PARTY AUTONOMY REGARDING JURISDICTION UNDER THE PROPERTY REGIMES REGULATIONS

AUTONOMÍA DE PARTE RESPECTO A LA JURISDICCIÓN BAJO EL REGLAMENTO DE RÉGIMEN ECONÓMICO MATRIMONIAL

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ABSTRACT: The main accomplishment of the Property Regimes Regulations lies in their bringing more coherence into the cross-border family law adjudication. In the field of international jurisdiction, they strive to align the competence in couples' patrimony disputes to that in succession and in separation proceedings, or else to align the competence of the courts to the applicable law. These tendencies are clearly visible in the Regulations' provisions on choice of court agreements. Namely, the Regulations allow for such agreements, but severely limit parties' choice and the possible effects of these clauses. When succession or separation proceedings are pending, it is often only possible to institute patrimonial disputes at the same court as the said proceedings. When proceedings concerning matrimonial or registered partners' property are initiated without previously pending succession or divorce proceedings, or else when the necessary consent to the joinder is not given, parties can avail themselves of a fairly limited list of options to choose a court from.

The Regulations leave several questions regarding choice of court agreements unanswered. Often, analogy with other EU regulations and the CJEU case-law can be of help. The critical eye of the doctrine is, however, mainly cast on the unpredictable fate of the choice of court agreements under the Regulations. The paper analyses the complex regulation of the choice-of-court agreements in the Property Regimes Regulations, draws attention to open questions and provides possible answers.

KEY WORDS: Choice-of-court agreement; jurisdiction; matrimonial property; registered couples' property; Regulation 1103/2016; Regulation 1104/2016; party autonomy.

RESUMEN: *El principal logro del Reglamento de Régimen Económico Matrimonial descansa en traer más coherencia dentro de la aplicación de derecho de familia transfronterizo. En el campo de la jurisdicción internacional, se pugna por alinear la competencia en disputas patrimoniales, como en procesos sucesorios o de separación, o también alinear la competencia del foro con el derecho aplicable. Estas tendencias son claramente visibles en las previsiones del Reglamento sobre acuerdos de elección del foro. Es decir, el Reglamento permite tales acuerdos, pero limita severamente la elección de las partes y los posibles efectos de tales cláusulas. Cuando un procedimiento sucesorio o de separación pende, a menudo es solo posible iniciar disputas patrimoniales en el mismo juzgado. Cuando se inician procedimientos relativos a régimen económico de matrimonios o parejas registradas sin un procedimiento sucesorio o de divorcio pendiente, o también cuando el necesario consentimiento del litisconsorcio no se presta, las partes pueden hacer valer una lista muy limitada de opciones para elegir juzgado.*

Los Reglamentos dejan una serie de cuestiones relativas a la elección del foro sin respuesta. Muchas veces, hacer analogía con otras regulaciones de la UE y del TJUE puede ayudar. Sin embargo, el ojo crítico de la doctrina se centra principalmente en el destino impredecible de los acuerdos de elección de tribunales en virtud del Reglamento. Este artículo analiza la compleja regulación de los acuerdos de elección de foro en los Reglamentos de Régimen Económico Matrimonial, presta atención a cuestiones abiertas y proporciona posibles respuestas.

PALABRAS CLAVE: *Acuerdo de elección del foro, jurisdicción, régimen económico-matrimonial, régimen de parejas registradas, Reglamento 1103/2016, Reglamento 1104/2016, autonomía de parte.*

I. INTRODUCTION.

The Matrimonial Property Regimes Regulation (hereinafter: the MPR Regulation)[1] and the Property Consequences of Registered Partnerships Regulation (hereinafter: the PCRP Regulation)[2] (the two hereinafter also referred to as the Property Regimes Regulations) were adopted in 2016 and entered into force in 2019. They are currently the newest additions to the EU regulation of cross-border family relations. Together with the Succession Regulation[3], they comprehensively regulate the private international law issues regarding the applicable law, the international jurisdiction and the recognition and enforcement of judgments relating to property issues of international couples. They represent a step forward in the unification of European private international law and bring further foreseeability and legal certainty in resolving cross-border family disputes[4]. The new regulations are a part of the so-called European Family (Private International) Law, which also encompasses the Brussels II bis Regulation[5], regulating procedural aspects of

1 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced co-operation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8 July 2016.

2 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced co-operation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183/30 of 8 July 2016.

3 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107 of 27 July 2012.

