AGREEMENTS REGARDING THE PROPERTY RELATIONS OF TRANSNATIONAL COUPLES AND THEIR EFFECTS UNDER THE APPLICATION OF THE TWIN REGULATIONS*

ACUERDOS SOBRE LAS RELACIONES ECONÓMICAS DE LAS PAREJAS TRANSNACIONALES Y SUS EFECTOS BAJO LA APLICACIÓN DE LOS REGLAMENTOS GEMELOS

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ABSTRACT: It is a true and verifiable fact that the family institution has evolved over recent decades in Europe and throughout the world, but not uniformly or at the same time. This is because it is influenced by social and cultural connotations specific to each State. All of which are respected under EU Regulations 2016/1103 and 2016/1104.

This work analyses the Twins Regulations, that gives the couples the possibility of choosing the jurisdiction (art. 7) and applicable legal system underpinning the property consequences of the marriage and registered partnerships (art. 22.1). However, we try to show you these rules absolute freedom of choice is not granted to the parties, because this freedom is conditional. This freedom of choice is limited for several reasons that we analysed in this paper.

KEY WORDS: Cross-border couples; property relations; agreement; applicable law; twin Regulations.

RESUMEN: *Es un hecho cierto y comprobable que la institución familiar ha evolucionado durante las últimas décadas en Europa y en todo el mundo, pero no de manera uniforme ni al mismo tiempo. Esto se debe a que está influenciado por connotaciones sociales y culturales propias de cada Estado. Todo lo cual se respeta según los Reglamentos de la UE 2016/1103 y 2016/1104.*

Este trabajo analiza los Reglamentos gemelos, que dan a las parejas la posibilidad de elegir la jurisdicción (art. 7) y el ordenamiento jurídico aplicable que sustenta las consecuencias patrimoniales del matrimonio y las uniones registradas (art. 22.1). Sin embargo, tratamos de mostrarles que la libertad de elección que se le otorga a las partes no es absoluta sino condicional. Esta libertad de elección está limitada por varias razones que analizamos en este artículo.

PALABRAS CLAVE: *Parejas transfronterizas; relaciones económicas; acuerdos; ley aplicable; reglamentos gemelos.*

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I. EQUAL TREATMENT THROUGH SEPARATE REGULATIONS IN THE PROPERTY RELATIONS OF CROSS-BORDER COUPLES.

The Regulations 1103/2016 and 1104/2016, which came into force on May 29, 2019[1], share the same structure, objectives and practically all of their literality, although the first regulates matrimonial property regimes while the second enshrines the property consequences of registered partnerships, following the principle of equality in the exercising of the rights that correspond to it, both for the spouse and for the registered partner.

Both Regulations, as we can see, constitute a further advance towards the unification of private international family law, by determining a personal, material, temporal and territorial scope of application, directed more to the creation of a uniform framework for conflicting rules[2], allowing those issues that arise within the cross-border family to be resolved, than to the unification of its substantive norms.

And although both rules are binding in their entirety, they are only directly applicable in those Member States participating of the enhanced cooperation in the field of jurisdiction, applicable law, and the recognition and enforcement of

1 Council Regulation (EU) 2016/1103 of 24th June 2016, establishing enhanced cooperation in the field of jurisdiction, applicable law, and the recognition and enforcement of decisions on matrimonial property regimes, and Regulation (EU) 2016/1104 of the Council of 24th June 2016, which establishes enhanced cooperation in the field of jurisdiction, applicable law, and the recognition and enforcement of decisions on the property consequences of registered partnerships.

2 Dicey, Morris and Collins: *The Conflict of Laws*, 15th ed., Sweet & Maxwell Ltd, October 2012, Vol. 2, p. 37.

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decisions relating to the property regimes of international couples, both in matters of matrimonial property regimes and the property consequences of registered partnerships, under Decision (EU) 2016/954, or by virtue of a decision adopted in accordance with Article 331, section 1, second and third paragraph of the TFEU (Whereas 13).

And as a common element they both refer only to cross-border situations, leaving any purely national case out of their scope[3]

Consequently, when evaluating a specific case, we must pay attention to the criteria that will define its cross-border nature (or not), and only when we are in the first scenario, should we determine the repercussion based on the criteria that both European Regulations establish.

This repercussion will be assessed based on the relationship of the parties. If we are dealing with a cross-border marriage, Regulation 2016/1103 will apply whereas, if it is a cross-border registered partnership, Regulation 2016/1104 will be applicable.

1. Equal treatment and non-discrimination without equalization by analogy.

The option of having two Regulations, popularly known as The Twins, is due to the recognition of giving each institution its place, but without identifying them in an analogous way, thus following the line established both by the European Court of Justice and by the jurisprudence of other Member States, as in the case in Spain.

The jurisprudence of the Spanish Supreme Court has constantly established the absence of analogy between both realities[4], because it does not accept equality or assimilation of the registered partnership to marriage, but limited to applying certain protective norms in favour of the party that has been harmed by reason of cohabitation in order to avoid unjust harm to the weakest.

It is determined, therefore, that there is no identity between marriage and registered partnerships, since it would be unjustifiable not to respect the presumed will of the cohabitants in a voluntary legal agreement, either as a married couple or as a registered partnership, given that Spain admits and regulates both options. In such a way, those who joined together and yet could have married, did so precisely to be excluded from marital discipline and not to be subjected to it; therefore, acting against such a decision would not conform to the values and principles

3 Gallant, E.: "Le nouveant droit international privé européen des régimes patrimoniaux de couples", *Europe: actualité du droit communautaire,* 2017, Vol. 27, No. 3, pp. 5-10.

4 The majority opinion of our jurisprudence since 1992 with the STS (Supreme Court Judgement) of 21st October 1992.

established in our legal system; that is to say, there is no analogous application of the matrimonial regulations to extramarital unions because this would constitute a flagrant violation of the principle of individual freedom and would be equivalent to imposing legal effects on the partners that, at the time, they did not want.

Nor can we say that we find a legal loophole that protects the analogous recourse[5] - that there are countries that do not regulate this does not mean that they are not aware of the casuistry, simply that they do not have a registry where the union is recorded; nor does this mean that there is a void that must be filled by the legal framework that regulates marriage, as this would involve establishing a de facto regulatory application that runs contrary to exercising their freedom.

2. Jurisprudential arguments of the Spanish Supreme Court and the CJEU.

The Spanish Supreme Court, in ruling 3544/2012[6], affirms that *more uxorio* unions are more and more numerous, and constitute a social reality, which, when they meet certain requirements - voluntary constitution, stability, permanence over time, and with the public appearance of conjugal cohabitation similar to marriage - they have deserved recognition as a family modality, although there is no equivalence with marriage; consequently, the legal regime for this cannot be transposed, except for some of its aspects.

The awareness of the members of the union to operate outside the legal regime of marriage is not a sufficient reason for disregarding the important consequences that might occur in certain cases (...), it is necessary to declare that the de facto union is an institution that has nothing to do with marriage. And even more today, where many states regulate homosexual marriage and unilateral divorce, it is easy to argue that the de facto union is made up of people who do not want to enter into marriage, with its attendant consequences, at all. Therefore, in Spain, both the Supreme Court[7] and the Constitutional Tribunal[8] consider that the application of their own marriage rules by *analogia legis* should be avoided.

5 Álvarez Lata, N.: "Las parejas de hecho: perspectiva jurisprudencial", *Derecho privado y Constitución,* 1998, No. 12, pp. 7-68.

6 STS of 10th May 2012. Appeal number (836/2011). Roj: STS 3544/2012 - ECLI:ES:TS:2012:3.

7 STS, 1st Chamber, of 17th January 2003 (Appeal: 1270/1998), citing the judgments of 10th March 1998 and 27th March 2001. STS, 1st Chamber, of October 19th 2006 (Appeal 4985/1999, STS, of 12th September 2005, in the Plenary of the 1st Chamber, (Appeal 980/2002) and the STS, 1st Chamber, of 16th June 2011 (Appeal 10/2008).

