulation), the *electio juris* agreement will only be effective when the choice of the parties specifically concerned the law of the territorial unit in which one or both of them had his/their habitual residence at the time of the election; having regard to the terms of Article 33(2)(a), in such a case it is not possible for the spouses to designate the law of any territorial unit of the concerned State. This objective rule allows for greater certainty and predictability for the parties. The situation is different when the criterion of designating the applicable law is the nationality of one or both spouses (Article 22(1)(a) of the Regulation). In these cases, the European legislator provides the applicability of the law of the territorial unit with which the spouses have the closest connection - Article 33(2)(b) of the Regulation; even if the doctrine advocates taking into consideration the parties' choice as one of the factors that makes possible the determination of the closest connection[48], it is not obvious that their decision will always produce effects (given the large margin of appreciation that judges will have in this respect if a dispute arises).

V. The unity of the chosen law

16. The 1978 Hague Convention allowed the *dépeçage* in the matter of matrimonial property regimes: thus, with regard their immovables (or some of them), the spouses could choose as applicable law, the law(s) of the place where those immovables were located[49]. The solution potentiated the autonomy of will and was able to facilitate an optimisation of the spouses' patrimonial situation, permitting the correlation between the law governing the matrimonial property regime and the law governing the succession[50]; at the same time, once the respective option was exercised, the complexity was enhanced, since the couple became subject to several matrimonial property regimes, corresponding to the multiple laws governing them.

The Regulation nº 2016/1103 and Article 2590 C. Civ. lead to a single law for all family assets, regardless of the acquisition time and regardless of their location[51], increasing the legal certainty[52]; au-

[47] In matters of succession, for the interpretation of Article 36 of the (EU) Regulation nº 650/2012, see *mutatis mutandis* A. BONOMI, *op. cit*., p. 557, nº 11. For a different position, see nevertheless J.L. Iglesias Buigues, *op. cit*., p. 240; this author argues that the direct choice, by a Spanish national, of the Catalan, Aragon, Galician … successions law or matrimonial property regime law would not be allowed in general by the Regulations, since this person does not possess Catalan, Aragon, Galician nationality (but only Spanish nationality) and thus, the requirements of the legal texts for the validity of the *electio juris* agreement (speaking of choices in favour of law of the State whose nationality he possesses) are not met.

[48] See *mutatis mutandis* A. Bonomi, *op. cit*., p. 560, nº 17.

[49] Article 3(4) of the Hague Convention : "*However, the spouses, whether or not they have designated a law under the preceding paragraphs, may designate with respect to all or some of the immovables the law of the place where those immovables are located. They may also provide that any immovable property which may subsequently be acquired shall be governed by the law of the place where such immovables are situated*".

[50] In this sense, see for example, H. Peroz, E. Fongaro, *Droit international privé patrimonial de la famille*, Lexis Nexis, coll. Pratique notariale, 2010, p. 156, nº 411: although the French law of successions establishes a compulsory portion (réserve) in favour of children, the provisions on matrimonial property regimes allow, within the community regime, the assignment of a certain asset to the surviving spouse, so that the optimization of his patrimonial situation becomes possible.

[51] See Article 21 of the Regulation: "*The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located*". In the Explanatory Memorandum (Article 5.3), the dépeçage was considered being a source of difficulty both at the moment of the dissolution of the regime and during marriage (since the spouses must comply with the particular rules provided by each of the laws governing the specific assets).

[52] See Recital 43 final.

tonomy of will cannot lead (at this stage) to a division of the matrimonial property regime, neither to its submission to two or more laws. Indivisibility is very important in practice: it allows a circumvention of the difficulties that might arise, for example, in relation with the determination of the exact nature of certain assets (movable or immovable, qualification normally made according to *lex rei sitae*[53]), or in relation with their spatial location. It may also avoid conflicts that could arise when patrimonial relations between spouses, subject to different regimes, would be governed by several laws[54]. Lastly, it supports the predictability of the law governing the matrimonial property regime as regards the third parties contracting with the spouses (or with one of them)[55].

