

**THE ROLE OF THE AGREEMENT AS A TOOL FOR MANAGEMENT
OF PROPERTY RELATIONS IN CASES OF CROSS BORDER
MARRIAGES AND CIVIL UNIONS/PARTNERSHIPS REGISTERED
UNDER THE EU REGULATIONS NR. 1103 AND 1104/2016.**

**EL PAPEL DEL ACUERDO COMO HERRAMIENTA PARA GESTIONAR
RELACIONES DE PROPIEDAD EN CASOS DE MATRIMONIOS Y UNIONES
CIVILES REGISTRADAS TRASFRONTERIZAS BAJO LOS REGLAMENTOS UE
1103 Y 1104/2016.**

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ABSTRACT: The essay examines the role of the agreement as a tool for managing property relationships in cross-border marriages and registered partnerships, in light of EU Regulations 1103 and 1104 of 2016, on the property regimes of international married or registered couples. The main prerogative of such acts is the recognition of the parties' freedom to choose the court and the applicable law.

The law governing the matrimonial property regimes, or the property consequences of registered partnerships, has universal scope. This agreement in the form envisaged, which is backed by the need for legal certainty and predictability of the applicable rules, means that the spouses, in family problems which have cross-border implications, are faced with a uniform system of rules on "conflict" which can resolve them. Therefore, with reference to the "applicable law", Regulation 1103 provides ample scope for contractual autonomy, both explicitly and implicitly. Thus, the contractual autonomy in this provision appears to be the first point of connection between the different systems, the hard base on which the contractual structure provided for in the Regulation is built, which strengthens the objectives of both civil law systems, which open the way to a moderate interpretation of general clauses by the courts, and of common law systems which give effect to a moderate interpretation of the will of the courts. Go away.

KEY WORDS: Cross-border marriages and registered partnerships; the court and the applicable law; uniform system; contractual autonomy.

RESUMEN: El presente artículo examina el papel que ejerce el acuerdo como herramienta para gestionar las relaciones de propiedad en casos de matrimonios y uniones civiles registradas trasfronterizas, a la luz del Reglamento UE 1103 y 1104/2016, sobre regímenes económicos de parejas y matrimonios internacionales. La principal prerrogativa de dichas normas es el reconocimiento de la libertad de las partes para escoger el foro y la ley aplicable.

La ley que rige el régimen económico-matrimonial, o las consecuencias de propiedad de parejas registradas, tiene alcance universal. Este acuerdo en la forma prevista, el cual está respaldado por la necesidad de certeza legal y previsibilidad de las reglas aplicables, lo que significa que los esposos, en aquellos problemas que tienen implicaciones transfronterizas, se enfrentan con un sistema uniforme de reglas de "conflicto" que pueden resolverlas. Por lo tanto, con referencia a la "ley aplicable", el Reglamento 1103 proporciona un amplio alcance para la autonomía contractual, tanto explícita como implícita. Esto es, la autonomía contractual se configura como el primer punto de conexión entre los diferentes sistemas, la base dura sobre la cual se construye la estructura contractual prevista en el Reglamento, lo que refuerza los objetivos tanto de los sistemas de derecho civil, y abre la puerta a una moderada interpretación de las cláusulas generales por los juzgados, como también de "common law" al dar efecto a una moderada interpretación de la voluntad del foro. Adelante.

PALABRAS CLAVE: Matrimonios y parejas registradas trasfronterizas; foro y ley aplicable; sistema uniforme; autonomía contractual.

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I. PREMISE.

The new discipline set out by EU Regulations 1103 and 1104 in 2016, regarding the Premarital Agreements of international married or registered couples¹, regulates the competence, the law applied, the recognition and the execution of public decisions and acts. The main prerogatives of such acts and the recognition regarding freedom of choice of the competent judicial body and of the laws to apply. It should be established that, in conforming with other EU Private International Law, no procedure is necessary for recognition of decisions.

The law that regulates the patrimonial regimes of spouses and the patrimonial effects of the registered unions is far-reaching²; it is determined, based on corresponding regulations, and it is applied even if it is not a member state of enhanced cooperation or of the European Union, thus strengthening this universal value.

