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Giovanni Zarra

EU REGULATIONS 1103 AND 1104 OF 2016: A BALANCE BETWEEN UNIFORMITY AND THE SAFEGUARD OF NATIONAL IDENTITY*

Sommario: 1. Regulations 1103 and 1104 of 2016 within the difficult relationship between EU and family law. – 2. Rationales of Regulations 1103 and 1104 of 2016. – 3. Jurisdiction. – 4. *Lis pendens* (in brief). – 5. Applicable law. – 6. Adaptation. – 7. Imperativeness.

1. European Union (EU) private international law is based on the well-known mechanism of «mutual trust», according to which the courts of EU Member States shall trust the work carried out by other EU domestic courts. Therefore, they shall be considered as completely fungible and shall not review the decisions issued by each other[1]. This means that, *willy-nilly* – and save as for rare exceptions explicitly set forth in the relevant private international law regulation[2] – judges within all EU States must decline jurisdiction whenever another EU court already declared itself competent in respect of the same case, as well as recognize and enforce judgments coming from all other European Member States. While this mechanism of almost total automatic recognition provides private parties with undeniable advantages, it has also generated certain distorted effects. The field of family law offers, in this regard, a significant example.

* Speech given at the Final Event of the PFESFS (Personalized Solutions in European Family and Succession Law) European Project, held in Camerino on 20 – 21 October 2020, at Campus universitario – Via D'Accorso, 16 – Sala Convegni del Rettorato.

[1] S. Prechal, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers*, 2017, p. 75 ss.

[2] See, e.g., the grounds for refusing recognition of judgments set forth by art. 45 of the EU Regulation 1215 of 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. There are, however, certain regulations where the possibility of refusal of other EU judgments is significantly reduced, such as EU Regulation 4 of 2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations or Regulation 2201 of 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. On these Regulations see M. Hazelhorst, *Free Movement of Judgments in the European Union and the Right to Fair Trial*, The Hague – Heidelberg, 2017, p. 51 ss.

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Liberato v. *Grigorescu*[3] is a case concerning the interplay between EU Regulation 44 of 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (now replaced by EU Regulation 1215 of 2012 – so called Bruxelles I and Bruxelles I-*bis* Regulations, respectively), and EU Regulation 2201 of 2003 on the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (so called «Bruxelles II-*bis* Regulation). Mr. Liberato and Ms. Grigorescu married in 2005 in Italy, where they lived with their son – born in 2006 – until the matrimonial relationship deteriorated. After that, the mother took the child with her to Romania and did not return to Italy. A claim was started by Mr. Liberato for legal separation from Ms. Grigorescu and custody of the child. By judgment of 19 January 2012, the Court of Teramo pronounced legal separation of the spouses, for which it held Ms. Grigorescu responsible, and, by a separate order, referred the case back for a decision on the claims concerning parental responsibility.

In the meanwhile, Ms. Grigorescu brought proceedings before the Judecãtoria Bucureşti (Court of First Instance, Bucharest, Romania), seeking divorce, sole custody of the child and a contribution from the father to the child's maintenance. Mr. Liberato asked for the suspension of proceedings in Bucharest due to the application of the *lis pendens* rule set forth by article 19 of the Regulation 2201 of 2003. Nevertheless, the said Court, by judgment of 31 May 2010, pronounced the divorce, awarded custody of the child to the mother, fixed the arrangements for the exercise of the father's rights of access to the child, and set the amount of maintenance to be paid by the latter for the child. This judgment then became *res judicata*.

On 8 July 2013, the Court of Teramo granted sole custody of the child to the father and ordered the immediate return of the child to Italy, also determining the arrangements for the exercise of the mother's rights of access to the child in Italy and her contribution for maintenance of the child. The Court also pointed out that the divorce proceedings in Romania had been commenced after the legal separation proceedings brought in Italy and that, consequently, Romanian courts had infringed article 19 of Regulation No 2201/2003 by failing to stay the proceedings. However, by judgment of 31 March 2014, the Court of Appeal of L'Aquila, Italy, varied the judgment of the Court of Teramo and upheld the objection re-

[3] Court of Justice of the European Union, Judgment of 16 January 2019, *Stefano Liberato v. Luminita Luisa Grigorescu*, case C-386/17.

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lating to the acquisition of the force of *res judicata* of the divorce decision delivered by Romanian courts, which also concerned custody of the child and maintenance contributions for him. This court held that the breach of the rules of *lis pendens* under EU law, by the judicial authorities of the Member State second seized was not relevant for the purposes of examining the conditions for recognition of the definitive measures adopted by that Member State and that there was no ground, in particular relating to public policy, preventing the recognition of the Romanian judgment. Mr. Liberato then brought a recourse to the Italian Court of Cassation. This Court referred to the Court of Justice of the European Union (CJEU) the question of whether an infringement, which it considered to be manifest, of the provisions relating to *lis pendens* in EU law by the courts which issued the decision which is the subject of the request for recognition, may be regarded as being a ground for withholding recognition of that judgment by reason of the fact that the violation of the *lis pendens* rule inspiring EU private international law may be interpreted also as a violation of the public policy of the requested State. Surprisingly enough, and notwithstanding the striking contrast of this decision with the common sense of justice, the CJEU held that «the rules of *lis pendens* in article 27 of Council Regulation (EC) No 44/2001 […] and article 19 of Council Regulation (EC) No 2201/2003 […] must be interpreted as meaning that where, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the court second seized, in breach of those rules, delivers a judgment which becomes final, those articles preclude the courts of the Member State in which the court first seized is situated from refusing to recognise that judgment solely for that reason. In particular, that breach cannot, in itself, justify non-recognition of a judgment on the ground that it is manifestly contrary to public policy in that Member State». In terms of axiological hierarchy, therefore, the Court impliedly affirmed that the principle of mutual trust is more important than the principle of legal certainty which inspires the *lis pendens* rule. In this regard, it is our opinion that it could not be contrarily argued that legal certainty requires that the decision in the second proceedings shall be recognized by the court firstly seized because it acquired the force of *res judicata*. In this respect, it must be pointed out that the second proceedings are initiated and concluded in violation of the *lis pendens* rule and, as a consequence, it is arguable that the resulting decision does not deserve the legal protection offered by EU law in terms of circulation between the Member States.