17. The unity of the applicable law is reinforced by the fact that Article 32 of the Regulation does not allow the *renvoi*[56]. This last technique is normally considered to be incompatible with the autonomy of will[57] : it is not reasonable to consider that, by choosing a certain law, the parties also opted for the application of the choice-of-law rules in force in that system of law; their choice necessarily pertains to the domestic law of the State concerned.

18. A single law will be applied not only to the matrimonial property located in the forum State, but also to the matrimonial property located abroad. Because the law governing the regime might consecrate rights unknown by the *lex rei sitae* (like the usufruct right from the civil law systems, unknown as such in *common law),* the European legislator provided in the Article 29 of the Regulation a special solution on the adaptation of the *in rem rights*, designed to solve the eventual difficulties in this field: "*Where a person invokes a right in rem to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it*".

19. Option for a specific matrimonial property regime. A practical problem that may arise is to know whether, when choosing the law governing their matrimonial property regime, the spouses can also opt for a specific matrimonial property regime provided by the chosen law[58]. The European legislator has not explicitly offered a solution. The provisions of the Recital 18 of the Preamble, which states that *"for the purposes of this Regulation, the term 'matrimonial property regime' should be interpreted autonomously and should encompass not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law*", would nevertheless allow for an affirmative answer. Thus, if the applicable law chosen by the spouses consecrates, alongside the default legal regime, one or more conventional matrimonial regimes, it should be possible that while choosing that law, the spouses also

[53] For a discussion, see P. Lagarde, " La qualification des biens en meubles et immeubles dans le droit international privé du patrimoine familial", in *Mélanges en l'honneur de Mariel Revillard. Liber amicorum*, Defrénois, 2007, p. 209.

[54] See I. Viarengo, *op. cit*., p. 212. C. Bridge, *op. cit*., nº 8.

[55] As regard the third parties, see nevertheless Article 28 of the Regulation (*infra*, nº 31 in text).

[56] See Article 32: „*The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law*". Since the comparative private international law reflects a great diversity of solutions on the matter, the clear exclusion of the renvoi is extremely important. In the Romanian law, the exclusion of the renvoi can be deduced from the corroboration of Articles 2559 (3) and 2590 C. Civ.. In the Hague Convention, Article 3 expressly speaks of the election of the *internal law* of a certain country; this formulation, excluding the intervention of the private international law norms, is currently interpreted as excluding the renvoi.

[57] In the French case-law on matrimonial property regimes, see *Gouthertz* decision (Cass. Civ. I, 12 February 1972, *JDI*, 1972, p. 594, note Ph. Khan).

[58] In France, the legislator terminated the extensive discussions on this subject, with the introduction, through the Law no. 97-987 of 28th October 1997 (amending the Civil Code to adapt to the 1978 Hague Convention), of the Article 1397-3 (3) in the Civil Code, which clearly states that "*On the occasion of the specification of the applicable law, before or during the marriage, the spouses may specify the nature of the matrimonial regime chosen by them*". For details, see H. Péroz, E. Fongaro, *op. cit.,* p. 154, nº 402.

choose one of the regimes provided by it, if the requirements set are fulfilled[59]. Such a solution merely confirms the multiple valences of the principle of party autonomy in this field.

In practice, the matrimonial property agreement should clearly specify the matrimonial property regime the spouses have chosen; in the absence of the corresponding provisions, the simple choice of the law of a particular State will be interpreted as an indirect option for the default legal matrimonial property regime provided by it.

VI. Consent and substantial validity of the choice-of-law agreement

20. Article 24(1) of the Regulation provides that the existence and validity of an agreement on the choice of law or any clause thereof shall be determined by the law which would govern it under Article 22 if that agreement or clause were valid. The application of the chosen law itself for the issues of material validity of the *electio juris* agreement, a solution also found in other European Regulations[60], has the benefit of simplicity and is in line with the legitimate expectations of the parties.

The scope of this text requires delimitation. Insofar as, in accordance with Article 1(2)(a), the spouses' capacity is excluded from the scope of application of the Regulation, this issue must be determined following the private international law rules of the forum. On the contrary, the law chosen by the spouses to govern their matrimonial property regime will normally apply to the possible vices of consent (error, misrepresentation, violence) and their consequences.