4 For an illustration of the issues that could arise regarding property regimes disputes before the unification of the rules, and which still arise when proceedings are instituted in Member States not participating in the enhanced co-operation, see: Cerasela Dariescu, N., Dariescu, C.: "The Difficulties in Solving Litigation Concerning the Patrimonial Effects of a Marriage between an Italian Citizen and a Romanian Citizen", *Journal of Private International Law*, Vol. 4, no. 1, 2008, pp. 107-119. For a detailed description of the process of adopting the Property Regimes Regulations, see eg Pogorelčnik Vogrinc, N.: "Applicable law in matrimonial property regime disputes", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 2019, vol. 40, no. 3, pp. 1076, 1077.

5 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000, OJ L 338 of 23 December 2003. The Recast Brussels II bis Regulation (Council

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divorce and parental responsibility, the Maintenance Regulation[6], and the Rome III Regulation[7] determining the applicable law in divorce and legal separation.

The European Family Law regulations, however, do not all share the same territorial scope of application, as some were adopted under the "regular" legislative scheme (where Ireland, Denmark and formerly the UK enjoy the so-called opt-in privilege)[8], whereas the Rome III and the Property Regimes Regulations were adopted within the so-called enhanced co-operation mechanism including a different number of Member States: 17 for the Rome III Regulation and 18[9] for the Property Regimes Regulations[10]. For purposes of clarity, this limitation in the territorial scope of application will not be repeated throughout the paper, and the term Member States will be used to describe the participating States.

As to the temporal scope of application, the Property Regimes Regulations are applicable as of January 2019. The application *ratione temporis* has several specifics regarding the applicable law and the recognition and enforcement of judgments, but the jurisdictional rules of the regulations apply to all proceedings started on or after 29 January 2019 (Article 69 of the Property Regimes Regulations)[11].Regarding the substantial (material) scope of application, Article 1 of the Property Regimes Regulations states that the regulations apply to "matrimonial property regimes" and to "matters of the property consequences of registered partnerships". The definition of the notion "registered partnership" is also provided by Article 3 of the PCRP Regulation: "'registered partnership' means the regime governing the

Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178 of 2 July 2019) will enter into application on 1st August 2022.

6 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations, OJ L 7 of 10 January 2009.

7 Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation, OJ L 343 of 29 December 2010.

8 In the Area of freedom, security and justice, these states can opt-in on a case-by-case basis. Thus, Denmark and Ireland do not participate at the Succession Regulation, and Denmark does not participate at the Brussels II bis Regulation. United Kingdom did not participate at the Succession Regulation, but participated at the Brussels II bis Regulation.

9 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden. The 18 Member States that joined the enhanced co-operation make up 70% of the EU population and represent the majority of international couples who live in the European Union. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_681.

10 The most prominent reason for Member States not to participate at the enhanced co-operation was (is) their unease regarding the legal status of same-sex couples. For more information on State-by-State basis, see Ruggeri, L., Kunda, I., Winkler, S., *Family Property and Succession in EU Member States, National Reports on the Collected Data*, Rijeka, 2019, https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf.

11 For an interesting case study highlighting the consequences of the different application *ratione temporis* of the conflict of law rules and the rules on jurisdiction, see Dougan, F.: "Matrimonial property and succession – The interplay of the matrimonial property regimes regulation and succession regulation", in Kramberger Škerl, J., Ruggeri, L., Viterbo, F. G.: *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law, Working Paper*, Camerino, 2019, pp. 75-82, https://www.euro-family.eu/news-126-case_studies_and_best_practices_analysis_to_enhance_eu_family_and_succession_law_working_paper.

shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation". Regarding the term "marriage", however, Recital 17 of the MPR Regulation refers to the definitions in national laws of the Member States. No autonomous interpretation of "marriage" is therefore available[12]. None of the Property Regimes Regulations apply to non-registered civil unions (Recital 16 of the PCRP Regulation), though relatively common in some Member States[13]. Lastly, it is important to emphasise that the Property Regimes Regulations only apply to cross-border situations. The bases for this assumption are, first, Article 81/3 of the Treaty on the Functioning of the EU[14], and, second, in the opinion of several authors, Article 2 of the Property Regimes Regulations[15]. The necessary cross-border implication is also clearly emphasised in Recitals 1 and 14 of the Regulations[16].