8 Judgements of the Constitutional Court 184/1990 and 222/92. STC (Constitutional Court Judgement) of 222/1992. Both judgments determine that marriage and extramarital cohabitation are not for all purposes "equivalent realities" STC184/1990 (3rd legal basis). This doctrine of the Spanish Constitutional Court concludes that "de facto unions and marriage are different realities, so automatically translating the entire normative complex referring to marriage to the first reality is not possible, thus no injury to equality is appreciated in denying the requested license ", because a consequence relevant to the interests of this decision is that, between both realities, no reason is identified to justify a possible analogous application of the 15-day marriage license regulation to grant it to a member of a *de facto* (common-law) union. This

For its part, the CJEU, in its 2008 judgment in the case of Metock et al.[9], the spouse is likened to the common-law partner when the spouse, under the definition in Article 2.2 of Directive 2004/38, recognises the spouse as a member of the family on a level of equality and non-discrimination; however, this is not by analogous application since they are two different institutions (marriage and a registered partnership) that are formed with the freedom of the parties according to the formal aspects that define the legal agreement[10].

This line of argument from the CJEU can be found in other judgments where the Court of Justice has declared, in relation to the registered life partner, as regulated in the German Law on registered stable partnerships (*Gesetz über die Eingetrangene Lebenspartnerschaft*)[11], that comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses, and of the members of the registered stable partnerships, as these result from the applicable domestic laws that are pertinent in light of the object and the conditions for recognising the provision that the main lawsuit deals with, without such comparison having to verify whether the national law has carried out a general and complete legal equalisation of the relationship for the stable registered partnership as for a married couple (see the Römer judgment, section 43)[12].

This legal doctrine of the CJEU was the one that the Spanish Supreme Court established by majority opinion (STS, 21st October 1992)[13] in which, without ceasing to apply the principle of equality as spouses or as partners *more uxorio,* under Articles 32 and 39 of the Spanish Constitution, the application of the same legal regime was not equalised under analogy for the purpose following the break-up.

The argument is based on the principle of non-discrimination, which is the motivation for the Twin Regulations, developed to respect fundamental rights and to observe the principles recognized in the Charter of Fundamental Rights of the European Union in the application of both Regulations (Whereas 73 of Regulation 2016/1103 and Whereas 71 of Regulation 2016/1104).

harmonizes the jurisprudence of the Constitutional Court with the jurisprudence of the Spanish Supreme Court, whose First Chamber has constantly established an absence of analogy between both realities.

9 CJEU in the judgment of 25th July 2008, Metock et al., C-127/08, EU: C: 2008: 449, paragraphs 98 and 99. ECLI identifier: ECLI:EU:C:2008:449.

10 It should be noted that it is mostly the Member States who regulate the freedom of agreement, but with some differences in the formalization and timing of carrying them out. Thus, Austria, Croatia, Germany, Spain, Estonia, France, Greece, Finland, Italy, Lithuania, Latvia, Luxembourg, Poland, Malta, and the Netherlands, among other States, admit agreements both before and after the celebration of marriage.

11 Judgment of the Court of Justice (Fifth Chamber) of 12th December 2013, case C 267/12, Document 62012CJ026. ECLI identifier: ECLI:EU: C:2013:823.

12 Judgement of the Court (Grand Chamber) of 10th May 2011. Jürgen Römer v. Freie und Hansestadt Hamburg Case C-147/08. Judgement ECLI:EU: C:2011:286.

13 The majority opinion of our jurisprudence since 1992 with the STS (Supreme Court Judgement) of 21st October 1992.

II. PROPERTY CONSEQUENCES OF TRANSNATIONAL PARTNERSHIPS.

It is a true and verifiable fact that the family institution has evolved over recent decades in Europe and throughout the world, but not uniformly or at the same time. This is because it is influenced by social and cultural connotations specific to each State, all of which are deserving of respect under EU Regulations 2016/1103 and 2016/1104.

We appreciate this diversity in parallel in the legal regimes of marriage and registered partnerships in the different Member States of the EU, which present different regulations according to the national law[14], determining the family model and the legal regime of marriage or partnership, which is the reason there is no unification in this regard across Europe.

States such as Italy, Romania, Slovakia, Greece and Lithuania, only regulate marriage between people of different sexes; Croatia and Slovenia only regulate registered partnerships between people of the same sex; and in Denmark, Finland and Germany, people of the same or different sex are encouraged to marry, if able to do so, instead of forming an unmarried partnership[15]; while Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia do not regulate registered partnerships or same-sex marriage.

Thus, the heterogeneity and the dynamic family model that becomes contextualized in each society over time is evident, as can be seen in its evolution across European territory, where in the last two years, there have been developments in thirteen European countries that affect their law. Germany, Malta, the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, Luxembourg, Finland, Ireland, Austria (as of 2019) and the United Kingdom (including Northern Ireland as of 2019) have approved marriage between people of the same sex, granting the same rights in full to the family based on partnerships of the same or different sexes[16].

14 Pintens, W.: "Europeanization of Family Law", *Perspectives for the Unification and Harmonization of Family Law in Europe* (K. Boele-Woelki), Intersentia, Antwerp/Oxford/New York, 2003, pp. 9-11.

15 Cazorla González, M. J.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio después de la entrada en vigor del reglamento UE 2016/1104", *Revista Internacional de Doctrina y Jurisprudencia,* Volúmen 21st December 2019, pp. 92-93.

16 Cazorla González, M. J.: "Introduction", in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid, 2020, pp. 15-19. Recalls the judgement of the European Court of Human Rights case of Rees v. United Kingdom. Judgement 17th October 1986. ECHR. 1986/11. A married person changes sex but does not want to change the marital status to married even though the UK does not regulate same-sex marriage because he has a daughter. The court understands, the annotation in the birth register would entail some kind of change in the British system of recording civil status; the practice in other States has shown that this was not an inevitable consequence.

1. Matrimonial property regimes.

Although Regulation (EU) 2016/1103 does not modify the substantive law of the States, since its function is to strengthen cooperation in matters of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes, it is necessary to know the substantive law of each of the States involved, not only to resolve conflicts when they arise, but also as information prior to exercising the right of option that the parties have in many States to choose the applicable law, or when they do not do, then for the place of marriage or residence. In this sense, we understand that the law is more useful from a temporal and property point of view if it is informed and advised before the problem exists, which is the point the marriage crisis emerges or because of the death of one of the members, without any prior choice having been decided.

The differences between one applicable law and another in each State of the European Union are decisive for liquidating or dissolving the property regime, since the distribution in a community property regime is not the same as when assets liquidation takes place under the deferred or limited property separation or community property regime.

Currently, the 27 Member States have a legal property regime applicable in the absence of an agreement, so there is no legal vacuum in this regard and, consequently, once residence has been determined, or failing that, common nationality or, in the absence of this, the place of greatest connection, the legal property regime regulated in that country will be applied.

However, it must be borne in mind that, although the United Kingdom is no longer a Member State, its citizens have married European citizens, and although it is a State that did not participate in the enhanced cooperation since it already anticipated its departure, what is most important now is to know that neither England nor Wales regulate a legal property system, although Scotland does, which determines the separation of property in the absence of an agreement made when the couple marries. In this sense, it can be said that the advantage of the English system would be the possibility of devising a solution tailored for each couple, adapted to their individual needs, because in England and Wales, the statutes provide a framework in which judges can redistribute property[17].

Furthermore, matrimonial regimes have important and direct effects for third parties. Therefore, it is evident that the rights, powers, and responsibility of a third party with respect to one or both spouses, may depend on the substantive rules

17 Cooke, E. et al.: *Community of property. A regime for England and Wales*, London: The Nuffield Foundation/ Policy Press, 2006, 2, available at: https://www.reading.ac.uk/web/files/law/CommunityofProperty_Version021106.pdf

of the property regime. Consequently, a third party may be legally prejudiced by the application of one property regime over another.

