THE VARIATION OF THE LAW APPLICABLE TO THE FAMILY PROPERTY REGIME IN EU REGULATIONS N. 2016/1103 AND 1104

LA VARIACIÓN DE LA LEY APLICABLE AL RÉGIMEN ECONÓMICO FAMILIAR EN LOS REGLAMENTOS DE LA UE N. 2016/1103 Y 1104

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ABSTRACT: The essay examines the discipline of EU regulations n. 2016/1103 and 1104 concerning the identification of the law applicable to the family property regime. Specifically, the work reflects on problems arising after a change, during the relationship, of the substantial law applicable to the couple's property regime.

KEY WORDS: EU regulations n. 2016/1103 and n. 2016/1104; family property regime; international private law.

RESUMEN: *El ensayo examina los reglamentos de la UE n. 2016/1103 y 1104 en lo que respecta a la identificación de la ley aplicable al régimen económico familiar. En concreto, la obra reflexiona sobre los problemas que surgen tras un cambio, durante la relación, de la ley sustancial aplicable al régimen patrimonial de la pareja.*

PALABRAS CLAVE: *Reglamentos UE n. 2016/1103 y n. 2016/1104; régimen económico familiar; derecho privado internacional.*

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I. FOREWORD. THE LAW APPLICABLE TO PROPERTY RELATIONS IN THE FAMILY. THE N. 1103 AND 1104/2016 EU REGULATIONS.

In their intense activity aimed at pursuing rapprochement amongst law systems and identifying measures to ensure the compatibility of the rules applicable in the Member States to conflicts of law and jurisdiction, the European legislator has always looked with particular attention to the context of family relations. However, among the numerous interventions made, the investigation of property regimes between spouses has always been avoided[1] due to a series of details of the single systems and technical difficulties that the connection of the disciplines of family property regimes posed. Of course, this omission constituted a limitation of the European legislation on family law, which became more and more problematic over time[2].

In 2016, the Council, with the two twin regulations, nos. 2016/1103 and 1104 of 24th June, both intervened in the field of enhanced cooperation in the area of jurisdiction, applicable law, recognition, and enforcement of decisions concerning, respectively, matrimonial property regimes and the property consequences of registered partnerships. The regulations came into force on July 28th, 2016, but

1 A first attempt to standardize legislations was made with The Hague Convention on the law applicable to matrimonial property regimes of 14th March 1978. However, the attempt was unsuccessful, because the convention has been ratified only by France, Luxembourg and the Netherlands.

2 See the Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, presented by the EU Commission on 17th July 2006, which notes the following: "A particular consequence of the increased mobility of persons within an area without internal frontiers is a significant increase in all forms of unions between nationals of different Member States or the presence of such couples in a Member State of which they do not have the nationality, often accompanied by the acquisition of property located on the territory of several Union countries. The preliminary study commissioned by the Commission in 2006 revealed that more than 5 million foreign EU nationals lived in another Member State of the Union, while there were around 14 million non-EU foreign residents in the Union in 2000. This study estimates that almost 2.5 million items of real property were owned by spouses and located in Member States different from that of their residence. The Commission impact study relating to its proposal for a Regulation on applicable law and jurisdiction in divorce matters shows that there are approximately 170000 international divorces in the Union each year, i.e. 16% of all divorces".

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their actual application was postponed to January 29th, 2019[3]. More precisely, art. 69 of both regulations, while indicating the transitional discipline, identifies two parameters to determine the actual effectiveness of the regulations. The first, formalized in paragraph 1, is of a procedural matrix, following a consolidated practice in the transitional disciplines of private international law norms[4], so that each regulation "applies only to proceedings initiated to public deeds formally drawn up or registered and to approved judicial settlements concluded on or after January 29th, 2019". The second parameter - used in the discipline regulating the identification of the law applicable to the family property regime and contained in art. 69 paragraph 3 - is instead substantial. It is envisaged that "the provisions of the third chapter apply only to spouses [or to partners] who have married [or registered their partnership] or who have designated the law applicable to the matrimonial property regime after January 29th, 2019".

Needless to say, the two regulations' problematic aspects are numerous and complex[5]. These pages aim to briefly reflect on some profiles specifically related to identifying the substantive law applicable to family property regimes. Such discipline is described in the third chapter, and includes articles from 20 to 35 of the regulations. Because of its complexity, it is better first to illustrate the essential features, stating that, given the almost identity of the disciplines, reference will be made to the reg. n. 1103, giving account, when necessary, of the differences that emerge concerning reg. 1104.