For a simpler and coherent application of the Property Regimes Regulations, especially in the first years of their application when doctrine and case-law is still scarce, it is important to note that they are largely based on the Succession Regulation, applicable since 2015. Case-law of national courts and the CJEU, as well as doctrine, based on the Succession Regulation, can thus often be of help in the interpretation of the new(er) regulations. Since Succession Regulation is itself based on previous EU legislation in private international law (especially on the Brussels I Regulation of 2000)[17], it also important that all regulations in this field are applied in a coherent manner and that the same notions are interpreted, as far as possible, in the same manner. Specifically for the interpretation of the choice

12 In the case *Coman and others* (no. C-673/16 of 5 June 2018) the CJEU included same-sex marriage into the notion of marriage, but that interpretation is, for the time being, limited to the interpretation of the so-called Free Movement Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States […], *OJ L 158, 30 April 2004*.

13 For example in Slovenia, where national legislation provides non-registered civil unions with the same legal status as the marriages (Article 4 of Slovenian Family Code of 2017). Thus, the Appellate Court in Maribor wrongly stated that it would apply the MPR Regulation if it was already applicable, which was not the case, since the proceedings were instituted before its entry into force, whereas the dispute concerned the property of a non-registered civil union: no. I Cp 653/2017 of 5 September 2017. One could, however, wonder whether in cases where non-registered unions have a clear legal status in a Member State and provide partners with rights and obligations deriving from such union, an exception should be made in the Regulation. Namely, the exclusion of the non-registered partnerships from the scope of application of the PCRP Regulation is based on the assumption that "only registered partnerships have an effect on legal status" (Rodríguez Benot, A.: "Article 1", in Viarengo, I., Franzina, P. (ed): *The EU Regulations on Property Regimes of International Couples*, Cheltenham, 2020, f. 20), which is not the case in all Member States.

14 TFEU, consolidated version (2012), OJ C 326 of 26 October 2012.

15 Marino, S.: "Article 2", in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., pp. 29-30, and multiple authors cited there.

16 For the interpretation of the required cross-border element, see Rodriguez Benot, A., in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., pp. 20-21.

17 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001.

of court agreements, the case-law regarding the Brussels I bis Regulation[18] and its predecessors will be useful.

The Property Regimes Regulations regulate, among other issues, the international jurisdiction, ie the question in which of the Member States, participating in the enhanced co-operation, the proceedings, falling into the scope of application of the Regulations, will be conducted. By contrast, national rules on territorial jurisdiction will determine the exact place in that country where proceedings are conducted. It is thus possible that succession or separation proceedings will be decided by a different court or authority than the property regimes dispute, both within the same Member State. National rules also define the competent authority, be it a court or, in case of delegation of jurisdictional powers, another authority or legal profession, typically a notary. The information on these national rules can easily be found on the European E-Justice website[19], provided that the Member States made such information available and up-dated it if necessary. When the dispute falls into the scope of application of the Regulations, national rules of Member States on international jurisdiction no longer apply[20].

The Property Regimes Regulations primarily align the international jurisdiction regarding the couple's property to the international jurisdiction regarding the situation at the origin of the need to adjudicate on such property. Most commonly, this will be the separation of the couple or else the death of one of the spouses or partners. By aligning the rules on international jurisdiction to such underlying proceedings, the new Regulations eliminate the potential need for the couples or the heirs to seize a court in another country than that of separation or succession proceedings, to regulate the questions regarding couple's property, eg which property is common to the spouses and which is the sole property of one of them. Said alignment also eliminates the positive conflict of jurisdiction (ie the jurisdiction of courts in two or more Member States), however, such conflict might still exist with the courts of non-participating Member States and third States[21].

The questions concerning property relations between spouses or registered partners must, however, sometimes also be resolved outside of the two mentioned situations, ie without underlying separation or succession proceedings. Such case arises, for example, if the creditors of one of the spouses demand the division of the common property in order to seize the debtor's assets. Also, the spouses may

18 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20 December 2012.

19 See the European Judicial Atlas in Civil Matters: https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do.

20 For nuance, see Bonomi, A.: "Chapter II. Jurisdiction", in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., p. 47.

21 Bonomi, A.: "Chapter II. Jurisdiction", cit., p. 49.

want to attain the division of their common property with the aim, for example, of changing their matrimonial property regime for the future. Therefore, the Property Regimes Regulations also provide for the international jurisdiction of courts in these "independent" cases.