One should consider that, although the legal matrimonial property regime in most European countries is the community of property (Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, and Slovenia), in others this is not the case, as in Denmark, Germany, Finland and Sweden where a deferred community property system governs; and still others have a separation of assets regime: Austria, Cyprus, Greece, Ireland or multi-legislative territory countries such as Scotland in the United Kingdom and the regions of Catalonia and the Balearic Islands in Spain[18].

In general, one should recall that Regulation (EU) 2016/1103 determines that, in the absence of choosing the law applicable to the matrimonial regime, the criteria for determining said choice are found in Article 26, and that they will not only apply to marriages celebrated after 29th January 2019, but also those celebrated previously where the spouses have chosen the applicable law and have expressly declared so, following the formalities established in the Regulation.

Given the premises, the results are diverse. Thus, a marriage between a French person and a Spanish person with Andalusian *civil residence* (*vencindad civil*), who decide to reside in one or another State, in the general scope of the regulation there are not many differences because both countries participate in enforced cooperation, they recognize marriage between people of the same or different sexes, with both regulating the principle of free choice of legal regime, and allowing agreements to be made before a notary with a 'community of property' as regime. Therefore, there would be no substantial differences *a priori*, beyond the limits and requirements established by each Code, and whose rules should be followed.

The situation can become complicated if we introduce a country like Spain, with multiple regulations applicable both to matrimonial property regimes and to the diversity of de facto partnerships that exist today. This means that when a citizen of any Member State marries a Spanish person, or when two citizens move to Spain to live, depending on their residence (by birth or by continuous residence – "vecindad civil")[19], the applicable legal regime will be different. For example, a Finn and a Spanish woman (in a registered partnership under Finnish law) with Catalan civil residency (Law 25/2010 of 29th July) are nationals of countries that participate in enhanced cooperation, recognize and regulate

18 https://www.euro-family.eu/eu-database

19 Pérez Vallejo, A. M. and Cazorla González, M.J.: Spain, pp. 610-657, *Family Property and Succession in EU Member States National Reports on the Collected Data* (ed. L. Ruggeri, I. Kunda, S. Winkler), *Sveu□ilište u Rijeci, Pravni fakultet*/University of Rijeka, Rijeka, 2019. https://psfes.euro-family.eu/pagine-15-results

marriages and domestic partnerships. between people of the same and different sexes and have 'separation of property' as the established legal regime, although since 2017 a Finnish registered partnership can become a marriage if the parties file a joint application in the Civil Registry; however, if they decide not to do so, the parties continue to live as a registered partnership. New partnerships can no longer register, while in Catalonia they can register through the Permanent Partnership Registry. Therefore, they can register in the Catalonian Registry, and their relationship will be recognized in Finland.

2. Property consequences of cross-border registered partnerships.

The Regulation (EU) 2016/1104, following the provisions of Article 3.1 b), regulates only the property consequences of registered partnerships with cross-border repercussions, regardless of the country where they are registered. Such patrimonial effects are defined as 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".

Another aspect to assess will be the neutrality of the EU Regulation with respect to the inclusion or not of same-sex couples, as this implies that in all cases arising related to their property regime, it will be essential to resolve the prior question of whether or not they are included in its scope of application, a matter that will be resolved differently depending on the EU Member State where the dissolution of the partnership occurs, that this knows about the succession of one of the members of that couple, where they want to make the marriage contract, etc.[20].

The truth is that one of the fundamental problems of registered partnerships is the lack of agreement in the property area when the partners want to separate. The regulation of the property consequences of these partnerships varies greatly from State to State, even more so if one considers that these consequences include not only the possible property regime that may have been created when the partnership was formed, but also other property consequences that may derive from having had a life in common, such as nourishment or a pension due to an imbalance with the other member, or common children, the fate of the home and the family furnishings, or the possible inheritance rights of the surviving member with respect to the deceased's estate. To this can be added other issues, such

20 Soto Moya, M.: *Uniones transfronterizas entre personas del mismo sexo*, Tirant lo Blanch, Valencia, 2013, pp. 17-32.

as the possibility of claiming compensation for damages due to the death of the partner or the possibility of subrogation in the renting of the family home[21].

Let's look at an example dealing with the differences between an Austrian and a Latvian, where the State of the latter not only does not regulate registered or unregistered couples, but only recognizes heterosexual marriage and, moreover, does not participate in enhanced cooperation. Here, we must answer two questions: on the one hand, in the absence of a choice of applicable law, could the Austrian or Latvian law apply if the couple settled in Austria? The answer is affirmative in accordance with paragraph 1 of Article 26, and the separation of property would govern in the absence of an agreement. Nevertheless, they might get married in Austria and then move to Latvia and take up residence.

In such a case, as a Member State, it cannot claim to consider same-sex marriage as a matter of public order because the free movement of people within Community territory is a limit that cannot be violated. Therefore, when it comes to liquidating the assets, it is not the same to apply the property separation system established in Austria as the community property system that is applied in Latvia, and the Latvian court could end up having the jurisdiction to resolve it by heeding Austrian law, since the marriage was validly celebrated in a Member State.

The fundamental difference with respect to matrimonial property regimes is that the members of the registered partnership do not have a legal framework in the absence of an agreement (or pact) that attributes property consequences. That is why we find that jurisprudence has resorted to concepts such as 'unjust enrichment' to compensate for the economic imbalances that may have arisen from the dissolution of the partnership, because as we have seen in the previous section, it is not possible to apply marriage provisions by analogy.

III. THE FREEDOM OF CHOICE IN THE PROPERTY RELATIONSHIPS OF CROSS-BORDER COUPLES.

Assessing the impact of freedom of choice on regulating relationships between individuals, generated in the European legal framework and configured in the field of national and international private law[22], there is a marked plurality of laws on civil matters that coexist on an equal footing.

The consequences of such pluralism are the conflicts of laws that arise from the existence of multi-localized private-legal relationships, from the moment that

21 Cebrian Salvat, M. A.: "The property consequences of unregistered couples in Spanish private international law", *Cuadernos de Derecho Transnacional*, March 2018, Vol. 10, No. 1, pp. 127-143.

22 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations on Matrimonial and Patrimonial Property,* Oxford, March, 2018, p. 7.

they present elements of contact, subjective or objective, with at least two of the legal systems that coexist in Europe, whose heterogeneous private relations affect Interregional Law when the issue arises between two internal legal systems in a multi-legislative State.

Faced with this plural reality, solutions must be found when a conflict between rules arises, respecting the equality between the civil legal systems, applying both Regulations, which introduce freedom of choice as the preferred criterion when determining both the competent court and the applicable law[23].

From our point of view[24], there are more advantages than disadvantages derived from applying the Regulations under freedom of choice than in the absence of choice by the parties, because their economic interests will be more appropriately supported both by their agreeing on the court and on the applicable law, provided that they are informed before each agreement on the limits, consequences, and requirements for its validity that are required before carrying it out, avoiding confusion that eventually end up in the opposition of one of the parties, or even in totally or partially invalidating the agreement, which would not produce the intended effects either because it is null or void, or because it causes harm to third parties in good faith; or, because being valid, it is ineffective (when it is necessary to redress the injury or harm suffered by one of the contracting parties as a result of the agreement entered into).

The areas of the Twin Regulations under which it is possible for cross-border marriages and registered partnerships to establish an agreement are the agreement to choose the forum, the choice of the applicable law, and any property agreement of the cross-border couple by which they organize the property consequences of their marriage or registered partnership.

To find out which court and which applicable law have jurisdiction, it is necessary to analyse the two regulations from an international perspective, as a consequence of the different nationality of its members, their residence in a country other than that of their nationality, the possession of property in different States of the European Union, or where the divorce, dissolution of the partnership, or death of one of the members took place, if in countries other than those of origin.

1. Choice of forum agreement.

Under Article 7 of both Regulations, the spouses or members of the registered partnership are allowed to make use of their freedom of choice to agree on which

23 De Sousa Gonçalves, A. S.: "El principio de la autonomía de la voluntad en los reglamentos europeos sobre derecho de familia y sucesiones", *Diario La Ley*, 2016, No. 8835, p. 78.