This case, which apparently has nothing to do with the topic of this paper, is actually pivotal for understanding why, in sensible matters such

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as family law, EU Member States traditionally shied away from a uniform substantive discipline of the subject[4]. Family law expresses the most intrinsic aspects of the culture of a population and the fact that States are willing to keep sovereignty on its regulation shall not come as a surprise. It is also not surprising that only eighteen of the EU Member States, after long discussions and negotiations[5], decided to enter into an enhanced cooperation – which necessarily generates a two-speeds Europe[6] (or an Europe with «super-variable geometry»)[7] – in the regulation of the matter. Finally, it is not surprising that – within the scheme of the enhanced cooperation – States left aside crucial questions such as the definition of marriage or registered partnership, considering that there is still significant disagreement among them on the significance of these concepts[8].

The twins EU Regulations 1103 and 1104 of 24 June 2016 (in force since 29 January 2019) – implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of (*i*) matrimonial property regimes and (*ii*) registered partnerships (respectively) – are, therefore, the result of a compromise. On the one hand, they shall be welcomed because they start a process of uniformization of family law matters within the private international law of the EU, which is the necessary completion of the trend started with the already mentioned Regulation 2201 of 2003, as well as Regulations 4 of 2009 (on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations), 1259 of 2010 (so called «Rome III Regulation», implementing enhanced cooperation in

[4] See, in this regard, A. Las Casas, *La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali*, in *Nuove leggi civ. comm.*, 2019, p. 1535 ss.

[5] For an historical analysis of the process which led to the Regulations, see M. Pinardi, *I regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate*, in *Eur. dir. priv.*, 2018, p. 733 ss.

[6] G. Gaja, *La cooperazione rafforzata*, in *Diritto dell'Unione europea*, 1996, p. 321, highlighting the risk of the emergence of an hegemonic group of States within Europe. For another criticism see O. Feraci, *Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate*, in *Riv. dir. int.*, 2016, p. 529 ss.

[7] E.M. Magrone, *Un'Europa a geometria superviariabile in materia di regimi patrimoniali delle coppie internazionali? Prime considerazioni sui regolamenti 2016/1103 e 2016/1104*, in E. Triggiani, F. Cherubini, I. Ingravallo, E. Nalin e R. Virzo, *Dialoghi con Ugo Villani*, Bari, 2017, p. 1131 ss.

[8] There is strong disagreement between European Member States as to the possibility to include, within the concept of marriage, also homosexual marriages. See, in this regard, the debate reported in C. Ricci, *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giudiziario europeo*, Padova, 2020, p. 213 ss.

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the area of the law applicable to divorce and legal separation) and 650 of 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). On the other hand, however, this process shall necessarily *take its time* because, in order to ensure that the harmony between EU legal system in family matters is gradually reached without sacrificing the domestic identities[9], it is first of all necessary to wait for more *cultural* homogeneity in family matters between EU Member States. Uniformity is important, but not at all costs; and, as we will try to demonstrate in the course of this paper, Regulations 1103 and 1104 of 2016 seem to be a good point of balance in the tension between uniformity and protection of domestic traditions.

2. Prior to start with the analysis of the principles behind the Regulations[10], it is necessary to clarify that the EU legislator, in light of the socially and culturally fragmented scenario concerning family law, has never had the intention of providing a complete primary law system for EU family law. Instead, it is trying to achieve the objective of harmonization in Europe through private international law (i.e. providing for uniform criteria for jurisdiction, applicable law and circulation of judgments). Should the circumstances allow to do so, and only in a second moment, the EU legislator will perhaps try to issue an embryonic form of EU primary legislation in matters of family[11].

Which are, then, the rationales inspiring the twins Regulations 1103 and 1104?[12].

The first of them is, certainly, *completeness*: both the Regulations concern the entire private international law discipline, i.e. jurisdiction, applicable law and circulation of judgments. This is an undeniable advantage in terms of simplification for lawyers, who know in advance that the Regulations will provide them with all the necessary guidance concerning the property regime in marriages and registered partnership. In this regard, it

[9] On this subject, see, more generally P. Perlingieri, *Il rispetto dell'identità nazionale nel sistema italo europeo*, in *Foro nap.*, 2014, p. 449 ss.

[10] Please note that, unless in the exceptional cases where there is a significant difference between the Regulations, we will only refer to the provisions of Regulation 1103 (which find also equal place, *mutatis mutandis*, in regulation 1104).

[11] C. Ricci, *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giudiziario europeo*, cit., p. 32.

[12] For a general analysis concerning the Regulations see D. Damascelli, *Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law*, in *Trusts & Trustees*, 2018, p. 1 ss.

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is also worth mentioning what is stated by Recital 18 of the Regulations, providing that «[t]he scope of [the] Regulation[s] should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses»[13].

Simplification, indeed, is another rationale inspiring the Regulations. In this regard, the EU legislator made significant efforts in terms of coordination of Regulations 1103 and 1104 with the already mentioned instruments governing family and succession matters in EU private international law. This will be particularly evident when we will discuss about jurisdiction within the Regulations' system.

Uniformity, as foreseeable, is another relevant goal of the Regulations. This is expressed, first of all, by the ideas of universal application and unity of applicable law[14], which respectively set forth that (*i*) «the law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State» (art. 20); and (*ii*) «[t]he 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» (art. 21, which applies save as for the application of the *lex rei sitae* to real estates). Secondly, uniformity is ensured by the autonomous definition[15] that the EU legislator has given of «matrimonial property regime»[16], which, according to article 3 of the Regulation 1103, means «a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution»[17]. Uniformity, however, as already stressed above, should not

[13] The reference applies to both the one which in Italy is called as «primary regime» of the patrimonial relationship in marriages (i.e. the rules governing the maintenance of the couple) and the «secondary regime» (i.e. the one concerning other aspects of the couple's life). See E. Calò, *Variazioni sulla* professio iuris *nei regimi patrimoniali delle famiglie*, in *Riv. not*., 2017, p. 1097.

[14] See I. Viarengo, *Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea*, in *Riv. dir. int. priv. proc.*, 2018, p. 44 ss.

[15] This is a general tendency of EU law. See Las Casas, *La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali*, cit., p. 1538 ss., According to CJEU, judgment of 6 october 1982, case C-283/81, *Srl CILFIT e Lanificio di Gavardo SpA* v. *Ministero della Sanità*, § 19, Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States». Therefore (§ 20) «every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied».

[16] Or, in Regulation 1104, of «property consequences of registered partnerships».

[17] Similarly, art. 3 of Regulation 1104 states that ««property consequences of a registered

be pursued at any cost. The Regulations do not even try to offer a single definition of the concepts of marriage (which continue to be defined and regulated, sometimes very differently, by domestic systems of law)[18] and give adequate relevance to imperative norms of domestic systems, either expressed by principles (public policy) or more specific rules (overriding mandatory rules).