The role of party autonomy is eminent in EU private international law, both regarding the choice of law as regarding the choice of court. European legislators provided a place for parties' choice in such matters, which were traditionally, and still are in most national legislations, reserved to mandatory rules, such as: consumer, insurance and employment disputes, divorce, and succession. Therefore, it is no surprise that also the Property Regimes Regulations enable the couples to choose both the law, as well as the competent court. This paper will focus on the choice of court agreements and examine the specific rules that apply to such agreements under the Regulations, as well as the rules from other EU regulations and CJEU case-law which can be applied to the couples' property relations in analogous manner.

II. GENERAL REMARKS.

As already mentioned in the Introduction, the main goal of the Regulation is the alignment of jurisdiction in property disputes to the jurisdiction in divorce or succession proceedings. This aim has an important influence on the regulation of the choice of court agreements in that the parties' choice will sometimes be ignored when divorce or succession proceedings are pending. Another important goal is detectable in the Regulations, namely the wish to align the jurisdiction and the applicable law, so that the competent court will apply their domestic law (the so called *Gleichlauf*). Thus, the parties have a very limited choice of competent courts. A third tendency, also confirmed by the limited choice of the parties and by the sometimes prevailing joinder to the divorce or succession proceedings, is the emphasised importance of the connection between the dispute and the competent court. Unlike, for example, in the Brussels I bis Regulation, the parties will not be able to choose a court in a Member State with no connection whatsoever with the litigious relationship. From the available choice, it is also possible to deduce the legislator's wish to simplify the proceedings, rather than to promote the parties' liberty to choose.

The parties can reach the agreement on the competent court(s) at any time until the beginning of the court proceedings, when *perpetuatio fori* kicks in. Andrae cites the conclusion of a prenuptial contract and a divorce agreement as typical occasions for also choosing the applicable law, as well as the competent court

for any future disputes regarding the couple's property[22]. In our opinion, it is not necessary that the choice of court was made after the entry into force of the Regulations; however, once the proceedings are instituted, such agreement will be examined under the rules of the Regulations[23].

The Regulations are only applicable to the choice, by the parties, of the competent courts of one of the participating EU Member States. If the parties additionally chose the venue, ie the competent court within the designated state, such choice is examined under the national procedural rules[24]. Thus, if, for example, the parties agree that the court in Ljubljana will be competent for their dispute, the validity of the choice of Slovenian courts will be examined pursuant to the Regulations; if such validity is confirmed, the choice of the Ljubljana court will further be assessed under the Slovenian procedural legislation.

The Regulations are also only applicable to judicial resolution of the parties' dispute and not to extra-judicial settlements. As is stated in Recital 39 of the MPR Regulation, the "Regulation should not prevent the parties from settling the matrimonial property regime case amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the matrimonial property regime is not the law of that Member State".

III. LIMITED CHOICE OF COMPETENT COURT(S).

1. Choice of court in "autonomous" proceedings.

Article 7(1) of the Regulations provides that in cases where no separation or succession proceedings are pending, the parties may agree that the courts of the Member State whose law is applicable (either on the basis of a choice of law agreement or on the basis of other rules of the Regulations), or the courts of the Member State of the conclusion of the marriage (or registration of partnership) have exclusive jurisdiction to rule on matters of their matrimonial property regime (or on the property consequences of their registered partnership). Recital 36 of the MPR Regulation and Recital 37 of the PCRP Regulation explain that such choice is given, "in order to increase legal certainty, predictability and the autonomy of the parties".

22 Andrae, M.: *Internationales Familienrecht*, 4th ed., Nomos, 2019, p. 275.

23 *Contra* Andrae who deems that the agreement must be concluded after the entry into force of the Regulations. Andrae, M.: *Internationales*, cit., p. 277.

24 Cf. Bonomi, A.: "Chapter II. Jurisdiction", cit., p. 47.

It is important, however, to emphasise that only the choice of courts of one of the currently 18 EU Member States participating in the enhanced cooperation is examined under the Property Regimes Regulations. Thus, if the parties chose the law of a non-participating state to be applicable to their dispute (which they are allowed to do, under the conditions of Article 22) or if such law is applicable under Article 26, the option of choosing the courts of the state whose law is applicable, is not available under the Regulations. Frimston warns that parties might decide to choose the law of one of the participating Member States only to be able to also choose the courts of that Member State[25].

A) Choice of court of the Member State whose law is applicable to the dispute.

Within the possibility of choosing the court of the Member State whose law is applicable to the dispute, one has to examine which law can be applied to the property relations of spouses/partners. This can be, first, the law chosen by the parties, and second, the law applicable in the absence of parties' choice. It is thus possible that the parties choose both the applicable law and the competent courts, as well as that the parties only choose competent courts and the applicable law is determined pursuant to Article 26 of the Regulations.