II. THE OBJECTIVE OF ENHANCED COOPERATION AND THE MAIN.

The necessity of legal certainty³ and predictability of applicable rules requires that, in cases of family questions with cross border implications, the spouses be confronted with a Uniform System of "conflict" rules to solve the same problems.

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- 1 DAMASCELLI, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", *Rivista di diritto internazionale*, 2017; CARRIÓN GARCIA DE PARADA, P.: "Nuevos reglamentos europeos sobre regímenes matrimoniales y sobre efectos patrimoniales de las uniones registradas", *Revista El Notario del Siglo XXI*, 2019; JOUBERT, N.: "La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés", *Revue critique de droit int. Privé*, 2017; CAZORLA GONZALEZ, M.J.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio tras la entrada en vigor del Reglamento UE 2016/1104", *International Journal of Doctrine and Jurisprudence*, 2019; LAGARDE, V.P. : "Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Rivista di diritto internazionale privato e processuale*, 2016.
 - 2 BARUFFI, M.C. : "I nuovi Regolamenti UE sui regimi patrimoniali delle coppie internazionali sposate o registrate", *Quotidiano giuridico*, 2016.
 - 3 With regard to principle of *certeza del diritto* cfr. PERLINGIERI G.: *Profilo applicativo della ragionevolezza nel diritto civile*, Napoli, 2015, p. 123 ss.; PERLINGIERI, P. e FEMIA, P.: *Nozioni introduttive e principi fondamentali del*

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The Recital 43 of the Regulation 1103/2016, in fact, provides for the creation of regulations standardised on conflicts of law in order to avoid contradictory results.

The above regulation aims to establish an enhanced cooperation based on the three known issues:

- 1) Establishment of a competent judicial body
- 2) Establishment of applicable laws
- 3) Recognition and enforcement of judgements in connection with matrimonial property regimes.

The enhanced cooperation is a procedure that deals with jurisdiction, applicable laws and recognition of the sentences and public acts regarding the patrimonial relations of married couples and of registered unions; it was authorized by the EU Council with decision 2016/954 of the 9th June 2016.

III. MARGINS RECOGNISED IN THE SECTOR TO CONTRACTUAL AUTONOMY.

What needs to be highlighted is that the Regulation 1103 provides a great margin to contractual autonomy⁴ in an explicit and implicit way.

The contractual autonomy, therefore, represents in this measure the first connecting point among the different systems, the cornerstone on which the contractual structure provided for in the Regulation stands.

As stated by Professor Ana María Pérez Vallejo and widely accepted⁵ , "... the big novelty of the Regulation 1103 is that it provides the married couples with the opportunity to regulate their own patrimonial relations and applies a law which is different from that of their nationality. The European legislator guarantees future spouses a wide margin of contractual autonomy. On one hand, it shall encourage the conclusion of pacts, agreements or transactions; on the other hand,

diritto civile, Napoli 2004.

- 4 With regard to contractual autonomy cfr. PERLINGIERI, P.: *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Edizioni Scientifiche Italiane, Napoli, 2006; FUSARO, A.: *Tendenze del diritto privato in prospettiva comparatistica*, Torino, 2017; GRIECO, C: "The role of party autonomy under the regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations and other relevant instruments of European Private International Law", *Cuadernos de Derecho Transnacional*, 2018; NUZZO, M.: *Utilità sociale e autonomia privata*, Milano, 1974.
- 5 PÉREZ VALLEJO, M.: "Notas sobre la comunidad de bienes: reglas básicas y algunas cuestiones litigiosas", *Revista: Derecho PUCP*, 2018; Id., *Matrimonial Property Regimes. On Property Relations of Cross-Border Couple in the European Union*, ESI, Napoli, 2020.

it allows spouses to identify a law that is applicable to the content of the economic consequences of marriage (agreement on the choice of the law). What has been established by this agreement with reference to the choice of the law becomes, therefore, the main connecting factor".

In Article 3(I)(b) of the Regulation 1103 Marital Agreements are defined as...

"any agreement between the spouses or engaged couples through which they establish their property regime"⁶. These are agreements which provide rules that allow the couple "an informed choice" on the applicable law to the content of economic consequences of marriage; a "predictable" law, therefore, that ensures the certainty of legal rules to be applied under the Recital 43 of the Regulation in question.