Strictly related is the need for *legal certainty*, which inspires the entire EU system of private international law: a party should be able to know in advance where it may start legal proceedings, which law will be applied and under what conditions a judgment may be recognized. In matters of applicable law, this is clearly expressed by Recital 43 of the Regulations, according to which «[i]n order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable spouses to know in advance which law will apply to their matrimonial property regime. Harmonised conflict-of-law rules should therefore be introduced in order to avoid contradictory results».

In addition, Member States which have taken part in the enhanced cooperation have been inspired by a *favor* for the circulation of judgments which enforce patrimonial regimes arising from marriages or registered partnerships[19]. In this regard, it is significant that the Regulations contain

partnership» means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution». This definition derived from the decision of the CJEU, 27 march 1979, *Jacques de Cavel* v. *Louise de Cavel*, case C-143/78, § 7. In this regard, Las Casas, *o.c.*, p. 1540, correctly noted that the notion of «patrimonial regime» is extended to the regulation also to relationships with third parties, thus creating a notion which is broader than its usual meaning.

[18] Similarly, art. 3 of Regulation 1104, concerning registered partnerships, states that «registered partnership» means the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation». At closer look, this is not a substantive definition of registered partnership and the provision merely identify the formal requirement of registration. On the coordination of this definition with the one provided by the Italian law n. 76 of 2016 (so-called «Cirinnà law») see C. Ricci, *Giurisdizione in materia di regimi patrimoniali*, cit., p. 72 ss.

[19] This favor is expressed by the limited number of causes which may justify non-recognition according to the Regulations. Indeed, according to article 37, «[a] decision shall not be recognised: (*a*) if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought; (*b*) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so; (*c*) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought; (*d*) if it is irreconcilable with

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a rule, namely art. 9, which has been enacted with the precise purpose of avoiding the circulation of decisions denying the recognition of patrimonial regimes arising from marriages or registered partnership. Indeed, according to this rule, if a court of the Member State that has jurisdiction pursuant to the Regulations «holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction». This provision clearly expresses the idea that is better to decline jurisdiction than to have a judgment against the recognition of patrimonial relationships between spouses or members of a registered partnership. On the other hand, the provision of a *forum necessitatis* (art. 11), to be activated in presence of strict requirements in the cases where there is no other available forum[20], reinforces the idea that Member States wanted, as much as possible, to ensure that spouses and members of registered partnerships are offered adequate protection in patrimonial matters within the EU framework.

In light of these guiding principles, we will now analyse the various aspects concerning the EU Regulations 1103 and 1104 of 2016.

3. Provisions concerning jurisdiction in Regulations 1103 and 1104 are aimed at providing the parties with a unique forum concerning family matters (basing jurisdiction on uniform rules) recognizing to the same parties a margin with regard to the possible choice of the competent judge and limiting as much as possible the recourse to national laws. The discipline is, therefore, largely inspired by the need for uniformity and legal certainty. In addition, mutual trust finds large application in the regulation of jurisdictional matters, considering that article 39 provides that «[t]he jurisdiction of the court of the Member State of origin may not be reviewed» by other Member States' courts. In addition, and specularly, article 15 states that «[w]here a court of a Member State is seized of a matter of matrimonial property regime over which it has no jurisdiction under this Regulation,

an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought».

[20] In this regard, Recital 41 is particularly explanatory. It states that: «In order to remedy, in particular, situations of denial of justice, this Regulation should provide for a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a matrimonial property regime which is closely connected with a third state. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third state in question, for example because of civil war, or when a spouse cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seized».

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it shall declare of its own motion that it has no jurisdiction», in order to allow to other national courts to promptly rule on the matter and provide justice to the parties. Hence, when a court of a Member State autonomously considers that it has jurisdiction on a matter, such jurisdiction cannot be reviewed. Symmetrically, when the court considers that it does not have jurisdiction, other courts cannot impose to it to rule on the case[21].

Preliminarily, it is necessary to clarify the particular meaning of the word «courts» which is given by the Regulations. Indeed, according to Recital 29, «[f]or the purposes of [the] Regulation[s], the term 'court' should […] be given a broad meaning so as to cover not only courts in the strict sense of the word, exercising judicial functions, but also for example notaries in some Member States who, in certain matters of matrimonial property regime, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given matrimonial property regime by delegation of power by a court. All courts as defined in [the] Regulation[s]should be bound by the rules of jurisdiction set out in [the] Regulation[s]. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of matrimonial property regime, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions».

As a consequence, the real issue is to determine who carries out a judicial function within the legal regime of the Regulations. According to a well-known definition «a legal dispute exists when two parties are in conflict of interests and are, as a consequence, in contrast between themselves»[22]; in this regard, we can infer that whoever has the task of mandatorily resolve this contrast – or at least to mandatorily rule on other parties' rights (even in lack of a conflict)[23] – is exercising judicial functions. In this respect, art. 3, § 2, of the Regulations clarifies that national authorities may be considered as «courts» for the purpose of the Regulations provided that provided that they «offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate: (*a*) may be made the subject of an appeal to or review by a judicial authority; and (*b*) have a similar force and effect as a decision of a judicial authority on the same matter».

[21] C. Ricci, *Giurisdizione in materia di regimi patrimoniali*, cit., p. 92.
[22] G. Morelli, *Nozioni di diritto internazionale*, Padova, 1967, p. 368.
[23] The reference applies to matters of voluntary jurisdiction.

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Generally speaking, jurisdiction conferred according to the Regulations concerns all aspects of the patrimonial regime. Legal certainty and harmony of decisions, indeed, require that, as a matter of principle, the forum concerning all the patrimonial aspects of couples are treated together, regardless of the place where assets are located or the qualities of the assets[24]. There are, however, some exceptions concerning specific assets[25] or kinds of judicial orders (such as provisional measures)[26].

The needs for uniformity and legal certainty shall be recalled again in order to explain the atypical sequence of the rules on jurisdictions in Regulations 1103 and 1104. Indeed, while usually private international law regulations set forth autonomously (viz. without considering other jurisdictional regulations) the criteria upon which jurisdiction is based[27], the Regulations' drafters did have exactly the primary goal of trying to avoid a multiplication of proceedings concerning various aspects of a single family law dispute. Indeed, articles 4[28] and 5[29] are aimed at giving prevalence to proceedings started under (pre-existing) Regulations 650 of 2012[30] and 2201 of 2003 over proceedings started under the Regulations[31]. This is due

[24] C. Ricci, *Giurisdizione in materia di regimi patrimoniali*, cit., p. 96; P. Franzina, *Jurisdiction in Matters Relating to Property Regimes under EU Private International Law*, in *Yearbook of Private International Law*, 2017/2018, p. 164 ss.