Under Article 22(1) of the Regulations, the spouses/partners may choose: (a) the law of the State where the spouses/partners or future spouses/partners, or one of them, is habitually resident at the time the agreement is concluded; or (b) the law of a State of nationality of either spouse/partner or future spouse/partner at the time the agreement is concluded. Registered partners can also choose the law of the State under whose law the registered partnership was created. When examining the effects of a choice of court agreement, the court must first resolve the preliminary issue, namely if the parties concluded a choice of law agreement in favour of a Member State and if such agreement is effective[26]. Only if such agreement is valid and effective, will the court be able to base its jurisdiction on the correspondent choice of court. Even a perfectly valid choice of court will thus be disregarded if the choice of law is found invalid.

Pursuant to the rule on the universal application of the conflict of law section of the Regulations (Article 20), the parties may agree on the application of the law of a State which does not participate in the enhanced cooperation, ie of a non-participating EU Member State or of a third State. If such was their choice, Article 7 does not apply. Namely, the Regulations do not regulate the jurisdiction in such

25 Frimston, R:: "Article 7: Choice of Court", in Bergquist, U., *et al.*: *The EU Regulations on Matrimonial and Patrimonial Property,* Oxford, 2109, p. 63.

26 Andrae, M.: *Internationales*, cit., pp. 276-277. Andrae is critical regarding the dependence of the choice of court agreement of the validity of the choice of law agreement; she deems it would have been better if the European legislature followed the example of Article 4 of the Maintenance Regulation: Andrae, M., *Internationales*, cit., p. 277.

States and therefore use the term "States" when speaking about the applicable law, and "Member States" when speaking of the jurisdiction. The question, however, arises, whether the courts in the participating Member States must respect the choice of court agreement in favour of a third State and thus decline their jurisdiction, even if the Regulations provide for their jurisdiction in case there was no (effective) choice of court. Similar issues already arose under other EU legislation, such as the Brussels I bis Regulation. We deem that such agreements must be examined under national laws of the participating Member States and respected, if their laws so permit[27].

Under Article 22(2), parties can also change their original choice of law. In such a case, the question arises, what happens with the choice of court agreement, which was aligned to the original choice, if the parties did not also change such agreement. Being that the *ratio* of the limited choice of court is the alignment with the law which will actually be applied to the dispute, we deem that a choice of courts in a country, the law of which will finally not be applied to the dispute, is not to be followed by the courts. The conditions from Article 7 must be fulfilled at the time of the proceedings, otherwise the choice cannot be effective.

If the spouses did not choose the applicable law, such law is determined under Article 26 of the MPR Regulation, which provides for the application of the law: "(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances'. Article 26 of the PCRP Regulation provides that in the absence of parties' choice, "the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created".

In view of all these options, numerous possible applicable laws and, consequently, competent forums can be available, the exact number depending on the circumstances of each individual case, ie on the habitual residence of the spouses at different times, of their nationality, and, lastly, on their close connection with a certain country. It must, however, be emphasised that parties might have several options when determining the applicable law, however, the choice of court must always follow the applicable law, be it on the basis of a choice of law agreement or on the basis of the Regulations. The courts of only one State are thus available under this option.

27 *Contra*: Frimston who deems that in case parties chose the law of a non-participating state, they cannot derogate from the rules of jurisdiction of Article 6. Frimston, R:: "Article 7: Choice of Court", cit., p. 63.

As mentioned, the jurisdiction of the courts of the Member State, whose law is applicable to the substance of the dispute, results in the so-called *Gleichlauf*, the always desirable application of the domestic law of the forum, which enables the judge to apply the law they know best and avoids the inconveniences linked to the application of foreign law (seeking of information on foreign law, translations, delays in proceedings, higher costs, and, maybe most importantly, a possible erroneous application of the foreign law). This alignment does not, however, in itself guarantee a strong connection of the dispute with the competent courts[28].

B) Choice of court of the Member State of the conclusion of the marriage/registration of the partnership.

The option of choosing the jurisdiction of the courts in the country where the marriage was concluded/the partnership was registered is more directly linked to the wishes of the parties: there is usually a close connection of the couple with the state where they got married or registered their partnership and they might want to fix the jurisdiction of the courts of that state, with no regard to their future changes of habitual residence[29]. But also this second choice will often lead to *Gleichlauf*: pursuant to Article 26(1), the first connecting factor for the law applicable in absence of choice by the parties is the spouses' first common habitual residence after the conclusion of the marriage. We can speculate that this will often be the same State where they got married or registered their partnership.