3 On the two regulations, with particular reference to the perspective of Italian law, see Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", in *Riv. dir. int.*, 2017, p. 1103 ff.; Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (ue) n. 2016/1103 in materia di regimi patrimoniali tra i coniugi", in *Riv. dir. internaz. priv. e proc.*, 2017, p. 356 ff.; Malagoli, E.: "Regime patrimoniale dei coniugi ed effetti patrimoniali delle unioni civili: i Regolamenti UE «gemelli» n. 2016/1103 e n. 2016/1104", in *Contr. impr. Europa*, 2016, p. 828 ff.; Pinardi, M.: "I regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate", in *Europa dir. priv.,* 2018, p. 733 ff.; Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", in *Riv. dir. internaz. priv. e proc.*, 2018, p. 33 ff.; Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali", in *Nuove leggi civ. comm.*, 2019, p. 1529 ff.; Colonna, G.V.: "I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate", in *Fam. dir.*, 2019, p. 839 ff.; Nencini, G.: "I rapporti patrimoniali tra i coniugi e gli uniti civilmente nella normativa comunitaria", in *Stato civ. it.*, 2019, p. 213 ff.
More in general, see also Vinaixa Miquel, M.: "La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)", in Aa.Vv., *El orden público interno, europeo e internacional civil*, Barcelona, 2017, p. 274 ff.; Lagarde, P.: "Reglements 2016/1103 et 1104 du 24 juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres", in *Riv. dir. internaz. priv. e proc.*, 2016, p. 676 ff.; Gallant, E.: "Le nouveau droit international privé européen des régimes patrimoniaux de couples", in *Europe. Actualité du droit de l'Union Européenne*, 2017, p. 5 ff.

4 Think of art. 72 of the Italian law n. 218 of 1995, for the reform of private international law. Adopting such a transitional provision entails the possibility that the same substantial relationship is subject to different rules depending on the moment in which the trial started.

5 The two regulations have universal range, so that the conflicting provisions they contain apply even if the law they designate as applicable is not that of a UE State or is that of a Member State not participating in enhanced cooperation: see Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali", cit., p. 1533.

The first criterion to identify the applicable law is parties' (spouses, future partners, or partners) choice. Such choice must fall within the framework of the State's law in which at least one of them has their habitual residence or of which at least one of them was a citizen at the time of the conclusion of the agreement (art. 22.1, letter *a* and *b*). For registered unions, the law of the State under the law of which the partnership was established may also be indicated (art. 22.1, letter *c*, reg. 1104).

In the absence of an express agreement on the applicable law choice, art. 26 determines the connection criteria for its identification, stating rules that are partially different for marriage and registered unions.

Indeed, with regards to marriages, reference must be made to the "law of the State a) of the first common habitual residence of the spouses after the conclusion of the marriage or, in lack thereof, b) of the common citizenship of the spouses at the time of the marriage or, in lack thereof, c) with which the spouses have the closest connection together at the time of the marriage taking into account all the circumstances" (art. 26.1, reg. 1103). If the spouses have several common citizenships at the time of the marriage, the criterion indicated in lett. *b* of art. 26.1 does not apply (art. 26.2, reg. 1103). Registered partnerships require the application of the law "of the State under whose law the registered partnership was established" (art. 26.1 reg. 1104).

As an exception, and upon request by either spouse, the judicial authority, instead of applying art. 26.1*a*, reg. 1103 and 26.1 reg. 1104, may apply the law of another State. This may happen if the applicant demonstrates that a) the spouses had their last common habitual residence in that other State for a significantly longer period compared to the State of first official common residence[6]; b) both spouses or partners "had relied on the law of that other State in arranging or planning their property regimes" (art. 26.3 reg. 1103; art. 26.2 reg. 1104).

Some preliminary clarifications are necessary. First of all, it should be highlighted that for marriage, regulation 2016/1103 identifies three different "cascade" connection criteria in the absence of choice. In other words, they are ordered so that the applicability of one of them excludes that of the following[7]. Moreover, it

6 Art. 26.2.a reg. 1104 requires the petitioner to prove that «the partners had their last common habitual residence in that other State for a significantly long period of time» thus diverging from the analogous provision of art. 26.3.a regulation 1103. It is, after all, a consequence of the fact that regulation 1104 in art. 26.1 does not provide for the plurality of connection criteria but only refers to the State›s law in which the union was established. Damascelli, D. writes about this in "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", cit., p. 1146 f. He states that the formulation of reg. 1104 was essentially inevitable, given that only in the system of art. 26 of Regulation (EU) 2016/1103 lies the possibility of comparing the duration of two common habitual residences and of giving prevalence to the (also in this case, significantly) longer one.