In addition, Article 24(2) of the Regulation provides a derogatory rule which can be invoked (only) by the spouse who wishes to establish the absence of his or her consent to the agreement: this spouse may rely on the law of the State of his habitual residence at the time the court is seised[61], if it appears from the circumstances that it would not be reasonable to determine the effect of his behaviour in accordance with the chosen law[62]. A short explanation is necessary. In contractual matters, where the formal validity requirements are very liberal and a tacit consent, deduced sometimes from the silence or lack of reaction of one of the parties, is considered a sufficient expression of the will, Article 10(2) of the Regulation nº 593/2008 (*Rome I*)[63] – almost identical to Article 24(2) of the Regulation 2016/1103 and its likely source of inspiration – is perfectly justified by the legislator's desire to safeguard the existence of parties consent; it will also have a large scope of application. Things are different in the respect of matrimonial property regimes and the practical utility of Article 24(2) might be discussed. Undeniably, the existence of the spouses' consent for the *electio juris* agreement is highly important here too but, given the fact that Article 23 clearly states that the spouses' choice must be made in writing and the corresponding agreement must be signed, Article 24(2) will probably have a very narrow scope. Considering the impact on the consent, a possible application might be made when the agreement is drafted in a foreign language unknown by the contesting spouse and the putative law governing this agreement and the law of the actual habitual residence of that spouse diverge on the consequences of this aspect on the existence of the consent. Regardless, fulfilling the special circumstances required by this text – necessitating a restrictive interpretation – is not an easy task; since there is no guidance from the legislator, the courts enjoy a margin of discretion as regards the reasonableness test to be respected before the elimination of the putative designated law.

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[59] In this respect, see indirectly, I. Viarengo, *op. cit*., p. 212. C. Bridge, *op. cit*., nº 10. Much more dubitative, see S. Godechot Patris, *op. cit*., p. 2296, which shows that the possibility of choosing concurrently the applicable law and a conventional matrimonial regime provided by it implies an interference with the implementation of the chosen law; consequently, this author considers that the solution of the Article 1397-3 (3) of the French Civil Code should perhaps be rethought.

[60] See, for example, Articles 3(5) and 10(1) Rome I Regulation; see Article 6(1) Rome III Regulation.

[61] This temporal element might appear as problematic. First, the existence of the consent should normally be evaluated at the time when it was given; only by reference to that moment the contesting spouse may have a legitimate interest to rely on a certain law (different than the one governing the agreement). Secondly, the habitual residence may be purposefully modified be a spouse wishing to benefit from a certain law, and thus the time reference retained by the legislator might encourage the abuses.

[62] An identical provision is found in Article 6(2) Rome III Regulation.

[63] Article 10(2) Rome I Regulation: „*Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph* 1".

VII. Exteriorisation of the parties' choice and the law governing the form of the *electio juris* agreement

21. A matter of practical interest is represented by the formal validity requirements of the agreement on the choice of law applicable to the matrimonial property regime[64]. These are regulated in the Article 23 of the Regulation, whose stated purpose is to support legal certainty, to facilitate an informed choice and to make sure that spouses are aware of the consequences of their choices[65]. Thus, on the one hand, by means of a uniform substantive norm laid down in Article 23(1), the legislator stated that the agreement for the election or for the modification of the law applicable to the matrimonial property regime should be expressed in writing and should be dated and signed by both spouses; also, as in other European private international law Regulations, it provided that *"any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing"*. With these requirements, the legal certainty is strengthened, at least at first sight, and practitioners' work is facilitated. A similar solution can be deduced from the provisions of Article 2591(2) C. Civ., this being however slightly more liberal[66], or of the Article 13 final of the 1978 Hague Convention[67].