[25] See articles 10, 11 and 13. The latter rule is particularly relevant for the purpose of legal certainty and favor for the circulation of decisions, saying that «[w]here the estate of the deceased whose succession falls under Regulation (EU) No 650/2012 comprises assets located in a third state, the court seized to rule on the matrimonial property regime may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognized and, where applicable, declared enforceable in that third state».

[26] Article 19 provides that «Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter».

[27] It is sufficent to think about, in this regard, art. 4 of the Bruxelles I-*bis* Regulation.

[28] «Where a court of a Member State is seised in matters of the succession of a spouse pursuant to Regulation (EU) No 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case».

[29] «Without prejudice to paragraph 2, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201 of 2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application».

[30] On the distinction between patrimonial aspects and succession matters see F. Maoli, *Successioni, regimi patrimoniali tra coniugi e problemi di qualificazione in una recente pronuncia della Corte di giustizia*, in *Riv. dir. int. priv. proc.*, 2018, p. 676 ss.; I. Viarengo, *Effetti patrimoniali delle unioni civili transfrontaliere*, cit., p. 53 ss.

[31] The Regulations do not provide any coordination with Regulation 4 of 2009. As explained

to the fact that, usually, all familiar disputes are strictly related and it would be nonsensical to celebrate them in different fora[32].

In all cases where articles 4 and 5 do not apply, the principle of party autonomy – cornerstone of EU private international law – finds application. The possible recourse to party autonomy, however, is in this case limited. Indeed, the parties may choose the courts which have jurisdiction among a limited list. The reference applies to the courts (*i*) whose law is applicable because it has been chosen by the parties according to article 22[33], or (*ii*) whose law is applicable by default according to article 26, or, finally, (*iii*) of the place where the marriage has been celebrated or the registered partnership was created.

In the lack of choice of court agreement, article 6 applies. This rule provides for a cascade of connecting factors. As far as Regulation 1103 is concerned, it states that jurisdiction shall be conferred to the courts «(*a*) in whose territory the spouses are habitually resident at the time the court is seised; or failing that (*b*) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that (*c*) in whose territory the respondent is habitually resident at the time the court is seised; or failing that (*d*) of the spouses' common nationality at the time the court is seised»[34].

by I. Viarengo, *o.c.*, p. 43, however, this coordination may be sometimes interpretatively reached by a joint reading of article 5 of the Regulations and article 3, letter *c*), of Regulation 4 of 2009, stating that jurisdiction may be conferred to «the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties». As a consequence, in the cases where article 5 applies (i.e. the judge which is competent for the separation or divorce also decides patrimonial aspects), the same judge could also decide for maintenance aspects. There may be specific problems of coordination between the Regulations and Regulation 4/2009 when the applicable law is English law. See, in this regard, A. Las Casas, *La nozione autonoma di «regime patrimoniale tra coniugi»*, cit., p. 1541 ss.

[32] S. Bariatti, I. Viarengo, *I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario*, in *Riv. dir. priv. proc.*, 2007, p. 603 ss.

[33] In this regard, it is worth anticipating that according to article 22 of the Regulation 1103 the parties may choose the applicable law only between «(*a*) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or (*b*) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded». Article 22 of regulation 1104, instead, provides that the law may be chose among «(*a*) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded (*b*) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or (*c*) the law of the State under whose law the registered partnership was created».

[34] Regulation 1104 provides that jurisdiction shall be conferred to the courts: «(*a*) in whose territory the partners are habitually resident at the time the court is seised, or failing that, (*b*) in whose territory the partners were last habitually resident, insofar as one of them still resides

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The entire system is therefore to be construed upon the notion of habitual residence. This concept, as for the other concepts discussed under the Regulations, shall be interpreted with an autonomous meaning. In the lack of indications by the EU legislator and – in the specific field – by the CJEU, scholarship has tried to find out a meaning for this concept[35]. By referring to previous case law of the Court of justice in fiscal matters[36], it has been affirmed that the concept of habitual residence may be found taking into account the parties' «intention that it should be of a lasting character, the permanent or habitual centre of [their] interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account». There is, therefore, a certain margin of discretion for national courts in evaluating the factual scenario surrounding a dispute, but the CJEU has provided domestic judges with clear guidelines, mainly based on the intentional factor. In this regard, as already noted in scholarship[37], the Italian Supreme Court has clarified that attention must be paid to the affective and emotional centre of interests and not to the patrimonial one. The reference, therefore, applies to the personal centre of interests of the couple and not to the economic one[38]. This clarification is important because it gives judges the possibility to discern between the various possible links with different courts and to give weight only to the ones where the couple actually had a real centre of interest (taking into account the concrete circumstances), also avoiding possible abuses and frauds (i.e. cases where the centre of interests of the couple is artificially created with forum shopping purposes)[39].

there at the time the court is seised, or failing that, (*c*) in whose territory the respondent is habitually resident at the time the court is seised, or failing that, (*d*) of the partners' common nationality at the time the court is seised, or failing that, (*e*) under whose law the registered partnership was created».

[35] C. Ricci, *Giurisdizione in materia di regimi patrimoniali*, cit., p. 111.

[36] CJEU, judgment of 15 September 1994, *Pedro Magdalena Fernández* v. *Commission of the European Communities*, case C-452/93, § 22.

[37] C. Ricci, *o.u.c.*, p. 113.

[38] Italian Court of Cassation, Plenary Section, ordinance 3680 of 17 February 2010, in *Riv. dir. int. priv. proc*., 2010, p. 750 ss.

[39] See the English «P.O. Box Saga» (Family Court of England and Wales, Decision of 30 September 2014, *Rapisarda v. Colladon*, [2014] EWFC 35, in *marinacastellaneta.it/blog/wp-content/uploads/2014/10/Rapisarda-v-Colladon-Irregular-Divorces-2014-EWFC-35-30-September-2014.pdf*), where the English High Court was systematically sued on the basis of the artificial manipulation of the factual circumstances in order to take advantage of connecting factors set forth in Regulation 2201 of 2003 and obtain the application of English law – under which obtaining a divorce was easier – to the case). The Court declined jurisdiction noting the «systematic

Two other rules of the Regulations deserve specific attention. The first of them, the already mentioned art. 11, concerns the well-known mechanism of *forum necessitatis*. According to this rule «[w]here no court of a Member State has jurisdiction [according to the Regulation], or when all the courts pursuant to article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to article 9(2) or article 10, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected. The case must have a sufficient connection with the Member State of the court seized». This provision is, again, the result of a compromise. On the one hand, it is aimed at providing the parties with legal protection in any case. Depriving the couple from access to justice would, indeed, constitute a serious departure from basic human rights standards[40]. On the other hand, however, the rule clarifies the rigid requirements that must be met in order to take advantage of the *forum necessitatis*, which shall not be abused for forum shopping purposes.