7 Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione", cit., p. 360.

is worth underlining that the three criteria are structured in a partially different way from each other for the relevant purposes here. On the one hand, all three are "fixed", *i.e.*, not intended to change. Indeed, the criterion consists of a complex case in point, in which not only an evaluation of factual and legal elements is relevant (habitual residence, citizenship, closest connection). It also encompasses - directly or indirectly - a specific time to verify them (for instance, the moment of the conclusion of the marriage, for the criteria under lett. *b* and *c*; the first common habitual residence, for the criterion under lett. *a*. On the other hand, however, the case identified by the criterion under lett. *a*, unlike what happens for the other two, may not exist at the time of the marriage and may occur later.

The so-called exception clause, arising from art. 26.3 reg. 1103 (and from art. 26.2 reg. 1104) identifies an alternative connecting factor structured in a very peculiar way. Indeed, the possibility of exceptionally exceeding the law of the State identified by art. 26.1.a (26.1 for reg. 1104) exists only if, alternatively, reference is made to the State in which the spouses or partners had their last common habitual residence. In other words, it is not enough that the common residence of the spouses has changed since the marriage celebration and that they have relied on the applicability of the law of the State of the new residence to their property relations. It is also necessary that the spouses have not moved to another State again later on. Structured this way, the connecting factor can be considered effective or disappear depending on whether the spouses further move their habitual residence[8].

II. THE POSSIBILITY OF VARIATION OF THE LAW APPLICABLE TO THE FAMILY PROPERTY REGIME.

This concise description introduces a delicate aspect: the possible change – during the relationship - of the substantial law applicable to the couple's property regime.

In particular, several hypotheses of variations can occur. First of all, in the event of a voluntary change made by the spouses/partners during the relationship, art. 22.1 allows this possibility provided that "a) the law of the State of the habitual residence of the spouses or future spouses, or of one of them, at the time of the agreement; or b) the law of a State of which one of the spouses or spouses is a national at the time of the conclusion of the agreement".

8 An example can help understand the issue. Imagine two spouses who, at the time of the marriage, reside in Italy. After two years, they move to France, where they remain for 15 years and where they organize their property relations considering French law to be applicable. Later on, they move to Spain, where, a year later, they divorce. The criterion identified by article 26.1.a reg 1103 establishes the discipline of their property relationships in substantive Italian law. The criterion identified by article 26.3 reg 1103 should lead to the applicability of French law, which, however, is not the last common habitual residence.

Moreover, after the marriage or registered union, a variation to the law applicable to the property regime is possible even without an express agreement of the spouses or partners. Therefore, the cases of marriages and registered partnerships must be distinguished.

It may happen that the spouses do not have a common habitual residence at the time of marriage, and this occurs only at a later time. In fact, given the wording of art. 26.1, in the absence of a common residence, the connecting factor must be identified in the common citizenship under art. 26.1.b; the subsequent occurrence of habitual residence produces the priority of the connecting factor established by art. 26.1.a, and thus involves a modification of the applicable substantive law.

Furthermore, a variation in the applicable law is also possible if the exception clause is used. As illustrated, the variation is contemplated by art. 26.3 reg. 1103, according to which the criterion established by art. 26.1.a can be replaced if the spouses have resided in another state for a longer period than their first residence and have relied on the applicability of the law of that second state in organizing their property regimes. Art. 26.2 reg. 1104 admits the exception clause also in registered partnerships.

It is easy to understand that the variation of the law applicable to property regimes among spouses or partners involves a problem.

First of all, the property regimes of a couple are usually destined to encompass years or even decades, during which many events may happen. So, it is just appropriate that such events are treated uniformly.

Secondly, it must be considered that the regulation of a couple's property regime affects all the goods that, during the marriage duration, become part or are excluded by the estate of the spouses or partners. Such goods inevitably have a diverse nature and are potentially placed in different States.

Furthermore, the discipline of the property regime has a double front of relevance, both internal to the couple and towards third parties, for which the opposability of any variation of the applicable substantive law poses a series of complicated problems.