22. As regards the choice-of-law norms, the European legislator distanced himself from the Romanian Civil Code[68] or the Hague Convention's solutions[69]. In order to protect the spouse considered vulnerable, Article 23(2) of the Regulation additionally prescribes the observance of the formal requirements, if any, laid down for marital property agreements in the law of the Member State in whose territory both spouses are habitually resident at the time of the conclusion of the agreement[70]. *Per a contrario*, when the spouses (possible European nationals) are habitually resident on the territory of the same third State, the mere writing, dating and signature would be sufficient for the formal validity of the *electio juris* agreement. Beyond the fact that it cannot guarantee that the spouses were actually aware of the implications of their choice, as wanted by the European legislator, this solution – application only of the formal requirements imposed by the EU Member States' laws – is not necessarily very coherent[71]. Also, because the legislator does not refer to the formal validity requirements of the law of the State where the *electio juris* agreement is concluded (which may be different from the State where the spouses

[64] This agreement can take the form of an independent agreement, the sole purpose of which is to determine the applicable law, or the form of a clause stipulated in a convention whose principal purpose is different (and more extensive), such as a marital property agreement.

[65] See Recital 47 of the Preamble: "*Rules on the material and formal validity of an agreement on the choice of applicable law should be set up so that the informed choice of the spouses is facilitated, and their consent is respected with a view to ensuring legal certainty as well as better access to justice. As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice*".

[66] The text of Article 2591(2) C.Civ. is broader: it allows not only the express choice of the applicable law, but also a choice which undoubtedly results from the provisions of a marriage contract. An identical solution is found in the Article 11 of the Hague Convention.

[67] The Van Overbeck Report ("Explanatory Report on the 1978 Hague Matrimonial Property Regimes Convention"), expressly states that only the signature of the spouses must be manuscript, while the related provision and date can be typed - see M. Revillard, "La Convention de la Haye...", *op. cit.,* nº 16.

[68] According to Article 2591(2) C.Civ., "*The formal requirements of the choice of law agreements regarding the matrimonial property regime are those provided either by the law chosen to govern the matrimonial regime or by the law of the place of the conclusion of the electio juris agreement*"; the same paragraph also provides, in the final sentence, a unilateral rule: when the Romanian law is applicable (to the matrimonial property regime), the formal requirements set by it - act authenticated by the public notary, according to Article 330(1) C.Civ. - must be also respected in order to ensure the validity of the marital property agreement.

[69] As regards the form of the *electio juris* agreement, Article 13 of the Hague Convention provides that it should comply with the form prescribed for marriage contracts, for which two alternatives are provided (the law chosen to govern the matrimonial regime or the law of the place where the agreement was made).

[70] Although there is no express provision in this sense in the Regulation, the references to the law of a Member State should normally be understood as references to the law of a Member State where the Regulation nº 2016/1103 is applicable: see S. Godechot Patris, *op. cit*., p. 2294.

[71] V. M. Buschbaum, U. Simon, "Les propositions de la Commission européenne relatives à l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples mariés et des partenariats enregistrés", *Rev. Crit. DIP*, 2011, p. 801, sp. p. 805-806.

are habitually resident), it may raise in practice some problems of equivalence – such as not knowing whether the notarial act drawn up under the *lex loci actus* is equivalent to the authentic act required by the law of the spouses' habitual residence[72]; absent any other clarifications, the public authority or the notary seised should settle them on a case by case basis.

Finally, paragraphs 3 and 4 of Article 23 of the Regulation provide for two additional conflict-of-laws rules for the cases in which spouses are not habitually resident in the same state when the agreement is concluded. First, if they are habitually resident in the territory of different EU Member States, the European uniform requirements will be completed by the formal requirements provided by either of the laws of those States; since these two laws are provided for in an alternative way, for the *electio juris* agreement to be valid it is sufficient that spouses comply with the requirements of the most liberal of them. If the habitual residence of only one of the spouses is located on the territory of an EU Member State, the formal validity of the *electio juris* agreement is conditional on compliance with the requirements of the law of that Member State. In both cases, the habitual residence of the spouses (or of one of them) should be appreciated at the time when the agreement is (or was) concluded; since the problems related with the validity of the *electio juris* agreement may arise long after its conclusion, when the connecting factor could have been changed, this time precision is welcomed as it increases the legal certainty.