Recital 37 of the MPR Regulation very helpfully provides the interpretation of "the Member State of the conclusion of the marriage" as "the Member State before whose authorities the marriage is concluded". Thus, if the marriage is concluded for example by a consular agent of the state A in the territory of the state B, the Member State of the conclusion of the marriage will be the state A. The PCRP Regulation does not provide a similar explication, but an analogy with the MPR Regulation should not be problematic.

2. Choice of court when the property proceedings are joined to succession or divorce proceedings.

Under the Property Regimes Regulations, the choice of court is disregarded, if the proceedings have to be joined to the already pending succession or divorce proceedings. This is always the case with succession proceedings, while in divorce proceedings, this sometimes depends on the consent of the spouses. When proceedings for a dissolution of a registered partnership are pending, the partners' consent is always needed for the joinder of the property proceedings.

28 Andrae, M.: *Internationales*, cit., p. 277.

29 *Contra* Andrae, who questions the sense of this provision, in that the connection of the spouses with the state of the marriage is often coincidental. Andrae, M.: *Internationales*, cit., p. 276.

A) Obligatory joinder to succession proceedings and, in some cases, divorce proceedings.

If the divorce proceedings fall under Article 5(1) of the MPR Regulation, then the joinder of the connected property proceedings is obligatory, with no regard to any prior agreements on jurisdiction. The said article refers to proceedings where the court competent to rule on divorce, legal separation or marriage annulment has jurisdiction on the basis of the Brussels II bis Regulation, however, not on the basis of any rule of that Regulation (for exceptions, where joinder is not obligatory, see the next subchapter).

The doctrine denounces this lack of legal certainty of the parties who conclude a choice of court agreement, since its effectiveness depends on the circumstances in which the property regime dispute will be resolved[30]. Most often, the parties will namely choose both the law and the competent court before knowing if and when there will be court proceedings concerning their property. They cannot predict whether their choice of court will be effective, since this will depend on whether succession or divorce proceedings will be pending at the time of the institution of proceedings concerning matrimonial or partners' property. What is more, Andrae warns that such obligatory joinder enables a party to unilaterally avoid the choice of court agreement regarding property issues, by instituting divorce proceedings in the country falling into the scope of Article 5(1) of the Regulations[31].

Walker is also critical of the fact that the rules on choice of court of the Property Regimes Regulations do not promote the common choice of the parties, made on the basis of the circumstances of the dispute, and deems that a choice of court should only be possible when dispute has already arisen, same as under Article 12 of the Brussels II bis Regulation[32]. Bonomi, on the other hand, draws attention to the fact that the mentioned rule of the Brussels II bis Regulation sometimes undermines the choice of court agreement previously concluded in relation to property relations and to maintenance[33].

There is no obligatory joinder to the proceedings for the dissolution or annulment of the registered partnership. This is understandable, since the rules for such proceedings are not unified on the EU level (the Brussels II bis Regulation does not apply to registered partnerships).

30 Pogorelčnik Vogrinc, N.: "Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema", *Podjetje in delo*, no. 1, 2020, p. 197.

31 Andrae, M.: *Internationales*, cit., p. 279.

32 Walker, L.: "Party Autonomy, Inconsistency and the Specific Characteristics of Family Law in the EU", *Journal of Private International Law*, Vol. 14, no. 2, 2018, pp. 260-261.

33 Bonomi, A.: "Article 5", in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., p. 76.

B) Joinder following the spouses'/partners' consent.

The spouses' consent is needed for the joinder, if the divorce, separation or marriage annulment proceedings are resolved by a court competent pursuant to the Brussels II bis Regulation on the basis of the applicant's habitual residence (at least 1 year) or of the applicants' nationality and habitual residence (at least 6 months), or else because of the conversion of legal separation into divorce, or, lastly, in cases of residual jurisdiction (Article 5(2) of the MPR Regulation).

Pursuant to Article 5 of the PCRP Regulation, partners' consent is always needed for the joinder of property proceedings to those for the dissolution or annulment of the registered partnership.

If spouses'/partners' consent is needed for the joinder to happen, such consent prevails over a choice of court agreement in favour of another Member State. If, however, there is a choice of court agreement in favour of the Member State in which the divorce proceedings are pending, such agreement will be interpreted as the consent needed for the joinder[34]. If the choice of court is concluded in favour of another Member State and the defendant does not consent to the joinder, the choice of court agreement takes full effect and the proceedings in property relations will be conducted in the chosen Member State.