According to Art. 22 of the Regulation 1103, with reference to the section of the contractual freedom reserved to the spouses in the choice of the law to be applied, there's one only restriction which consists in two possibilities of choice:

- a) Law of the country where one or both spouses or engaged couples have the habitual residence;
- b) Law of the country where one of the spouses / engaged couple has the citizenship.

Furthermore, other rules are established with regard to the formal and substantive validity of such conventions in order to facilitate the acceptance of spouses' property rights which will result from them under the Recital 47 of the Regulation.

It should be noted that formal requirements demanded, have the sole objective to draw the spouses' attention on what they choose, in order to make them more aware of the consequences of their choice.

IV. THE NATURE OF THE AGREEMENTS BETWEEN THE SPOUSES.

There are questions with reference to the legal nature of these conventions compared to the better-known "Premarital agreements" foreseen in almost all EU legislations; in fact, despite formal differences, in an acceptable way, the doctrine recognizes a sufficient equivalence between the two acts.

⁶ ALMEIDA, J.G.: "Breves considerações sobre o conceito de Estado-Membro nos regulamentos em matéria de regimes matrimoniais e de efeitos patrimoniais das parcerias registadas", *Revista do Centro de Estudos Judiciários*, 2016.

This institution is frequently used in Common Law countries, but it is also known in the system of Civil Law in Continental Europe.

The conclusion of premarital agreements is legally or judicially admitted today and the content of these agreements can be various, also covering subjects excluded by the regulations.

So, Regulation 1103 does not expressly mention premarital pacts, as an anticipation of the regulations of family relations in the event of a separation or divorce, but aims, however, to cover as many subjects as possible; such regulation encourages the couple "to agree on the legal choice" on the economic regime as an informed choice, so that they are both aware of the law to be applied regarding the economic consequences of the marriage.

This is in order to ensure that the matrimonial property regime is governed by a "predictable law" with which it has close links; the aim is to protect also the weakest and least informed.

V. CONCLUSIONS.

To conclude, by the very short exegesis of the above-mentioned laws, what can be drawn from the reading of the two regulations is that a new and important step has been taken by the Union. It seems that a unification of private international family law is actually taking shape in full respect of the principle of contractual autonomy⁷.

This is a tool utilized by the European legislator not to impose rules to be observed passively, but to involve spouses as much as possible and provide them guarantees and safeguards.

In this way the wishes of both parties is privileged: the future partners, the couples and the future spouses can together plan or modify the applicable law, but there must always be a connection with the chosen law.

Therefore, the applicable law will always regulate everything included in the patrimonial regime of the spouses and for the registered civil partnerships.

It should be pointed out that in spite of the great differences that exist in Family Law, Civil Law and Common Law, both lead to the same destination, which is the reciprocal protection of the Patrimonial Laws of the couple and equal division property if the union should fail.

⁷ ALMEIDA, J.G.: "Breves considerações", cit.

The field that has been examined, despite setting off from two different sets of rules⁸ are intertwined to reach a common goal.

There are evident structural differences between the two systems examined: in Civil Law, the regulation is rigorously applied and its interpretation, reserved for the judge, does not allow for deviation.

However, by reason of a pretorial development, the system of general clauses is elevated, and therefore, in the system of Common Law the exaltation of contractual autonomy does not permit the judge to intervene in any significant way.

At the same time, the system of remedies, which is expanded in Civil Law, is extremely dynamic in Common Law, what in our system we call "Laws of Invalidity and Laws regarding responsibility".

These are important differences considering that in Systems of Common Law there are no anticipated rules, but the regulation rigorously follows what is written in the contract.

In conclusion, we are confronted by a convergence of objectives, on one side the Civil Law Systems which open up to a temperate interpretation of the general rules taken by the judge, and on the other side, the Systems of Common Law that demonstrate a moderate interpretation of the wishes of the parties.

This is therefore the result of the two EU Regulations examined here.

⁸ MATTEI, U.: "Il modello di Common Law", Torino, 2004; cfr. DEAKIN, S.: *Contract Law and the institutional preconditions*, in *Eur. Rev. Cont. L.*, 2006; GAMBARO, A. and SACCO, A.: *Sistemi giuridici comparati*, in *Trattato di Diritto Comparato*, Utet, Milano, 2018.

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