24 Cazorla González, M.J. and Soto Moya, M.: "Material, territorial, and temporal scope of the twin Regulations", Chapter IV, Intersentia, 2021 (in press).

court will have jurisdiction to hear questions relating to their matrimonial property regime or property consequences of their partnership.

However, this freedom of choice is limited for several reasons:

- Firstly, it will only be possible to submit to the Courts of a State that is party to the Twin Regulations; that is, one of the 18 States that are part of the enhanced cooperation. This is because, if they agree to a court in a non-participating State, the consequences of their choice will not be guaranteed by the Regulation. However, it should be assessed whether this choice could be validly concluded in accordance with the national rules of private international law of that State and, therefore, if the agreement agreed by the parties to choose the court would be respected.

- Secondly, the choice is limited to the Courts of a State whose law is applicable by virtue of Article 22 or Article 26, paragraph 1, a) or b) for spouses or Article 22, and failing that, Article 26, Section 1, for registered partnerships[25]; as well as to the Courts of the Member State in which the marriage was celebrated or the registered partnership was registered - except in those cases where the objective is to challenge the jurisdiction, or applying the connection rules through Article 4, which refers to jurisdiction in the event of the death of one of the members of the couple.

For both marriages and registered partnerships, the time when they can agree on the choice of forum may be before or after the celebration of the marriage or registration of the partnership.

- and thirdly, when a lawsuit for divorce, legal separation or marriage annulment is brought before a court of a Member State under Regulation (EC) 2201/2003, the courts of that Member State shall be competent to decide on the matrimonial property regime that arises in connection with said lawsuit; that is to say, the spouses in this scenario will not be able to make use of their freedom of choice due to the *vis atractiva* of Regulation 2201/2003[26].

And for registered partnerships, the agreement can be celebrated "in silence" at the beginning of the legal proceedings by means of the respondent appearing before a court in which the applicant has initiated the procedure (Article 8),

25 Peroz, H.: "Le nouveau règlement européen sur les regimes matrimoniaux", JPC èd, 22nd July 2016, étude 1241, p. 35.

26 Specifically, the competent Courts must be the same as those that heard the divorce (separation or annulment), if their jurisdiction has been based on Regulation 2201/2003, in the forums provided for in Articles 3.1 a) parts 1-4 or 3.1 b). If the jurisdiction has been based on parts 5-6 for the divorce court to be seized, the spouses have to agree.

provided that the court has also been chosen by an express choice of court agreement (Article 7)[27].

Ultimately, it is possible to enter into an agreement to choose the court of a Member State by applying Article 7 of Regulation 2016/1103 and Regulation 2016/1104, provided that said country participates in enhanced cooperation, and is chosen to resolve the questions related to the matrimonial property regime or the property consequences of the registered partnership, leaving the formalized agreement (art. 7.2 of the Regulation[28]) in two different areas[29]:

- When the agreement is made based on any of the scenarios laid out in Article 6 of the Regulation, where situations related to habitual residence or nationality are described, so that they can choose the court of a member state whose law is applicable by virtue of Article 22 (valid agreement by choice) or Article 26.1 a) or b) (valid agreement in the absence of choice).

- When the agreement is made by choosing the Courts of the Member State where the marriage or registered partnership was entered into.

Since both regulations became applicable as of 29 January 2019, any lawsuit filed, judgement or other acts issued that day, at a later date, or by voluntary submission of the parties, are thereby determined under the rules contained in Regulation 2016/1103 for marriages, and in Regulation 2016/1104 for registered partnerships, in matters that affect the property field, and that deal with different forums according to the circumstances, since this is not the same as when the relationship terminates due to death (connected to successions; art. 4), that by divorce, separation or annulment of the marriage, or the dissolution or annulment of the registered partnership (art. 5), or attending to the express submission (arts. 6 and 7) or tacit forums (arts. 4, 5.1 and 8), to the objective forums (art.6), *forum necessitatis* (art. 11), by alternative jurisdiction if the court is inhibited (art. 9), or by subsidiary jurisdiction attending to the location of the immoveable property (art. 10 of the Regulation).

27 Dougan, F. and Kramberger Þkerl, J.: "Guidelines for registered partnerships under Regulation (EU) 2016/1104", pp. 44 and 45, in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid, 2020.

28 Judgment of the Court of 14th December 1976. Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH. Case 24-76. European Court Reports 1976 -01831. ECLI identifier: ECLI:EU: C:1976:177.

29 Cazorla González, M.J.: "Guidelines for determining the competent court in matters of matrimonial property regimes", p. 20, in "Guidelines for professionals on cross-border family property and succession consequences. A collection of model acts accompanied by comments and guidelines for their drafting" (ed. Cazorla González, M. J. and L. Ruggeri), Dykinson, Madrid, 2020.

Within this framework of respect and legal certainty, both Regulations speak of competent jurisdictional bodies, making mention not only of the courts but also of notaries, who are assigned jurisdictional functions in some Member States; under application of Article 3.2.[30], they are non-judicial authorities that exercise jurisdictional functions under conditions equal to those of the courts, unless we are facing a lawsuit, in which case the jurisdiction will correspond to the competent court.

However, notaries have been designated in some Member States as courts within the meaning of Article 3.2 of the Regulations, and are consequently bound by these competency rules, although they can continue to act freely in the drafting of a contract. marriage or choice-of-law agreement. This is the case in Spain, Luxembourg, and the Czech Republic, among others.

In most countries, Germany, Austria, Belgium, Bulgaria, Italy, Malta, the Netherlands, Portugal, and Slovenia, notaries are not bound by these competency rules (unless they are appointed by their State in compliance with the provisions of 3.2) and therefore they can act freely, for example, in the drafting of a marriage contract or a choice-of-law agreement. The situation in Greece is similar, where the notary has the power to draft a cohabitation contract but not a marriage contract; or in Slovenia, which from 15 April 2019 notaries have been able to draft a formal marriage contract (a notarial act). Notaries in the Netherlands are not considered judicial bodies within the meaning of this Regulation.

Both regulations prohibit the courts and other competent authorities (such as notaries in some States) from applying a public order argument in refusing to recognize or enforce a decision, a public document or a judicial transaction of another Member State when this is contrary to the Charter and, in particular, Article 21, on the principle of non-discrimination[31].

2. Agreement on the applicable law.

EU Regulation 2016/1103 gives the spouses the possibility of choosing the applicable legal system underpinning the property consequences of the marriage. And so, in the same sense, does EU Regulation 2016/1104, for registered partnerships. The rules for these purposes are those provided for in Article 22,

30 Opinions of the Advocate General Y. Bot, presented on 28 February 2019. WB v. Notariusz Przemysława Bac. Request for a preliminary ruling from the Sąd Okręgowy w Gorzowie Wielkopolskim. Case C-658/17. European Jurisprudence Identifier: ECLI: EU: C: 2019: 166. CELEX code: 62017CC0. Specifically, in Whereas 29 of the Regulation, the term judicial body must be understood in a broad sense, including notaries as competent courts in matrimonial property regime matters (Whereas 30 and 31), provided that they comply with the provisions of art. 3 of the Regulation, and in their respective States they can exercise their powers, so that the acts issued by notaries in this matter circulate in accordance with the provisions of the Regulation regarding public documents.

31 Whereas 54 of Regulation 2016/1103, and 53 of Regulation 2016/1104.

Section 1, in which absolute freedom of choice is not granted to the parties. This freedom is conditional on the chosen law having a close connection, either with their habitual residence or with their nationality.

Both Regulations offer the partners the possibility of choosing the law applicable to property consequences (Article 22.1), but limiting its scope of application, that is, without giving the parties absolute freedom of choice:

1. The first limits the freedom of choice of the parties by subjecting it to the condition that the chosen law be closely related to the parties, attending to the criterion of their habitual residence or to the criterion of their nationality.