Normally, the *electio* juris agreement and the matrimonial property agreement are distinct. For its formal validity, the *electio juris* agreement must comply, as already presented above, with the requirements set by Article 23 and of the laws referred thereof. If in the same document, the spouses designate the law applicable to their regime and also select a conventional matrimonial property regime, provided by the chosen law[73], the validity of the corresponding matrimonial convention is conditional, in addition to the requirements set out above, which can be found also in the Article 25(1)-(3) of the Regulation, by the compliance with the possible additional formal requirements provided by the law governing the matrimonial property regime (Article 25(4) of the Regulation).

VIII. The moment of choice

23. In the Article 22 of the Regulation there is no provision as to the timing of the election. However, the Recital 45 of the Preamble provides that "*this choice may be made at any moment, before the marriage, at the time of conclusion of the marriage, or during the course of the marriage*"; this solution, increasing the legal certainty, is identical to that expressely found in the Article 2591(1) C. Civ., which provides that the agreement on the choice of law applicable to the matrimonial regime may be concluded before the marriage is celebrated, at the time of the marriage or during the marriage. In the Hague Convention, the Article 3 provides that the choice of applicable law must be made before marriage; in the absence of any further clarification, this choice may be included in the spouses' matrimonial convention or may be the subject of a separate agreement, which has as its object precisely the choice of law. This solution may seem more restrictive than the one in the Regulation or in the Romanian Civil Code; however, considering that the Article 6 of the Convention allows the change of the applicable law (obviously, during marriage), it is not really much more severe.

IX. Change of the chosen law

1. Admission of the voluntary change of the chosen law

24. All the texts analysed allow the voluntary change of the law governing the matrimonial property regime. In fact, the continuity of the applicable law is generally considered to be a too rigid and inappropriate solution, given that the change of residence (and even of the citizenship) might be frequent

[72] S. Godechot Patris, *op. cit.*, p. 2296.

[73] On this issue, see *infra* nº 26 in text.

ISSN 1989-4570 - www.uc3m.es/cdt - DOI: https://doi.org/10.20318/cdt.2018.4390

in practice, so that the law originally chosen or the one (objectively) applicable at the time of marriage may not present sufficiently relevant connections with the current situation of spouses or may not respond anymore to their substantial interests[74]. This is why, both Article 22 of the Regulation 2016/1103 and Article 2591 C. Civ. or Article 6 of the Hague Convention allow for the designation of a law other than the one previously applicable to the regime, so that the patrimonial situation of the spouses can be better adapted to their personal circumstances and life realities.

In principle, this change is possible irrespective of whether the law previously applicable to the matrimonial property regime had initially been chosen or whether it had to be determined on the basis of objective connecting factors[75]. Also, in principle, given the broad formulation of the texts, the change is possible whenever the spouses want it. Like for the *electio juris* agreements concluded before or in the moment of the marriage, the spouses' option may only concern the law of the nationality or of the habitual residence of either of them[76]. The 1978 Hague Convention provided also an additional alternative, allowing for the designation, with respect to all or some of the immovables, of the law of the place where these immovables are situated (*lex rei sitae)* (see supra no 16).

25. In the context of the Regulation, is also of interest the transitional provision found in Article 69(3), which provides for the applicability of Chapter III (on the applicable law) to spouses who have married or who have designated the law applicable to their matrimonial regime after 29 January 2019. Thus, irrespective of the moment of marriage, after 29 January 2019, the spouses may amend the law previously applicable to their matrimonial property regime, following the conditions provided by Article 22 of the Regulation[77].

2. The change of both the applicable law and of the matrimonial property regime

26. A delicate issue, not explicitly resolved by any of the texts subject to this article, is to know whether, when changing the applicable law, the parties may also opt directly for a specific matrimonial property regime provided by the newly chosen law. The texts only address the change of the applicable law and the option for a new different law (which normally entails the application of the default matrimonial regime provided by that law[78]). In our view, when they proceed to a change of the law applicable to their regime, the spouses should be also able to elect a specific conventional regime provided by the newly chosen law: when the parties were subject to a specific conventional regime provided by the original law (e.g. separation of property/gütertrennung, provided by German law) it seems excessive to require them, in order to reach the same or a similar conventional regime governed by another law (e.g. separation of property/*séparation de biens* or partnership of acquests /*séparation de biens avec société d'acquêts*, provided by French law), to switch first to the default legal regime provided by the newly elected law, which, on the basis of the provisions of this new law, they would subsequently amend to the desired regime[79].