IV. APPEARANCE OF THE DEFENDANT (*SUBMISSIO*).

A "silent" choice of court agreement (*prorogatio tacita, submissio*) is possible only if the proceedings are instituted before a court of a Member State whose law is applicable pursuant to the Regulations. Interestingly, the "choice" is thus even more limited in the cases of the silent acceptance of the defendant, contrary to a more usual situation in EU and national private international law where the possibilities of *submissio* are aligned with those of the express choice of court agreement. Furthermore, the acceptance of jurisdiction is not possible in cases of obligatory joinder with succession or divorce proceedings.

The Regulations further emphasise the common understanding of the entrance of appearance for the purposes of accepting the jurisdiction: the defendant must, namely, appear in order to argue the case on the merits and not only (or primarily) to contest jurisdiction. Naturally, if the defendant does not "appear", ie they do not react to the claim, a silent choice of court cannot be construed under the Regulations[35].

34 Andrae, M.: *Internationales*, cit., p. 279.

35 Cf. Frimston, "Article 7: Choice of Court", cit., p. 68.

In has often been emphasised that the defendant should accept jurisdiction consciously and not because of ignorance of the possibility to contest it. These concerns were raised, for example, in the process of recasting the Brussels I Regulation and resulted in the obligation of the court to inform (or to verify if they were informed by the serving authority) the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer and the employee of the possibility of objection (Article 26 of the Brussels I bis Regulation). This rule was, however, not stretched outside of the circle of defendants who are the protected weaker parties. It is most welcome that the Property Regimes Regulations include such duty of the court in Article 8(2). In practice, it is not an excessive burden for the court or other authority or legal profession entrusted with the service of the claim to include the information for the defendant of their right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

V. MATERIAL AND FORMAL VALIDITY.

Under Article 7(2), the choice of court agreement must "be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing". This fairly laconic rule is further explained in Recital 47 of the MPR Regulation: "

rules on the material and formal validity of an agreement on the choice of applicable law should be set up so that the informed choice of the spouses is facilitated and their consent is respected with a view to ensuring legal certainty as well as better access to justice. As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal rules, those rules should be complied with. If, at the time the agreement is concluded, the spouses are habitually resident in different Member States which lay down different formal rules, compliance with the formal rules of one of these States should suffice. If, at the time the agreement is concluded, only one of the spouses is habitually resident in a Member State which lays down additional formal rules, those rules should be complied with". Frimston warns that the wording of the Regulations regarding electronic means of communication does not exclude the obligation of signature in such cases, and proposes as a safe option, when concluding the agreement via e-mail, that the parties send a signed document[36].

36 Frimston, "Article 7: Choice of Court", cit., pp. 65-66.

Contrary to, for example, the Brussels I bis Regulation [Article 25(1)][37], the Property Regimes Regulations do not provide for a conflict of law rule regarding the material validity of the choice of court agreement. This might be surprising, since the Regulations do provide for such a rule regarding the choice of law agreements (Article 24). Also, the Rome I Regulation[38] excludes choice of court agreements from its scope of application (Article 1(2)e)), while it could be applied to the choice of law agreements in the absence of a special rule. Furthermore, it is questionable whether any analogy can be made between the choice of law rule and a choice of court under the Regulations. A much better option seems to be the analogous application of the said Article of the Brussels I bis Regulation[39]. Analogy to the Brussels I bis Regulation can also be used regarding the autonomous interpretation of whether consent was reached[40].

The choice of court is deemed to be exclusive, which means that all other courts which would be competent under other rules of the Regulations, lose their jurisdiction. Thus, unlike some other EU regulations, such as the Brussels I bis Regulation or the Maintenance Regulation, the Property Regimes Regulations do not permit a non-exclusive choice of court agreement, ie a choice of an "additionally" competent court[41]. However, like in other EU Regulations, a later appearance of the defendant in a court other than the chosen court, prevails over an earlier explicit choice of court[42].

A choice of court agreement can be entered into regarding all property disputes between spouses, or else only regarding a specific dispute[43]. Andrae deems that the wording of Article 7 allows for a third party to participate in the agreement, beside the spouses (or registered partners); such agreement with a third person can only concern a specific dispute[44]. In this regard, Frimston rightfully draws attention to the fact that the notion of "a party" from Article 7 can be very difficult to define especially when couples' property disputes are decided upon in non-contentious proceedings[45], where that notion can be flexible and encompass all persons whose legal situation will be affected by the proceedings.