The second relevant provision is article 9. According to this rule «[b]y way of exception, if a court of the Member State that has jurisdiction pursuant to [the Regulation] holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay» (§ 1). In this case, «where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with article 7, jurisdiction to rule on the matrimonial property regime shall lie with the courts of that Member State. In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to article 6 or 8, or the courts of the Member State of the conclusion of the marriage» (§ 2). This provision, at least in its first paragraph, recalls article 13 of Rome III Regulation (1259 of 2010), according to which «[n]othing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of

fraud and forgery» organized by the parties and highlighting a «conspiracy to pervert the course of justice on an almost industrial sole». See O. Lopes Pegna, *Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo*, in *Riv. dir. int.*, 2015, p. 397 ss.

[40] It is not by chance, indeed, that the *forum necessitatis* is provided also in Regulations 2201 of 2003 and 4 of 2009. See I. Viarengo, *Effetti patrimoniali delle unioni civili transfrontaliere*, cit., p. 45 ss.

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divorce proceedings to pronounce a divorce by virtue of the application of this Regulation». This rule was, however, criticized because it could lead to denial of justice when no courts are willing to decide a certain case. For this reason, article 9 of the Regulations has been enriched with the second paragraph, which ensures that the parties will have, in any case, a forum to which refer. The *forum necessitatis* is, also in this case, the last resort choice[41].

4. There is not too much to say about the *lis pendens* regime in the Regulations. It is inspired by the principle of legal certainty and it is aimed at granting a rigid application of the «first in time rule» (which inspires the entire jurisdictional setting in EU private international law), according to which – after that a EU court is seized with a matter under the scope of application of the Regulations – other courts shall stay and wait for the determination of jurisdiction of the firstly seized court. In this regard, art. 17 affirms that «[w]here proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established». The only issue lies in the identification of the same parties and the same cause of action. While the reference is undoubtedly made to the so-called triple identity test – parties, *petitum* and *causa petendi* – it is well-known that this test may be interpreted either strictly and formally, i.e. requiring perfect identity of the three elements, or in a substance-oriented way, that is by considering that when the parties represent the same centres of interests (meaning that they are, according to the English law definition, «privies») and their claims are based on the same facts, even if they are formally distinguished from the legal point of view[42], two legal proceedings can nevertheless be considered as identical[43].

In this regard, it is well-known that – in order to avoid abuses of the *lis pendens* mechanism set forth in EU regulations (and mainly, at that time, by article 21 of Regulation 44 of 2001, today article 27 of Regulation 1215 of 2012) – the CJEU has opted for the second possible interpretation. As to the same parties requirement, in *Drouot assurances*

[41] I. Viarengo, *o.u.c.*, p. 44.

[42] E.g. two claims arising from the same contract, one of which is aimed at obtaining payment and the other one of which is aimed at obtaining a declaration of denial of liability.

[43] See the discussion in G. Zarra, *Parallel Proceedings in Investment Arbitration*, Turin – The Hague, 2017, p. 135 ss.

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SA v. *Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne*[44], the Court clarified that the privity of interests between the parties in the two pending cases shall be ascertained by domestic courts on a case-by-case basis. This on the basis of the assumption that «there may be such a degree of identity between the interests of [the parties] that a judgment delivered against one of them would have the force of res judicata as against the other» (§ 19). With regard to the same cause of action requirement, in *Gubisch Maschinenfabrik KG* v. *Giulio Palumbo*[45], it indeed clarified that «[t]he concept of *lis pendens* pursuant to article 21 of the Convention of 27 september 1968 covers a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State».

In conclusion on this point, as the CJEU explained in *The Tatry*[46], the *lis pendens* regime in EU private international law is «intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) [of Regulation 44 of 2001], that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought». This conclusion may, in our opinion, be extended also to Regulations 1103 and 1104 of 2016[47].

Prior to conclude the *lis pendens* analysis, it is worth noting that –

[44] Judgment of 19 May 1998, case C-351/96, § 23.

[45] Judgment of 8 December 1987, case C-144/86, § 20.

[46] Judgment of 6 December 1994, *The owners of the cargo lately laden on board the ship «Tatry»* v. *the owners of the ship «Maciej Rataj»*, case C-406/1992, § 32.

[47] In any case, whenever the requirements for the application of the *lis pendens* rule are not met, article 18 (on related claims) may find application. According to this rule «1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. 2. Where the actions referred to in paragraph 1 are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof. 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings». On this provision see C. Ricci, *Giurisdizione in materia di regimi patrimoniali tra coniugi*, cit., p. 264 ss.

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while it is intended to avoid the circulation of conflicting judgments – this is not always a result that may be ensured. Indeed, article 37, letter *c*), of the Regulations – concerning the cases of non-recognition of judgments – exceptionally states that in case of contrast between two judgments prevalence shall be, in any case, given to the decision issued by the requested State (even if posterior in time). This rule has been inserted within the Regulations with the precise aim of avoiding the distorted effects that (subsequently) materialized, e.g., in the *Liberato* case (mentioned at the very beginning of this paper).

5. The Regulations set forth a universal system of applicable law, which applies regardless of the legal system which is recalled to regulate the matter (which can be an extra-EU law) and completely replaces the domestic provisions on applicable law (such as art. 30 and 32-*ter* of Italian law n. 218 of 1995)[48]. In order to ensure legal certainty, the Regulations exclude the possibility of *renvoi*[49], which is instead admitted by Regulation 650 of 2012[50]. Art. 21 of the Regulations also sets forth the principle of «unity of applicable law», according to which «[t]he 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».

The system is first of all based on party autonomy[51]. Indeed, according

[48] According to article 27, the scope of application of applicable law is the following: (*a*) the classification of property of either or both spouses into different categories during and after marriage; (*b*) the transfer of property from one category to the other one; (*c*) the responsibility of one spouse for liabilities and debts of the other spouse; (*d*) the powers, rights and obligations of either or both spouses with regard to property; (*e*) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property; (*f*) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and (*g*) the material validity of a matrimonial property agreement.

[49] Article 32 (titled «Exclusion of Renvoi») states that «[t]he 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».

[50] Article 34 (Titled «Renvoi») states that «1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*: (*a*) to the law of a Member State; or (*b*) to the law of another third State which would apply its own law. 2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (*b*) of Article 28 and Article 30».