[74] See E. Fongaro, „Le changement de régime matrimonial en droit international privé, entre présent et avenir", *Droit et patrimoine*, December 2012, p. 87 *et seq*., at I.A.

[75] Departing from the solution found in the article 7(2) of the Hague Convention, which admitted, despite a series of inconveniences in terms of uncertainty and technical difficulties, an automatic mutability of the law governing the matrimonial property regime, the Regulation only admits the voluntary change of the applicable law - see Recital 46 of the Preamble: „*To ensure the legal certainty of transactions and to prevent any change of the law applicable to the matrimonial property regime being made without the spouses being notified, no change of law applicable to the matrimonial property regime should be made except at the express request of the parties*".

[76] The Romanian Civil Code does not expressly provide this solution in the Article 2591(3), but it can be indirectly deduced, since Article 2591 is the logical continuation of Article 2590 (who limits the spouses' options).

[77] A similar solution can be found in Article 21(1) of the 1978 Hague Convention, who states that, irrespective the date of marriage, the Convention (also) applies to spouses who designates the law applicable to their matrimonial property regime after its entry into force.

[78] If the parties' agreement concerns only the modification of the applicable law, without including any mention on a specific matrimonial property regime, the spouses will be subject to the default legal regime provided by the newly elected law.

[79] See indirectly, B. Audit, *op. cit.,* p. 712, nº 878; D. Bureau, H. Muir-Watt, *op. cit*., t. II, p. 221, nº 821.

ISSN 1989-4570 - www.uc3m.es/cdt - DOI: https://doi.org/10.20318/cdt.2018.4390

27. When the original law governing the regime requires, similar to the Article 369 of the Romanian Civil Code, the passing of a certain period of time from the date of marriage before any change of the matrimonial regime, an additional question to be answered is whether this period of time should also be respected before any change of the applicable law (which indirectly amounts to a change of the regime). In our opinion, taking into consideration the differences existing between autonomy of will on a substantial level and on a conflicts-of-laws level, the response should be a negative one. In fact, the limits of the spouses' autonomy on the substantial level are set by the internal law governing the regime and time limits like those indicated above must be respected in purely internal situations or, in international cases, when the modification wanted purports just to a different regime provided by the same law. In contrast, spouses' freedom of action and its limits in private international law are governed by specific texts, like Article 22 of the Regulation nº 2016/1103 or Article 2590 C. Civ.; since these texts do not impose any time requirements, the spouses' possibility to change the applicable law should be recognized at any time, despite the particular and restrictive conditions set by the domestic laws. Any circumstantial reluctance determined by the necessary protection to be guaranteed to third parties against a law whose applicability they could not have expected can be overcame by taking into account the Article 28(1) of the Regulation, which provides that the law applicable to matrimonial property regimes may be invoked against a third party only when *"the third party knew or, in the exercise of due diligence, should have known of that law"*[80].

3. Temporal effects of the newly chosen law

28. In the context of Article 6 of the 1978 Hague Convention, the question of whether the modifying law (the new law chosen by spouses) during the matrimonial property regime has retroactive effects has been controversial. The French doctrine militated for the retroactive application of the new law[81]. This solution raised serious problems, especially when a community regime had to be transformed into a separation regime, whose retroactivity could lead to random results when spouses have not previously liquidated their community regime[82]. Also, when the spouses' will is not clearly expressed in this sense, the retroactivity of the newly chosen law is likely to seriously affect the legal certainty and foreseeability so necessary in the matter.