In this way, the European legislator grants a limited *freedom of choice*[32]*;* because the choice-of-law agreement must have a certain connection with the real situation of the parties: either the State Law, in which both or one of them have their habitual residence, or the Law of the State of nationality of one of them, thus favouring the conclusion of pacts, agreements or settlements, and also allowing them to agree the legal system applicable (the choice of applicable law agreement) at the base of the property consequences of the marriage or registered partnership. The provisions of this agreement of choice become the first point of connection[33].

Consequently, there is no freedom of choice of applicable law in the sense that the parties can freely establish the agreements, clauses, and conditions that they deem appropriate, rather it is limited to the legal system of the habitual residence or nationality of both, or of one of them (Whereas 45).

2. The second limit is found in the scope of temporal application, in that the effects of the agreement will not be retroactive. Here, it should be noted that the spouses/partners are allowed to choose the applicable law under Regulation 2016/1103 if the marriage was celebrated before 29 January 2019 and by Regulation 2016/1104 if the partnership was registered before the aforementioned date, provided that they agree to it in accordance with the provisions of art. 22 of the respective Regulations, thus modifying the applicable law in force up to that time to resolve possible conflicts of laws with the express choice of both parties, and without retroactive effects, unless expressly provided for on their part. Both

32 Vinaixa Miquel, M.: "The freedom of choice in the recent EU regulations with regard to matrimonial property regimes (2016/1103) and the property consequences of registered partnerships (2016/1104)", *Internal, European and International civil public order.* Act in homage to Dr Núria Bouza Vidal, *Indret*, 2017, pp. 302-309; Grieco, C.: "The role of party autonomy under the regulations on registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations on European Private International Law", *Transnational Law Journals*, 2018, No. 2, pp. 457-476.

33 Pérez Vallejo, A.M.: "Matrimonial property regimes with cross-border repercussions: Regulation (EU) 2016/1103", in *The property relationships of cross-border couples in the European Union* (ed. M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler), Edizioni Scientifiche Italiane, Napoli, 2020, pp.: 15-27.

spouses and members of registered partnerships can make agreements before and after the celebration of the marriage or registered partnership.

Therefore, it must be the law of the State either in which both, or one of them, have their habitual residence, or of the State of nationality of either of them (in both cases referring to the moment the agreement was made). Nevertheless, there are exceptions that we must assess before choosing the applicable law because each regulation establishes the materials that are freely available from those that are not, as would be the case of a marriage where the man is a Cuban national and the woman has Italian nationality.

In this case, Italy recognizes the premarital and postmarital agreements that both agree, but Cuba establishes that the agreements of the parties cannot derogate the provisions of the Cuban legal regime[34]. Therefore, if the closest connection to which Regulation 1103 applied were the application of Cuban law, the alternative to ensure the pacts agreed by the parties could not meet the validity requirements, and a new agreement on the applicable law would be needed before the competent court where the application for separation or annulment is presented.

On the other hand, we must remember that the choice of law by mutual agreement, although it can change at any point, is always set at the time of the agreement in order to protect third parties that could be affected by the agreements made by the spouses or members of the registered partnership[35]. It is thus fixed at the specific and concrete moment in time, granting legal security and avoiding possible fraud in the applicable law, because if the couple decide to choose another law later in the marriage, exercising their freedom of conflictual choice, it only has effects for the future unless otherwise agreed, and the chosen law will not negatively affect the rights of third parties derived from said applicable law in the absence of choice[36].

Thus, the choice remains linked to the connection with proximate rules indicating the material orientation of the conflict rule, this being necessary to set the temporal scope, since the spouses and members of registered partnerships can make an agreement choosing the law applicable to their matrimonial property regime or the property consequences of the registered partnership before, during or after celebrating the marriage or partnership - this is because the applicable

34 Bonomi, A. and Wautelet, P.: "Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104", Bruylant, Bruxelles, 2021, pp. 592-597.

35 Garetto, R.: "Registered partnerships and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, p. 91.

36 Moreno Sánchez-Moraleda, A.: "The conflict rules of European Union Regulation 2016/1103 on matrimonial property regimes: materially-oriented rules", *Direito electronic magazine*, February 2019 – No. 1 (V. 18), pp. 13-15.

law in the absence of choice is applied to the parties (Article 26) if they do not choose it.

However, no agreement on the applicable law (art. 22) modifies the substantive law of the States, since the objective is to reinforce cooperation in jurisdiction, applicable law, and the recognition and enforcement of decisions with property consequences in cross-border marriages or registered partnerships, it being necessary to know the substantive law of each of the States involved, not only to resolve conflicts when they arise but as information prior to the parties exercising the right to choose the applicable law, which they have in many States, or if not, then based on the place where the marriage or partnership was celebrated, or establish their residence.

In this regard, we understand that the applicable law under the parties' freedom of choice is more useful from the temporal and economic standpoints if it is informed and advised prior to the marriage or partnership crisis arising, or the death of one of the members.

The differences between one applicable law and another in each State of the European Union is decisive in the legal liquidation of the matrimonial property regime or the termination of the property consequences of the registered partnership, since the community of property distribution is not the same - when the liquidation of assets takes place under a separation of assets regime or a pact in which there are only agreements on family charges while each partner retains ownership of his/her property.

On the other hand, the legal regime applicable to marriage is different in each country, since we find States that recognize and regulate marriages of the same and opposite sexes, while others do not regulate the former at all. Furthermore, if we talk about registered partnerships, the differences are even greater - in some States, they are not regulated whereas in others, they are only allowed between people of the opposite sex[37].

IV. LIMITS TO FREEDOM OF CHOICE WHEN CHOOSING THE APPLICABLE LAW.

37 In relation to marriage, the law of the State in which the spouses or future spouses, or one of them, have their habitual residence at the time of concluding the agreement, or the law of the State of nationality of either spouse or future spouses at the time the agreement is entered into.
In relation to the registered partnership, the law of the State in which the members or future members of the registered union, or one of them, have their habitual residence at the time of concluding the agreement, the law of the State of nationality of any of the members or future members of the registered partnership.
All this provided that the chosen law, whatever it may be, attributes property consequences to the institution of the registered partnership.

The connection criteria therefore address elements of proximity (residence rather than nationality), although the preferred criterion for the application of the conflict rule, as we have indicated above, is based on freedom of choice. Therefore, Article 26 will only be applied when the parties have not agreed on the property relations of their marriage or registered partnership.

Under agreement (art. 22.1), they can choose common nationality, or the place of habitual residence of both, or one of them, or the law of the State that best regulates their situation, thus altering the order of priority established in Article 26, where habitual residence appears as a preferential connection over nationality, and without territorial limit under the universal application of Article 20 of the Twin Regulations, where it is allowed to determine the applicable law under this Regulation, even if it is not that of a Member State.

1. Habitual residence.

Article 22 of each of the Regulations recognizes, under the principle of free choice, that the interested parties can determine or change by common agreement the law applicable to their matrimonial property regime or the property consequences of their registered partnership, establishing habitual residence as the connection point option, in which there are two different perspectives between the application of national civil law and the right to cross-border mobility in Community territory for all European citizens and their family members, as would be the spouse or registered partner, in accordance with the current legislation of any of the member states, from which exercising their right of residence can begin[38].

In this context, where mobility, together with the free movement of people[39], makes the habitual residence appear in the two Regulations as a flexible and necessary connection point that allows the parties to determine the place where the cross-border relationship is most linked, either by agreement or in the absence of an agreement (art. 26 of the Twin Regulations)[40]. Hence, the spouses

38 Jiménez Blanco, P.: "The cross-border mobility of same-sex married couples: the EU takes a step. Judgment of the Court of Justice of 5 June 2018, Case C-673/18: Coman", *The European Union Law*, No. 61, 31st July 2018.