[51] C. Grieco, *The role of party autonomy under the Regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new Regulations and other relevant instruments of European private international law*, in *Cuadernos de Derecho Transnacional*, 2018, p. 457 ss.;

to article 22, § 1, «[t]he spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following: (*a*) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or (*b*) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded». While for marriages this approach recalls what was already done in the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes[52], the possibility of a *professio iuris* is an absolute novelty with regard to registered partnerships; this is a good development from the perspective of ensuring equality between the two regimes, in particular in light of article 21[53] of the EU Charter on Fundamental Rights[54].

The choice of applicable law may also come at a subsequent time, provided that it does not prejudice the rights acquired by third parties in good faith on the basis of the previously applicable legal system. In particular, § 2 and 3 of article 22 states that «2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only. 3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law». Article 22, § 3, is the result of a balancing between two exigencies. On the one hand, by ensuring the retroactivity of the newly chosen system of law, this rule safeguard the parties from the risks related to the change, e.g., from a regime based on the separation of property to one which provides for the community of property. On the other hand, this is an expression of the principle of good faith which already found place in EU private international law. It is sufficient, in this regard, referring to article 3, para. 2 of the Rome I Regulation (593 of 2008).

E.A. Oprea, *Party autonomy and the law applicable to the European matrimonial property regimes in Europe*, in *Cuadernos de derecho transnacional*, 2018, p. 579 ss.

[52] The Convention is available at the *link hcch.net/en/instruments/conventions/full-text/?cid=87*.

[53] Article 21, titled «Non-discrimination», states that: «1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited».

[54] I. Viarengo, *Effetti patrimoniali delle unioni civili transfrontaliere*, cit., p. 48.

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The formal requirements of choice of law agreements are expressed by article 23, which is clearly formulated in order to ensure, firstly, legal certainty (requiring that choice of law agreements are «expressed in writing, dated and signed by both spouses»), and, secondly, the *favor* towards party autonomy. From the latter perspective, the regulation accepts that the writing requirement is satisfied by electronic means of communication[55] and, more importantly, § 3 of article 23 provides that «[i]f the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws». From the perspective of legal certainty, art. 23, with a provision which may be considered similar to art. 3, § 3, of the Rome I Regulation (concerning the application of domestic mandatory rules of the country with which a contract is entirely related in the cases where another country's law is chosen by the parties)[56], aims at avoiding abuses of the freedom of choice as to the formal validity of agreements concerning the patrimonial aspects of marriages. Indeed, § 2 of art. 23 provides that «[i]f the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply». In our opinion, exactly as art. 3, § 3, of the Rome I Regulation, this provision does not only refer to the overriding mandatory rules of the applicable law concerning the formal requirements of agreements as to patrimonial relationships between spouses (i.e. the *lois de police* which shall be applied in all cases – also in those with some elements of transnationality – because they are an expression of the fundamental principles of the relevant legal system) but also to the so-called simple mandatory rules governing property regime between spouses (i.e. those rules which express merely technical principles and do not claim to be applied to transnational cases). A similar rationale, together with the necessity (inspired by material justice) to protect the legitimate expectations of the parties of the choice of law agreement, seems to inspire § 4 of art. 23, according to which «[i]f only one of the spouses is habitually resident in a Member State at the time the agreement

[55] The lack of any reference to these means of communication has generated issues in other contexts, such as the interpretation of article II, § 1 (concerning the form of arbitration agreements), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[56] G. Zarra, *Autonomia negoziale e norme inderogabili secondo il regolamento «Roma I»*, in *Rass. dir. civ*., 2018, p. 229 ss.

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is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply».

The same formal requirements apply to matrimonial property agreements (art. 25), with the sole addition that «[i]f the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws»[57].

As to the substantive validity of choice of law agreements, according to art. 24 it is usually governed by the law regulating the entire patrimonial relationships in the couple. However, the principle of legal certainty and the need to protect the expectations of the parties led the EU legislator to provide that «a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seized if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1» (art. 24, § 2).

Should a *professio iuris* be lacking, applicable law is determined by article 26[58]. This rule, at § 1, provides that «[i]n the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State: (*a*) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that (*b*) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (*c*) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances». In this regard, while as to the concept of «habitual residence» it is possible to refer to the considerations already made with regard to jurisdiction, it is worth noting that this provision gives some relevance to the criterion of the «closest connection» or «proximity requirement». This is not the first time that – in matters of applicable law – EU private international law endorses this approach (see art. 4, § 3, of the Rome I Regulation)[59] and

[57] This addition has been considered worthless by I. Viarengo, *Effetti patrimoniali delle unioni civili transfrontaliere*, cit., p. 51.

[58] See F. Vismara, *Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (UE) n. 2016/1103 in materia di regimi patrimoniali tra coniugi*, in *Riv. dir. int. priv. proc.*, 2017, p. 359 ss.; D. Damascelli, *La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato ed europeo*, in *Riv. dir. int*., 2017, p. 1103 ss.

[59] «Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law

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this addition – which provides judges with a particular discretion – is certainly to be welcomed.

The criterion of proximity[60], whose applicability shall be assessed *in concreto* by judges, seems also to inspire the exception to the normally applicable law mechanism set forth by § 3 of art. 26[61]. According to this rule, «[b]y way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (*a*) of paragraph 1 [according to which the law of the common habitual residence of the spouses after the marriage] shall govern the matrimonial property regime if the applicant demonstrates that: (*a*) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (*a*) of paragraph 1; and (*b*) both spouses had relied on the law of that other State in arranging or planning their property relations»[62]. It is important to note that the particularity of this exception stays in the fact that, differently from other rules based on the criterion of proximity, its application is based upon a request by the parties and not on an *ex officio* evaluation by judges (such as in the case of art. 4, § 3, of the Rome I Regulation). This difference is possibly due, in this author's opinion, to the political scenario surrounding the enhanced cooperation leading to the Regulations, which indeed did not include the United Kingdom. This Country, due to its common law tradition which bases the choice of the applicable law on its «appropriateness» for the case (in light of the links existing between a certain legal system and the facts of the case)[63], has been the main supporter of the escape clause contained, e.g., in article 4, § 3, of the Rome

of that other country shall apply». See A. Leandro, *Art. 4. Legge applicabile in mancanza di scelta*, in *Nuove leggi civ. comm.*, 2009, p. 639.

[60] On which see P. Lagarde, *Le principe de proximité dans le droit international privé contemporain. Cours general de droit international privé*, in *Recueil des cours*, vol. 196, 1986, *passim*.

[61] See the wide discussion in F. Vismara, *Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (UE)*, cit., p. 364 ss.