It is no coincidence that in most cases, the regulations of private international law make use of connecting criteria that are as stable as possible, like, for example, the national law common to the spouses.

All these problematic aspects were kept in mind in the impact assessment accompanying the Commission proposal for a Council regulation of 2011[9]. There, in illustrating the policy options, on the one hand, the importance of applying the same substantive law to all assets subject to the regime was emphasized; on the other, it was proposed that "The conflict of law rule in property matters should be based on the principle of immutability of the property regime. This means that the legal framework of the spouses' property regime will remain unchanged during the marriage or partnership. In particular, there will be no automatic change of the property regime on the ground that a relevant connecting factor has changed"[10]. And the same document, in identifying the proposal to be preferred, indicated the regime's immutability as a goal to be pursued[11].

Nevertheless, these proposals were only partially incorporated in the regulations' final text, where some contradictions emerge. In fact, in the recitals, the idea of the regulatory law's uniqueness appears on the one hand[12]. On the other hand, the non-modifiability of the same is affirmed, if not by the parties' express will. In particular, recital no. 46, reg. 1103 (and similarly, recital n. 45 reg. 1104) provides that "To ensure the legal certainty of transactions and to prevent any change of the law applicable to the matrimonial property regime being made without the spouses being notified, no change of law applicable to the matrimonial property regime should be made except at the express request of the parties. Such a change by the spouses should not have retrospective effect unless they expressly so stipulate. Whatever the case, it may not infringe the rights of third parties".

However, as already shown, both regulations entail the variation of the law regulating property regimes not only by an express agreement but also by substantial behavior. More, the exception clause introduces a further level of complexity, because it leaves it to the judiciary authority (especially *a posteriori*) to decide on the applicability of a law different from the ordinary one.

Of course, it cannot be an entirely discretionary decision. Still, certainly, the parameters on which the judge must decide are far from being clear and objective,

9 The document can be read at *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0327:FIN:EN:PDF.*

10 *Cfr. Impact assessment*, cit., p. 27, *sub Policy Option* 4.

11 *Cfr. Impact assessment*, § 12, *Preferred policy option*: "Furthermore, the principle of immutability and a unitary system would be included, thus ensuring that the law applicable to the matrimonial property regime does not change when the spouses move to another Member State and applies to all assets".

12 See in particular recital no. 43, reg. 1103: "For reasons of legal certainty and in order to avoid the fragmentation of the matrimonial property regime, the law applicable to a matrimonial property regime should govern that regime as a whole, that is to say, all the property covered by that regime, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State". Recital no. 42 reg. 1104.

in particular, the parameter regarding the significantly longer residency period in the State where the law must be applied[13].

The application of the exception clause thus risks introducing an element that is difficult to control by the spouses or partners themselves, who, for example, could place their reliance on the applicability of the law and organize their property regimes by referring to it. But this would not be effective until after sufficient time has elapsed (or, better, until after a period the judge considers sufficient).

If this is the case, it is a question of identifying the problems that may arise if the applicable law changes. On the one hand, such problems concern the internal relationship between the parties; on the other, that of the third parties' protection. From the first perspective, the problem is the retroactive effects of the variation. The matter also concerns whether third parties can know the variation and object to it. The European legislator must be acknowledged to have been well aware of these issues, focusing on specific regulations.

For the hypothesis of voluntary express variation of the applicable law, art. 22 clarifies that the change only has future effects "unless otherwise agreed" (art. 22.2) and that retroactive variation cannot prejudice third parties' rights (art. 22.3).

For the case regulated by art. 26.3, on the other hand, the rule is apparently the opposite. The applicable law of property regimes variation retroactively acts right to the beginning of the union unless one of the spouses objects to this (26.3, second paragraph). Clearly, even in this hypothesis, the variation in the substantial law cannot operate to the detriment or prejudice of third parties.

The third case of possible variation of the applicable law, the one extracted from art. 26.1.a (*i.e.*, the hypothesis of spouses or partners' common residency, which was missing at the establishment of the union), is not expressly regulated. Of course, it must be said that this is a presumably residual hypothesis because it is certainly not frequent that spouses or partners do not have a common residence at the time of marriage or union. Moreover, the importance of the requirement of habituality has been emphasized by scholars[14].