37 Under Brussels I bis Regulation the law applicable to the material validity of the choice of court agreement is the law of the chosen forum.

38 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4 July 2008.

39 For such solution also Andrae, M.: *Internationales*, cit., p. 278, and, in substance, Frimston: "Article 7: Choice of Court", cit., p. 65.

40 See eg CJEU, *Estasis Salotti*, no. 24/76 of 14 December 1976. Cf Andrae: *Internationales*, cit., p. 278, and other authors cited there.

41 Cf. Frimston, "Article 7: Choice of Court", cit., p. 62.

42 CJEU, *Elefanten Schuh*, no. 150/80 of 24 June 1981.

43 Cf. Andrae: M.: *Internationales*, cit., p. 276.

44 Andrae, M.: *Internationales*, cit., p. 276.

45 Frimston: "Article 7: Choice of Court", in Bergquist, U., *et al.*: *The Regulations*, cit., pp. 63, 64.

But since the said article also refers to "their" matrimonial property regime, the same author deems that the parties to the agreement are only the parties to the marriage, "and, presumably, the heirs or administrators of the estate of a deceased spouse"[46]. A third party can also be bound by a choice of court agreement if they are a legal successor of one of the original parties of the agreement[47].

VI. CONCLUSION.

The adoption of the Property Regimes Regulation is a welcome step ahead in the protection of European cross-border families and an important additional part in the mosaic of European Family Law. Because of the limited scopes of application of different regulations and the introduction of enhanced co-operation, this mosaic is more and more complex, but also more and more complete.

The main accomplishment of the Property Regimes Regulations lies in their bringing more coherence into the cross-border family law adjudication. In the field of international jurisdiction, they strive to align the competence in couples' patrimony disputes to that in succession and in separation proceedings. Another way of the Regulations' achieving more coherence are their efforts to align the competence of the courts to the applicable law (the so called *Gleichlauf*).

These tendencies are clearly visible in the Regulations' provisions on choice of court agreements. Namely, the Regulations allow for such agreements, but severely limit parties' choice and the possible effects of these clauses. When succession or separation proceedings are pending, it is mostly only possible to institute patrimonial disputes at the same court as the said proceedings. The joinder is namely obligatory, with no regard to a possibly existing choice of court agreements, every time there is a pending succession procedure, and most of the times when there is a pending divorce procedure. In some divorce cases and in all separation of registered couples cases, the joinder is optional and subject to parties' consent, which then prevails over a prior choice of court agreement.

When proceedings concerning matrimonial or registered partners' property are initiated without previously pending succession or divorce proceedings, or else when the necessary consent to the joinder is not given, parties can avail themselves of a fairly limited list of options to choose a court from. Namely, they can choose courts of a participating EU Member State, whose law is applicable to the substance of the dispute, or else the law of the participating EU Member State where the marriage was concluded or the partnership registered.

46 Frimston: "Article 7: Choice of Court", in Bergquist, U., *et al.*: *The Regulations*, cit., p. 64.

47 Andrae, M.: *Internationales*, cit., p. 276.

The Regulations leave several questions regarding choice of court agreements unanswered. Often, analogy with other EU regulations and the CJEU case-law can be of help. The critical eye of the doctrine is, however, mainly cast on the unpredictable fate of the choice of court agreements under the Regulations. Being that the aim of such agreements, proclaimed also in the preamble of the Regulation, is achieving more predictability and legal certainty, the probability that the jurisdiction will finally not be based on such agreement, is surprisingly high. First, there is the possibility of the obligatory joinder with succession and divorce proceedings. And second, when the chosen court is that of the Member State of the chosen law, an invalid choice of law undermines also the choice of court. It is also problematic that the complicated rules and the very limited choice might incite the parties to adopt questionable manoeuvres to attain the wished jurisdiction.

It will certainly be very interesting to observe and analyse the application of the rules on the choice of court from the Property Regimes Regulations in national courts and the future interpretations of the CJEU. Also, it will be important to examine whether the parties are using the possibility of autonomy in the field of jurisdiction in their contracts, seeing the limited choice and the uncertain effectiveness of the agreements.

It goes without saying that the success of the Property Regimes Regulations, and thus also of their rules on jurisdictional party autonomy, also depends on their territorial scope of application. We can only hope that other Member States will soon join the enhanced cooperation in this field, as well as regarding the Rome III Regulation, and thus ensure a common and truly European progress in cross-border family law.

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