29. The European legislator, in Article 22(2) of the Regulation, but also the Romanian legislator, in the Article 2591 C. Civ., preferred another solution: unless the spouses raise contrary agreement, the newly elected law has prospective effects only. This last solution has indisputable advantages: normally, the change of the applicable law will not affect the acts performed and the rights acquired by spouses under the old law. Thus, property acquired under a separatist regime will not automatically become community property; assets acquired under the regime of the community will not automatically become personal assets of spouses.

However, the situation of property may record changes over time. In accordance with Article 27 (b), *"the law applicable to the matrimonial property regime pursuant to this Regulation shall govern, inter alia... : b) the transfer of property from one category to the other one"*; given that the newly chosen law will govern the couple's matrimonial property regime for the future, it will have to be consulted to see whether, to what extent and in what way the assets previously acquired by spouses, for example, in co-propriety under the legal community regime can be transformed into personal assets of each of them[83]. Even in these circumstances, as the doctrine already identified, when the newly elected law esta-

[80] On the interpretation of this provision and on the difficulties that it may raise, see L. Rademacher, „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", *CDT*, March 2018, Vol. 10, nº 1, p. 7.

[81] See B. Audit, *op. cit.,* nº 878, p.713; D. Bureau, H. Muir-Watt, *op. cit*., t. II, p. 222, nº 823. However, dubitatively, see M. Revillard, *op. cit*., nº 40.

[82] On these difficulties, see H. Péroz, E. Fongaro, *op. cit*., p. 174 *et seq*.; in particular, on the arguments proposed by the French doctrine in favour or against the retroactivity of the chosen law, see p. 176 nº 478.

[83] In this respect, however, a reservation must be made: in accordance with Article 1(2) h) of the Regulation, the issues related to the recordings in public registers of *"rights in immovable or movable property, including the legal requirements for*

ISSN 1989-4570 - www.uc3m.es/cdt - DOI: https://doi.org/10.20318/cdt.2018.4390

blishes, for example, different rules regarding the right to dispose of the property, it is not obvious that the rights acquired over particular assets (by applying the old law) will remain unchanged[84].

Applying the new law only for the future also presents some practical embarrassments: the patrimonial situation of the spouses will be governed by two different laws (which may obviously provide for different solutions, for example regarding the situation of the acquired assets), so that in the moment of the final liquidation, the public notary will have to liquidate as many regimes as laws have been enforced over time. For these cases, the French doctrine judiciously recommends the liquidation of the previous matrimonial property regime in the moment of the change of the applicable law[85], with the inconveniences related to the fees payable for the corresponding notary services.

30. The spouses can also dispose that the newly elected law will produce retroactive effects[86]; the notaries will have to advise the parties on the matter, the final option being dictated by the parties' specific interests. Anyway, due to practical complications, retroactivity is not the most appropriate solution when switching from a community regime to a separatist regime (without liquidation).

4. Limitation of the effects of the newly chosen law and protection of the third parties

31. Normally, according to Article 27(f) of the Regulation, the law governing the matrimonial property regime also applies to the effects that the matrimonial property regime may have on the legal relationships *between spouses* (or, more frequently, *one of them*) and *third parties*[87]. Two clarifications are required.

First, an important reservation from the application of this solution is nevertheless foreseen in the Article 28 of the Regulation (Effects in respect of third parties), a text who masks the difficulties created by the absence of a European Register of the matrimonial property regimes[88] : the law applicable to the matrimonial property regime can be invoked only against the third parties who *have known or ought to have known, acting with due diligence, the existence of that law*[89]. The clarifications brought by the paragraph (2) of the Article 28, detailing the cases in which the third party is deemed to have known the law governing the regime, are likely to increase the much-needed certainty in this field. Although the legislator does not provide any obligation in this sense, an important role will be also played in this field by the public notaries who, when drafting an act involving family property, should inform the involved third parties on the law governing the couple's matrimonial property regime; any written mention of this law in the corresponding document would make things significantly easier in practice[90].

Secondly, according to the Article 22(3) of the Regulation, *"any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law"*. In fact, the legal provisions devoted in the comparative substantive law to the effects of patrimo-

such recording and the effects of recording or failing to record such rights in a register" are excluded from the scope of the Regulation ; thus, when the transfer from one category in another concerns assets subject to registration in a public register (like land register, trade register, industrial property register) its full effectiveness is conditional on cumulative compliance with requirements of the law governing the matrimonial property regime and of the law applicable to the register (*lex registrationis*).