39 Clerici, R.: "Alcune considerazioni sull'eventuale enlargement of the ruolo della residenza abituale nel sistema italiano di diritto internazionale privato", in Campiglio, C. (ed.): *Un nuovo diritto internazionale privato*, Cedam, Milán, 2019, pp. 56-64.

40 In the absence of agreement, art. 26 of Regulation 2016/1103 provides that, in the first place, it deals with the common residence following the celebration of the marriage, failing that, the common nationality (this provision will not apply if at the time of celebrating the marriage the spouses have more than one nationality), and finally, to the common place with the closest connection at the time of celebrating the marriage. Exceptionally, and at the request of either spouse, the judicial authority that has jurisdiction to determine on the matrimonial property regime may decide on the law of a State other than the State whose law might be applicable by virtue of common residence if the applicant shows that:
- the spouses had their last common habitual residence in that other State for a considerably longer period of time than in the designated State.

or members of the partnership can find themselves in different settings depending on the habitual residence:

- The simplest would be when both reside in the same place and decide to choose the law of that State, although they can agree on any other; however, in this case, the agreement is limited by the connection points established in art. 22, so they will presumably agree on the criterion of nationality or any other of the criteria that jurisprudence establishes to consider it a habitual residence[41], and about which we will talk briefly in this section.

- A more complicated scenario, because it requires prior negotiation, would occur when both reside in different States and must agree whether to choose one of the States or a third, with which they maintain family connection points, or for assets located in that territory, or by nationality.

- When it is not possible to establish a habitual residence, probably because both have a place where they live, but not for a long time, or with ties that allow the courts to establish that we are dealing with a habitual residence. Here, the applicable law agreement remains within the limits of Article 22.

This choice seems to be based on giving certain harmonization to the European rules of family law[42], through habitual residence, a criterion as flexible as it is indeterminate, on which will be determined by agreement or by default thereof, the place where the couple is effectively linked.

- both spouses relied on the law of that other State to organize or plan their property relations.
The law of that other State alone shall apply from when the marriage was celebrated unless one spouse disagrees. In the latter case, the law of that other State will take effect from when the last common habitual residence in said State was established, and its application will not negatively affect the rights of third parties derived from the applicable law under paragraph 1 a)
The present paragraph 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.
While, for registered partnerships, art. 26.1 of Regulation 2016/1104 regulates that it will be the law of the State according to whose law the registered partnership was created, adding in the second paragraph the possibility that a lawsuit may be filed by either partner before a competent judicial authority whose applicable law, either because the members of the registered partnership maintained their last common habitual residence in said State for a significantly long period of time, or that both members of the registered partnership relied on the law of that different State to organize or plan their property relations.

41 The criterion of habitual residence appears as a parameter that expresses the flexibility necessary to determine the place where the couple is effectively integrated. It deals with a criterion of transversal connexion that has been consolidated to the detriment of other parameters, such as domicile, precisely for being provided for in other European legislation, such as Regulation 2201/2003, Regulation 2010/1259, Regulation 2012/650. See Garetto, R., Giobbi, M, Giacomo Viterbo, F. and Ruggeri, L.: "Registered unions and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, pp. 77 and 78.

42 Boele-Woelki, K.: "The principles of European family law: its aims and prospects", *Utrech Law Review,* 2005, Volume 1st, Issue 2 (December), p. 161.

It is, therefore, a criterion of transversal connection that has been consolidated to the detriment of other parameters, such as that of domicile[43], precisely because it is provided for in other European legislation, such as Regulation 2201/2003, Regulation 2010/1259 and Regulation 2012/650)[44]; while in the Rome I and Rome II Regulations, relating to the law applicable to contractual and non-contractual obligations, the habitual residence criterion has been introduced.

Some authors tend to differentiate both concepts according to the consequences they are affected by or dependent on. In this regard, the concept of domicile is usually linked to a more economic sphere, for example to taxation, while residence deals more with the personal relationships of the couple's family life and to the place where they carry out their professional work. In this way, when interpreting in the absence of an agreement or choosing by agreement, the Regulations opt for the habitual residence criterion because it is more flexible when applying the law to the complex family situations that usually affect couples; thus, it is more complicated when dealing with a cross-border couple.

Although we share this argument, we consider that it would have been desirable for the legislator to have given a definition of habitual residence, thus avoiding it ending up being the object of interpretation by the Courts of Justice, as happened in the CJEU, of 17 October 2018, regarding the High Court of Justice (England and Wales), Family Division, where it was pointed out that the concept of "habitual residence" continues to raise questions that have not yet been examined by the Court of Justice, in particular it analyses whether the physical presence of the minor in a Member State constitutes a necessary shaping element of this concept[45].

2. Nationality.

Nationality is the second point of connection, which operates when an agreement of choice by the parties is absent. For example, when it is not possible to determine habitual residence.

43 See Chap. IV, infra. About this argument, see Rogerson, P.: "Habitual residence: the new domicile?" 9, *Int'l & Comp. L.Q.* 86, 86-96 (2000).

44 Also in the so-called Rome I and Rome II Regulations, relating to the law applicable to contractual and non-contractual obligations, the criterion of habitual residence has been introduced. See Cazorla González, M.J.: "Matrimonial property regimes after the dissolution by divorce: connections and variables that determine the applicable law", in Kramberger Škerl, J., Ruggeri, L., Viterbo, F. G. (ed.), n 16 *supra*, 40-48; Damascelli, D.: "Applicable law, jurisdiction, and the recognition of decision in matters relating to property regimes of spouses and partners in European and Italian Private International law", *Trust & Trustees*, 6-11 (2019).

45 Campuzano Díaz, B.: "A new ECJ judgment about the concept of habitual residence in the framework of Regulation 2201/2003: Judgment 17 October 2018, ud v. xb, c. 393/18", *Transnational Law Journals* (October 2019), Vol. 11, No. 2, pp. 462-471; Davies, G.: "Any Place I Hang My Hat?" or: Residence is the New Nationality," European Law Journal 11, No. 1 (2005), pp. 43-56; Hilbig-Lugani, K. "Habitual Residence in European Family Law: The Diversity, Coherence and Transparency of a Challenging Notion", in Boele-Woelki, K, Dethloff, N. & Gephart, W. (ed.): *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, Intersentia, 2014, pp. 249-262.

But if the parties agree to designate or change, by common agreement, the law applicable to their matrimonial property regime or the property consequences of their registered partnership, provided that it is one of the laws determined in Articles 22 of the respective Regulations, and that it meets the formal and material requirements of validity, it will be applicable. However, the choice of the applicable law by nationality increases the complexity of applying the criterion in cases in which the spouses have common dual nationality at the time of the marriage.

In such a case, it is necessary to assess the fact when a person has multiple nationalities, because it is a matter that must be left to the discretion of the National Law, and of the international conventions that may be applicable, with full respect for the general principles of the European Union. Therefore, this consideration should not have any impact on the validity of the choice of applicable law in accordance with the Twin Regulations.

On this matter, the conclusions of the general counsel in the case, Laszlo Hadadi (Hadady)[46] versus Csilla Marta Mesko, referring to a divorce procedure, determines that the courts of the Member States of which the spouses have dual nationality are competent, and that the spouses can freely choose the court of the Member State to which the dispute will be submitted. In this way, coexistence is permitted without establishing a hierarchy of the same.

It therefore follows, according to the reasoning of the Court of Justice, that there can be no basis for establishing the predominant nationality to the extent that "it would have the consequence that individuals are limited in their choice of the competent court and, in particular, in the exercise of the right to free movement of persons"[47]. Therefore, it cannot be established that one nationality takes precedence over another, even when it comes to identifying the applicable law.

One of the innovative aspects of Regulations 2016/1103 and 2016/1104 is the regulatory framework that has emerged under them, where couples of different nationalities can find an appropriate and specific discipline for the protection of the property aspects of their union, even when the relationship is not based on marriage[48].