Identifying the discipline to apply to the case, however, deserves a brief reflection. As already mentioned, in the other two cases, for which the regulation dictates an express discipline, there is an apparent dyscrasia since art. 22.2 provides for non-retroactivity unless otherwise agreed; art. 26.3, on the other hand, provides for the retroactivity of the new applicable law unless one of the spouses opposes

13 Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione", cit., p. 366 s.

14 Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione", cit., p. 359 ss.

it. The contradiction, however, is only apparent. In both cases, the retroactivity of the variation operates if there is an agreement, while the dissent of only one of the spouses is enough to prevent it. The substantial difference lies in the fact that for the hypothesis provided for by art. 22.2, the spouses' agreement for retroactivity must be expressly stated while in that of art. 26.3 it is deemed to exist except for the manifestation of a contrary will of the individual.

This difference, however, finds a partial explanation in the fact that article 22.2 refers exactly to the hypothesis in which the spouses formalize their will to change the applicable law, so that the European legislator requires spouses or partners, on that occasion, to take an expressed position also on retroactivity. Instead, in the art. 26.3 case, the identification of the parties' will to change the substantive law governing their property regime is presumed in the presence of the elements referred to in letters *a* and *b* of art. 26.3, first paragraph.

Quid iuris, then, for the hypothesis that the change in the applicable law results from the arrival of the common residence? The most reasonable solution seems to be the application of a rule modeled on the scheme of art. 26.3, therefore, of the tendential retroactivity, unless a spouse opposes.

Another aspect that must be considered is that the transition from one substantive law to another can have a very different impact on the actual situation. For example, it is possible to change from a substantive law that establishes the sharing of acquired assets as a legal regime, to another that establishes an analogous regime, which in substance changes little; but it is also possible that the new substantive law provides an opposite regime, like the separation of goods. In such cases, having to proceed with the dissolution of the old regime may become a problem. A problem that spouses or partners could also not consider, especially in the event of a change not expressly agreed under art. 22 reg. 1103.

From this point of view, the choice of allowing the spouse or partner, even *a posteriori*, to oppose retroactivity appears to be reasonable since this opposition would allow intervening critically on a choice that was not pondered enough during the relationship.

III. THE EFFECTIVENESS RESPECT TO THIRD PARTIES OF THE VARIATION OF THE APPLICABLE LAW.

The matter is partly different when it comes to relations with third parties, which are the subject of express provision both for an express variation in the applicable law (art. 22.3) and for the case of clause of exception (art. 26.3). The discipline of the two hypotheses is, however, partially different because art. 22.3

establishes that the retroactive variation of the law governing property regimes does not affect the rights of third parties deriving from the previous law. The unenforceability, therefore, only concerns the profile of retroactivity, while from the change onwards, relations with third parties are also governed by the new law (with the limit established by art. 28).

For the exception clause hypothesis, however, art. 26.3, paragraph 3, reg. 1103, and art. 26.2 paragraph 3 reg. 1104 provide that the application (determined by the judge) of the new law may not affect the rights of third parties deriving from the previous law without referring to retroactivity. The question is whether the exception clause (which, as already seen, is normally retroactive, without prejudice to the opposition of one of the parties) is radically unenforceable against third parties, even starting from the moment in which the new regime is active (if there is opposition by a party, said moment is that of the establishment of the last common habitual residence in the new State[15]). And the answer must be affirmative, for the reason that the activation of the exception clause is subject not only to the request of the party but also to the judge's decision, so that it becomes a mere possibility, totally uncertain. For this reason, the exception clause cannot institutionally affect the rights of third parties, who, moreover, would be extraneous to the judgment in which the judge decided on it[16].

Such observations open up a further particularly complex and delicate scenario. It becomes evident that the variation in the property regime can create a double path, with a substantial law operating between the parties and a substantial law operating towards third parties.

The position of third parties, on the other hand, is not regulated due to the hypothesis identified above, in which the change in the law applicable to the matrimonial property regime depends on the establishment of a common habitual residence initially missing at the time of the conclusion of the marriage (art. 26.1.a). Obvious needs to protect third parties' leads to deeming the law of the first common residence State non-objectionable in prejudice of rights acquired by third parties in the previous period, in which art 26.1.*b* or *c* could be applied.

Many other issues would deserve further analysis. It can be certainly said that the two twin regulations are destined for a wide and repeated application so that it can be foreseen that the contribution of case-law in identifying problematic profiles and related solutions will not be lacking.

15 Art. 26.3, II reg. 1103; art. 26.2, II reg. 1104.

16 Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", cit., p. 1140.

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