[84] See I. Viarengo, *op. cit*., p. 215: "*given the wide variety of regulations concerning the administration of matrimonial property in EU Member States, it is often impossible to ensure that an act of disposition of an asset and the legal status of such an asset are not in opposition so as to comply with the law applicable at the time of disposition*".

[85] See H. Péroz, E. Fongaro, *op. cit*., p. 177; S. Godechot Patris, *op. cit*., p. 2295; B. Audit, *op. cit*., nº 878, p. 713. In the sense that when the change of the applicable law will have only a prospective effect, the liquidation is always mandatory in the moment of the change, see L. Rademacher, *op. cit*, p. 15-16, nº 23-25.

[86] This solution is inferred from the of article 22 (2) and (3) of the Regulation; it is also mentioned in Recital 46 of the Preamble.

[87] On the different types of effects that the matrimonial property regime may have on third parties (regarding the acquisition or disposition of property rights, debts and representations, successions) and of the differences existing in comparative law on this matter, see L. Rademacher, *op. cit*., at p. 9-13. See also, I. Antón Juárez, "The opposition of the matrimonial property regime and the protection of the third party in private international law", *CDT*, October 2017, Vol. 9, Nº 2, pp. 59-75.

[88] See P. Twardoch, *op. cit*, p. 476.

[89] On the fact that these requirements must receive an autonomous interpretation at European level, see L. Rademacher, *op. cit*., p. 17.

[90] H. Péroz, *op. cit*., *JCP N*, p. 39.

nial family law on third parties greatly differs among legal systems and a deliberate change of the applicable law (with retroactive effect) might negatively affect the rights previously held by them. In order to ensure a minimum legal certainty, the European legislator opted for a solution similar to the one found in Article 3(2) of the Rome I Regulation, permitting that the specific third parties' rights - understood in broad sense and regardless if they pertain to obligations law, to property law or to enforcement law -, deriving from the formerly applicable law, to be recognized and effective even if the newly elected law disregards them[91]. Thus, for example, in order to avoid the pursuit of a community asset by a creditor holding a joint debt, the spouses cannot modify it, by retroactively changing the law applicable to their regime, into a personal (private) asset of one of the spouses; the creditor's right to pursue that community asset, validly created according to the former law, will continue to exist despite the fact that the newly elected law gave a different classification to that particular asset.

X. Conclusions

32. With the provisions found in the Article 22 and the following in the Regulation, the European legislator consecrated a more elaborated legal framework regarding the choice of the law applicable to the matrimonial property regime. The relevant rules are clear enough, so that the effectiveness of the *electio juris* agreement could be ensured in practice in a large number of cases. Sometimes, they may also raise discussions. For a better respect of the vulnerable spouses' interests, the European legislator provided a set of technical limitation related to consent and the formalities for its expression; however, it is not obvious that they are able to always ensure the desired result. Similarly, aiming to address the tension between the spouses' autonomy and the interests of the third parties, a minimum set of rules have been imposed, eventually complicating the practical resolution of cases. Even if some aspects would have deserved further clarification - such as the spouses' possibility of choosing a specific matrimonial property regime along with the choice of applicable law, or the alternatives available for choice in case of plurilegislative States - the existing solutions are welcomed, because the party autonomy principle plays an important role in ensuring the legal certainty and clarity for those involved. The admission of the spouses' freedom to designate and to change at any time the law governing their matrimonial property regime undoubtedly testify the willingness of the European legislator to facilitate a better and large realization of the parties' private interests, through the possibility to adapt their patrimonial relations to the new life realities with which they are confronted. At the same time, the party autonomy is limited to a set of laws bearing a sufficient connection with one or both spouses and reflecting their integrative or identity ties; the proximity traditionally followed by the private international law norms is not entirely abandoned at the expense of purely private interests.

[91] For more details on this provision, see L. Rademacher, *op. cit.*, p. 17-18.