46 Laszlo Hadadi (Hadady) versus Csilla Marta Mesko, épouse Hadadi (Hadady). Judgment of the Court (Third Chamber) of 16 July 2009. Laszlo Hadadi (Hadady) v Csilla Marta Mesko, spouse of Hadadi (Hadady). Case C-168/08. European Court Reports 2009 I-06871. ECLI Identifier: ECLI:EU:C:2009:474.

47 Case C-168/08. Ms Jualiane Kokott, filed on 12 March 2009, Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, Hadadi's wife (Hadady, paragraph 53. ECLI:EU: C:2009:152.

48 Garetto, R.: "Registered partnerships and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, Edizion Scientifiche Italiane. Napoli, 2020, pp. 87-97.

Finally, if the parties have dual nationality, we can reduce the different state legal systems to a maximum of six, and if they only have one nationality each, we can reduce it to four. One option for each nationality and a different place of habitual residence from each one. Options that may be reduced for same-sex marriages in twelve EU Member States that do not contemplate their regulation: Bulgaria, The Czech Rep., Cyprus, Slovenia, Slovakia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Croatia and Romania.

From the possible options, the three potential scenarios that could affect marriages and registered partnerships in determining the applicable law must consider whether or not there is enhanced cooperation[49]:

- when both nationals are from the countries mentioned in Whereas 11 above,

- if only one of spouses or partners is a national of a State that is part of the enhanced cooperation and the other is not,

- and when none of the nationals is from a State that submits to enhanced cooperation, in which case we will be dealing with the Rome III Regulation and the applicable State regulations.

This apparently simple approach contains asymmetries in the material and geographical scope of application of both Regulations, which will have to be elucidated according to the specific case.

3. Territorial limit on the choice of applicable law agreement.

The territorial scope of application of both Regulations is limited to those Member States that participate in enhanced cooperation, who are bound by the agreement to choose the applicable law for their application.

However, not every court in the Member States is bound by the choice-of-law agreement.

Thus, only the Member States participating in enhanced cooperation will have to establish their international competence in accordance with the rules of Regulations (EU) 2016/1103 and 2016/1104. In other words, in the non-participating States, international jurisdiction will correspond to their respective courts.

49 https://www.euro-family.eu/eu-database In this link, the reader will find an interactive map in which, selecting two countries and two situations (marriage or registered partnership), general information is obtained on the applicable legislation. However, to determine exactly the applicable law of each specific case, it is necessary to consider numerous circumstances, since the nationality criterion is not enough to determine the applicable law in all cases. For judicial questions, we advise seeking the assistance of a professional assessor. The taxonomy allows one to search for the different typographies of mixed marriages and transnational families with people from different countries.

Consequently, the application of the Twins Regulations is not guaranteed in what, for the purposes of a choice of applicable law agreement, would result under the application of its rules. However, if the agreement met the requirements established in the State's rules of private international law, which has international jurisdiction, it would continue to validly produce effects.

A different issue is when the court opposes it, alleging incompatibility with the public order of the forum.

It seems that the provisions of Regulations 1103 and 1104, in the respective Article 30, state that they will not restrict the application of the laws of the (national) forum, when the observance of which was considered essential, to the point of being applicable to all situations that occur within its scope of application, regardless of the matrimonial property regime applicable pursuant to this Regulation. Adding below, in Article 31, the question of public order as a cause for refusing the application of the national law of a State when the application of the provision is manifestly incompatible with the public order of the forum.

European society has been changing over recent decades, and this is reflected in the different family models that currently coexist within our European territory, and the reality of which, under the principle of equality and non-discrimination, has been maintained by the European Court of Human Rights when determined in their judgements[50], that a homosexual couple can be included in the concept of "private life" and in that of "family life" in the same way as that of a heterosexual couple in the same situation.

But this is only appearance, since the Grand Chamber of our CJEU in the ruling of 5 June 2018, which affected the marriage of two people of the same sex, one of them a Romanian citizen, and for which Article 277 of the Romanian Civil Code prohibits marriage between people of the same sex, denying all legal recognition to those marriages contracted outside their State. However, the judgement ends in the 4th paragraph determining that the legal provisions relating to the free movement of citizens of the Member States of the European Union and European Economic Area shall apply in Romanian territory.

50 ECHR, Judgement of 7th November 2013, Vallianatos and others v. Greece, CE: ECHR: 2013: 1107JUD002938109 and the ECHR judgement of 14th December 2017, Orlandi and others v. Italy, CE: ECHR: 2017: 1214JUD002643112.

Our Court of Justice gives an account of this, under the application of Directive 2004/38, Article 2 (entitled "Definitions"), which establishes the following in points 2 a) spouse and b) partner[51].

And more recently, the Grand Chamber of the CJEU, in the judgement of 5th June 2018, has recalled that a Member State cannot invoke its national law to oppose recognition in its territory, for the sole purpose of granting a derivative right of residence to a national of a third State, from the marriage contracted by that State with a citizen of the Union of the same sex in another Member State in accordance with the law of the latter.

For its part, the Latvian Government pointed out at the hearing that, assuming that the refusal, in circumstances such as those at issue in the main proceedings, to recognize same-sex marriages contracted in another Member State, constitutes a restriction in Article 21 of the TFEU, such a restriction is justified for reasons related to public order and national identity, as referred to in Article 4. 2 of the TFEU.

This court has reiterated that public order can only be invoked in the event of there being a real and sufficiently serious threat affecting a fundamental interest of society[52].

In this regard, it should be noted that the obligation of a Member State to recognize a marriage between persons of the same sex contracted in another Member State in accordance with the law of that State, for the sole purpose of granting a derivative right of residence to a national of a third State, does not adversely affect the institution of marriage in the first Member State, which is defined by national law and falls within the competence of the Member States, as mentioned in section 37 of this judgment. It does not imply that the Member State contemplates, in its national law, the institution of marriage between persons of the same sex. It is limited to the obligation to recognize such marriages, contracted in another Member State in accordance with its law, and this for the sole purpose of exercising the rights for those people that derive from Union law.

51 'For the purposes of this Directive: 2) "Member of the family" means:
a) the spouse; The concept of "spouse" referred to in said provision designates a person joined to another by the bond of marriage (see, in this regard, the judgment of 25th July 2008, Metock et al., C-127/08, EU: C: 2008: 449, sections 98 and 99) equates it to the common-law partner
b) the partner with whom the Union citizen has entered into a registered partnership, in accordance with the legislation of a Member State, if the law of the host Member State accords to the treatment of registered partnerships equivalent to marriages and in accordance with the conditions laid down in the applicable law of the host Member State; [...] '.

52 See, in this regard, the judgments of 2nd June 2016, Bogendorff von Wolffersdorff, C-438/14, EU: C: 2016: 401, section 67, and of 13th July 2017, E, C-193/16, EU: C: 2017: 542, section 18, and the case law cited).

Thus, such an obligation of recognition for the sole purpose of granting a derivative right of residence to a national of a third State does not undermine national identity or threaten the public order of the affected Member State.

V. MATERIAL VALIDITY OF THE AGREEMENTS UNDER THE LIMIT OF RETROACTIVE EFFECTIVENESS.

Both Regulations establish requirements for material validity[53] and formal agreements entered into by the parties, to which the requirements established in the law of the country of residence must be added for their formalization, as we will see below.

Considering Whereas 45 of Regulation 2016/1103 and 44 of Regulation 2016/1104, in conjunction with Article 22 of both Regulations, the choice of applicable law agreement may be made at any time before, during or after the marriage, or before or after the registering of the partnership. That is, as long the couple remains together, they can make all the modifications that they deem appropriate.

Although there are some exceptions in countries such as Cyprus, where prenuptial agreements are not allowed, and others, such as Slovakia, that only admit them in a limited way, since it only regulates agreements after the celebration of marriage to expand or reduce the community of property.

However, the biggest difference between European countries lies in the authority before which the agreement is formalized: countries such as Hungary, give validity to the agreement whether it is made in a public document or in a private document signed by a lawyer, while Portugal admits that the drafting can be performed by both a civil law notary and an official of the civil registry office, whereas in Sweden, the marriage contract shall be made in writing and filed with the Swedish Tax Office.