[62] In any case, according to the same § 3, «[t]he law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State» and «[t]he application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (*a*) of paragraph 1»; but «paragraph [3]shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State».

[63] R. Fentiman, *International Commercial Litigation*, Oxford, 2015, p. 209 ss.

I Regulation. In this regard, it is to be noted that, according to the actual formulation of article 4 of the Rome I Regulation, in the cases where judges discretionally realize that there is a closest connection which leads to the application of a law which is different from the normally applicable one (i.e. the law of the habitual residence of the party having to carry out the characteristic performance in the contract), they may decide – again, discretionally – to apply such law[64]. It is not by chance that this provision has mainly been applied by English judges, since it is closer to their way of reasoning[65]. It seems, therefore, that in the context of the negotiations of the Regulations 1103 and 1104, the EU legislator wanted to keep this criterion within the possibly applicable law, but reducing its importance.

6. From a private international law perspective, one of the most interesting aspects of the Regulations concerns the material application of foreign law within the forum and is regulated by article 29, titled «[a]daptation of rights *in rem*». According to this rule, «[w]here 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».

This rule represents a significant example of the application of a private international law technique which was studied in depth by Giorgio Cansacchi in 1939 and has never been further adequately analysed[66]. The distinguished author talked, in this regard, of the «problem of adaptation», concerning the regulation of the cases where – after the recourse to foreign law is made – a foreign legal institution applicable pursuant to the private international law mechanism does not exist within the *lex fori* legal system. This circumstance may particularly materialize in cases regarding the recognition of foreign real estate rights inasmuch as many legal systems (such as Italy) have only a defined number (*numerus clausus*) of real estate rights.

[64] One of the reasons why they may decide to do so is to respect the legitimate expectations of the parties. See P.H. Neuhaus, *Legal certainty v. equity in the conflict of laws*, in *Law and Contemporary Problems*, 1963, p. 798. *Contra*, see W. Wengler, *The General Principles of Private International Law*, in *Recueils des Cours*, vol. 104, 1961, p. 363.

[65] On this criterion see R. Baratta, *Il collegamento piú stretto nel diritto internazionale privato dei contratti*, Milano, 1991, *passim*.

[66] G. Cansacchi, *Scelta e adattamento della norma straniera richiamata*, Torino, 1939 (reprinted in Napoli, 2019), p. 227 ss.

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This generates the problem of understanding whether and how a foreign unknown real estate right could be recognized in the forum. The possible solutions are: (*i*) not to recognize it – being it contrary to an allegedly fundamental principle of the forum (the *numerus clausus* of real estate rights); or (*ii*) trying *to adapt* the foreign real estate, i.e. to use the general principles of the *lex fori* and/or the specific regulation of similar institutions in order to find out a discipline for the foreign institution or right.

The first solution does not seem apt to satisfy the needs of modern private international law systems, which are inspired by openness towards foreign values[67]. The non-recognition of foreign legal institutions should be exceptional and may be dictated only by their contrariness to the fundamental values of the forum. In this regard it has already been demonstrated that the application of the public policy exception may find place only in the cases where foreign law violates the fundamental principles of the forum, while the contrariness of foreign institutions to merely technical principles does not justify the recourse to public policy[68]. As a consequence, the application of this defence to unknown real estate rights could be possible only provided that it is proved that the *numerus clausus* of real estate rights is the expression of a fundamental principle of the forum. This conclusion, at least as far as Italy is concerned, does not seem to be correct.

The recourse to the doctrine of adaptation seems, therefore, the most appropriate solution. In this regard, the Regulations' approach seems, again, a good compromise between the necessity to safeguard the peculiarities of domestic legal system and the opportunity to allow, in the best possible way, the functioning of private international law mechanisms. Indeed, while Recital 24 provides that the Regulations «should allow for the creation or the transfer resulting from the matrimonial property regime of a right in immoveable or moveable property as provided for in the law applicable to the matrimonial property regime» but they «should, however, not affect the limited number ('*numerus clausus*') of rights *in rem* known in the national law of some Member States», because a «Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law», article 29 provides judges with a mechanism aimed at giving effect to unknown real estate rights. The mechanism is adequately explained in Recital 25, stating that «in order to allow the spouses to enjoy in another Member State the rights which have been created or transferred to them as a

[67] See J. Basedow, *The Law of Open Societies*, The Hague, 2015, *passim*.

[68] G. Perlingieri e G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, p. 48 ss.

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result of the matrimonial property regime, this Regulation should provide for the adaptation of an unknown right *in rem* to the closest equivalent right under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it. For the purposes of determining the closest equivalent national right, the authorities or competent persons of the State whose law is applied to the matrimonial property regime may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law». As a consequence, provided that the foreign real estate is considered to be worthy of protection[69] in the forum's legal system, it will find legal discipline within the forum thanks to the mechanism of adaptation.

In conclusion, it is worth adding that Recital 26 of the Regulations recognizes that the «adaptation of unknown rights *in rem* as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation». This Recital confirms Cansacchi's idea that the functioning of private international law constantly and physiologically «needs concrete adaptations and amendments of the foreign law provisions»[70]. It also shows the favor of the European legislator towards the possible recourse to adaptation in all cases where it is necessary, as well as the need to allow, as far as possible, the circulation within the EU of domestic legal institutions aimed at safeguarding interests which are considered worthy of protection[71]. In all these cases, according to Recital 26, the EU legislator is providing interpreters with «a directive» to be followed, i.e. to *ad hoc* interpretatively modify the content of foreign law in order to render it, as far as possible, applicable within the forum[72]. We cannot determine in advance how such a directive is to be applied. It will be judges' task to take adequately into account the circumstances of concrete cases and understand how to better protect the interests and values involved in the dispute.

This approach is, in general, a tendency to be welcome, considering that it valorises the role of judges in allowing the circulation of values on the transnational level, favours the circulation of legal *status* and in-

[69] On the idea of worthiness, see G. Perlingieri, Il *controllo di meritevolezza degli atti di destinazione* ex *art. 2645*-ter *c.c.*, in *Foro nap.*, 2014, p. 54 ss.

[70] G. Cansacchi, *Scelta e adattamento della norma straniera richiamata*, cit., p. 23.

[71] On the normative value of recitals see A. Malatesta, *Il nuovo regolamento Bruxelles i*-bis *e l'arbitrato: verso un ampliamento dell'*arbitration exclusion, in *Riv. dir. int. priv. proc.*, 2014, p. 13.

[72] G. Cansacchi, *o.c.*, p. 246.

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stitutions, and allows not to oppose mere domestic technicalities to the full functioning of private international law[73].