The material validity, as regulated in both Regulations, safeguards third parties against changes in the applicable law, granting legal security to third parties in good faith, but making their application difficult due to the lack of unification of the Civil Registry institutions in the European Union.

53 Regulation 2016/1103 does not expressly establish concrete effects, but generally links the applicable law of the matrimonial property regime and its effects. On the other hand, it does establish the areas of application, in a positive sense, under the agreement of the applicable law to the matrimonial property regime regulated in art. 27, and in a negative sense, in whereas 20 and 21 on the areas of exclusion that should not be applied.

1. The effectiveness limits on the choice of applicable law agreement vis-à-vis third parties.

Article 22 of both Regulations operates under the limit of retroactive effectiveness, that is, the agreement will not affect previously made agreements with third parties if it is detrimental to them. And, in the legal relations between a spouse and a third party, referring to the property effects of the matrimonial property regime (Article 27 f), the law applicable to the matrimonial property regime between the spouses may not be invoked by one of them against a third party in a dispute between the third party and either spouse, or both, unless the third party knew or, acting with due diligence, should have had knowledge of said law. In other words, it must be guaranteed that the agreement is in accordance with good faith.

For this, in Article 28 of Regulation 2016/1103, it considers that the third party knows the law applicable to the matrimonial property regime[54], as the law applicable between one of the spouses and the third party to the transaction, that is, that of their habitual residence, that is, the law of the State where the property is situated; or when (art. 28 b) either spouse had met the requirements for the disclosure or registration of the matrimonial property regime specified by the same criteria mentioned (place of transaction, residence, or location of the property).

It is possible that the law applicable to the matrimonial property regime may not be invoked by one of the spouses before a third party in accordance with Section 1, the effects of the matrimonial property regime being regulated against said third party:

a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or

b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated, or in which the assets or rights are registered.

As for marriages, the choice-of-law agreement of the members of the registered partnership in relation to third parties is conditioned by the knowledge of the chosen law, that is, they must know the law either because it is applicable to the transaction, or it is that of the habitual residence of the third party and one of the spouses, or because it is the law of the place where the property is located.

54 Mota, H.: "The protection of third parties in Regulation (EU) 2016/1103" (Protection of Third Parties in the Regulation (EU) 1103/2016), *Annals of Private International Law*, 2018, vol. XVIII.

Thus, under Article 27 f), the law chosen by the members of the couple governs the effects of the property consequences of the registered partnership in a legal relationship between a partner and third parties. And Article 28 of Regulation (EU) 2016/1104 establishes that the law applicable to the property consequences of the registered partnership may only be invoked by a partner against a third party (in a dispute between one of the partners, or both, and the third party) if the third party knew or, in the exercise of due diligence, should have known said law[55].

In cases where the applicable law cannot be invoked against a third party (Whereas 46), the property consequences of the registered partnership, with respect to the third party, will be governed by the law of the State whose legislation is applicable to the transaction between one of the members of the partnership and the third party or, in cases relating to immoveable property, or registered property or rights, by the law of the State in which the property is located or in which the property or rights are registered.

It is expected that they are duly formalized before a notary public and registered, so that they take effect against third parties from that moment on. Thus, marriage contracts made before a notary will only be applicable if the marriage is celebrated later on, and those made before a notary after the marriage will also be effective from the moment of their formalization.

However, they will only be enforceable against third parties from the date of their registration in the corresponding registry. In this context, we find other countries whose regulations incorporate prerequisites, such as Slovenia, which does allow pre-marriage agreements, linking them to prior information between the parties of the property situation and limiting the agreements that stipulate the separation of property regime from the community property regime to the time during which the marriage is in force.

Consequently, the effectiveness limits on the choice of applicable law agreement vis-à-vis third parties is governed by the provisions of Article 22.2, so that any change in the agreement, or a new agreement, made by the parties will only take effect *ex nunc*[56].

In this way, the effects of any agreement will not affect the legal regulatory regime of certain previously acquired assets, although attention will be required

55 Dougan, F. and Kramberger Škerl, J.: "Model clauses for registered partnerships under Regulation (EU) 2016/1104", in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid 2020, pp. 42-45.

56 Palao Moreno, G.: "Determination of the applicable law in Regulations 2016/1103 and 2016/1104 on the matrimonial property regime and the property consequences of registered partnerships", *Spanish Journal of International Law*. Vol.71/1, January-June 2019, Madrid, p. 104.

when the moment arrives to liquidate or dissolve the property regime of the marriage or the partnership. Nevertheless, the wording of the article in both regulations incorporates the final tagline *unless otherwise agreed to allow its retroactivity*. This gives the parties involved the possibility of conferring retroactive effects to the agreement, but without altering the established limit of not harming the rights of third parties (art 22.3). From this, we suppose two situations are the exception: either the third party is given a deliberation time where the "possibly affected" third party receives notified information of the agreement and does not show opposition; or the retroactive effect will not take place if it causes damage or prejudice that they are not prepared to assume.

Once it has been demonstrated that one of the main problems posed by the agreement is the effect on third parties, there being as many modifications as there are agreements that the cross-border couple, whether married or a registered partnership, may wish to adopt. Hence, Article 28 states that a member of the couple may not oppose the third party in a possible dispute, between the latter and one or both members, over the property consequences of the registered partnership in the legal relationship between a spouse and the third party descending from *professio iuris*[57], "unless the third party has had knowledge of this law or has been required to know it by exercising due diligence".

Ultimately, third-party protection is the protection that all European civil codes and laws provide for third parties in good faith. This subjective good faith of the third party, is understood as the excusable ignorance regarding the applicable law to the property consequences of the marriage or registered partnership, on which the right of opposition is exercised.

1. The legal presumptions that both Regulations establish.

Regarding the legal presumptions that both Regulations establish, it is evident that they are not means of proof in themselves, nor activities of proof, but are a method of proof of great importance in the field of European jurisprudence and of the member countries, but are therefore not considered evidence. These presumptions established by the law will admit proof to the contrary, except in cases where it expressly prohibits it.

However, in this regard, when the EU legislator enumerates the presumptions, she/he does so as presumptions *iuris et de jure* (art. 28.2 Twin Regulations)[58], relating

57 The *professio iuris* must be expressed, contained in a dated document, in written form or in an equivalent electronic form: just as in the agreements referred to in art. 7, it is necessary to comply with the additional formal requirements provided by the law applicable to the agreement.

58 Under Article 28, paragraph 2, the third party is presumed to have knowledge of the applicable law if it is that of the State whose legislation is applicable to the transaction between one of the two members and the third party. Likewise, knowledge is presumed if the applicable law of the State in which the contracting

to the good faith of the third party, of full and absolute right, a presumption that does not admit evidence to the contrary.

In summary, any choice-of-law agreement requires that the formalities provided for in both regulations be complied with in accordance with the provisions of the state regulations connected with the pact or agreement, to give formal validity both to the applicable law agreement (in art. 23), as well as to the marriage contract or the registered partnership (in art. 25).

For the agreement to be valid, it requires the concurrence of requirements of substance (*ex* art. 24 "Consent and material validity" and of form (*ex* art. 23), which must be in writing, dated and signed. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. Said provision establishes that if the law of the State of common habitual residence at the time of the conclusion of the agreement establishes additional formal requirements for capitulations, said requirements will be applicable. If 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. If only one of the spouses has his/her habitual residence in a Member State at the time the agreement is concluded and the law of that State establishes additional formal requirements for capitulations, these requirements will apply.

party and the third party have their habitual residence. When the third party has rights to real estate, it is presumed that he/she has knowledge if the applicable law is that of the State in which the property is located. The third party may not object to the fact that the applicable law for the property consequences of the union is not known if the pertinent disclosure or registration requirements "prescribed by the law of the State whose legislation is applicable to the transaction between a contracting party and the third party have been met, the State in which the contracting party and the third party have their habitual residence or, in cases related to immoveable property, the State in which the property is located.

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