7. In conclusion, it is worth highlighting that the Regulations give also relevance to domestic imperative norms in the private international law system concerning patrimonial regimes in the EU. In this regard, article 31 (titled «Public policy (*ordre public*)») provides that «[t]he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum», while article 30 (titled «Overriding mandatory provisions») states that «1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum». The reference respectively applies to those fundamental principles and rules which are considered so important as to require their application without exception also to transnational cases.

The two provisions find some clarification in Recitals 53 and 54, which clarify that both public policy and mandatory rules shall be applied in «exceptional circumstances» and on the basis of «considerations of public interest». In this regard, while it is today acknowledged that public policy is a *Generalklausel* composed by the fundamental principles of a State which are considered so essential as to require application in all cases (including those with a foreign element)[74] where the concrete application of foreign law generates a result which is incompatible with such principles, overriding mandatory rules («*lois de police*» or «*norme di applicazione necessaria*»)[75] are those domestic rules which claim to be applied in any case and regardless of the functioning of private international law rules[76]. However, while this distinction seems to assume that there is a significant substantive distinction to be drawn between public policy and mandatory rules (the former being an expression of fundamental principles and the latter being an expression of States' organizational needs) some authors argued that such a substantive difference is to be blurred

[73] G. Zarra, *«Scelta» e «adattamento» alla prova del diritto internazionale privato del XXI secolo. L'attualità del pensiero di Giorgio Cansacchi*, in G. Cansacchi, *o.c.*, p. XXI. For a previous similar opinion see G. Cassoni, *Considerazioni sugli istituti della poligamia e del ripudio nell'ordinamento italiano*, in *Riv. not.*, 1987, p. 234.

[74] This is the reason why we usually talk about «international public policy». See G. Perlingieri e G. Zarra, *Ordine pubblico interno e internazionale*, cit., p. 48 ss.

[75] A. Bonomi. *Le norme di applicazione necessaria nel regolamento «Roma I»*, in N. Boschiero (a cura di), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Torino, pp. 173-189.

[76] See, inter alia P. Francescakis, *Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois*, in *Revue critique de droit international privé*, 1966, pp. 1-18.

and that generally speaking the main difference between public policy and mandatory rules stays in the normative technique used to express them (general principles and specific rules, respectively)[77].

In this respect, art. 30 and Recital 54 specify that the application of overriding mandatory rules can be justified by considerations «*such as* the protection of a Member State's political, social or economic organisation» (emphasis added). Does this mean that overriding mandatory rules only exist in the fields of political, social and economic organization? In our opinion this approach would be misplaced. Overriding mandatory rules usually are specific rules which express more general principles which are considered fundamental for the legal foundation of a country in a certain historical period. As paragraph 2 of article 30[78] (in its first sentence) clarifies, «[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests». This means that the reference to the aspects of political, social or economic organisation, preceded by the words «such as» is only aimed at providing interpreters with an example of the mandatory rules justifying an exception to the normal functioning of the private international law mechanism.

In conclusion, considerations of public interest (expressed either by general principles – public policy – or by more specific rules – overriding mandatory rules) allow the application of imperative norms of the forum to a case concerning the transnational regulation of patrimonial regimes between couples and could lead to the non-application of foreign law and to the non-recognition of foreign judgments (in accordance with article 37). This is an essential safeguard which, again, mediates between the needs to allow the international circulation of values and that of safeguarding national identities. In this regard, it is finally worth noting that article 38 of the Regulations, titled «Fundamental Rights», provides that «[a]rticle 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in article 21 thereof on the principle of non-discrimination». This is a significant provision from two perspectives. First of all, it clarifies – even if it was pleonastic – that the EU Charter of Fundamental Rights constitutes an example of EU public policy, i.e. the general principles which

[77] A. Bonomi, *Le norme imperative nel diritto internazionale privato*, Zurich, 1998, p. 201 ss.

[78] This provision is inspired by art. 9, § 1 of the Rome I Regulation, on which see, *ex multis*, F. Mosconi, C. Campiglio, *Diritto internazionale private e processuale*, vol. 1, 9° ed., Torino, 2020, p. 274 ss.; U. Villani, F. Sbordone e M. Di Fabio, *Nozioni di diritto internazionale privato*, Napoli, 2012, p. 62 ss.

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represent the real core of the legal system of the EU and that shall be applied by domestic judges jointly with the international public policy of their countries[79]. Secondly, the provision officially recognizes the relevance of human rights within the context of private international law[80], and, from this angle, this can both mean that a foreign decision violating fundamental human rights (protected by domestic and EU law) shall not be recognized and that the respect for human rights may dictate the recognition of a certain decision in a specific case.

Abstract

In this paper, we briefly provide readers with an overview of (and an explanation of the rationale behind) the quite recent EU discipline enacted to govern the areas of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of (*i*) matrimonial property regimes (EU Regulation 1103 of 2016) and (*ii*) registered partnerships (EU Regulation 1104 of 2016).

In this regard, it is submitted that these EU Regulations have – in a delicate matter such as family law – successfully found a compromise between the opposed needs of ensuring the transnational circulation of values (which is one of the key goals of modern private international law, inspired by openness) and the safeguard of domestic fundamental interests. In this respect, the paper highlights the main aspects in which this tension is visible and explains how the EU legislator has tried to (in our opinion, successfully) accommodate both these needs.

Nel presente articolo si proverà ad offrire una panoramica della disciplina (e delle *rationes* ispiratrici della stessa) posta in essere dai Regolamenti europei n. 1103 e 1104 del 2016, in tema di giurisdizione, legge applicabile ed esecuzione delle decisioni in materia, rispettivamente, di regimi patrimoniali (*i*) nel matrimonio e (*ii*) nelle unioni civili registrate.

A tal riguardo, si argomenterà che questi regolamenti hanno – in una materia delicata come il diritto di famiglia – trovato un valevole compromesso tra le opposte esigenze di assicurare la circolazione di valori tra ordinamenti giuridici (uno degli obiettivi principali della moderna disciplina internazionalprivatistica, ispirata dall'apertura verso gli ordinamenti stranieri) e la salvaguardia degli interessi fondamentali del foro. L'articolo è volto a porre in evidenza gli aspetti nei quali la tensione appena descritta è maggiormente tangibile e a spiegare come il legislatore europeo abbia (a giudizio dell'autore, con successo) adeguatamente bilanciato queste esigenze contrapposte.

[79] See O. Feraci, *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012, *passim*.

[80] See, *ex multis*, P. Kinsch, *Droits de l'homme, droit fondamentaux et droit international privé*, in *Recueil des cours*, vol. 195, p. 1 ss.

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