PRE-MARITAL AND PRE-UNIONAL FINANCIAL AGREEMENTS AND THEIR CIRCULATION IN THE CONTEXT OF THE NEW EU REGULATIONS 2016/1103 AND 2016/1104

ACUERDOS FINANCIEROS PREMATRIMONIALES Y PREVIOS A LA CONVIVENCIA Y SU CIRCULACIÓN EN EL CONTEXTO DE LOS NUEVOS REGLAMENTOS DE LA UE 2016/1103 Y 2016/1104

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ABSTRACT: Regulations (EU) 2016/1103 and 2016/1104 provide spouses and partners with the possibility to conclude agreements for the organization of their property regime but do not detail their content and structure. Moreover, while the possibility to conclude those agreements even prior to the marriage or the conclusion of a registered partnership is a valuable innovation in comparison with other European Regulations in family matters, some choices made by the European legislator on applicable law will likely be source of inconveniences.

Furthermore, as for their recognition and enforcement in the participating Member States – which will be based on the same rules enacted for decisions, authentic instruments, and court settlements – attention should be paid to their admissibility in some of them, like Italy, where the jurisprudence of the Supreme Court is steadily opposed to their acceptance.

KEY WORDS: Pre-marital agreements; pre-unional agreements; EU regulations.

T RESUMEN: *Los Reglamentos (UE) 2016/1103 y 2016/1104 brindan a los cónyuges y unidos la posibilidad de celebrar acuerdos para la organización de su régimen patrimonial, pero no detallan su contenido y estructura. Además, si bien la posibilidad de celebrar esos acuerdos, incluso antes del matrimonio o la celebración de una unión registrada es una innovación valiosa en comparación con otros reglamentos europeos en materia de familia, es probable que algunas decisiones tomadas por el legislador europeo sobre la ley aplicable sean fuente de inconvenientes.*

Además, en cuanto a su reconocimiento y ejecución en los Estados miembros participantes- que se basarán en las mismas normas dictadas para las decisiones, los documentos públicos y las transacciones judiciales- debe prestarse atención a su admisibilidad en algunos de ellos, como Italia, donde la jurisprudencia del Tribunal Supremo se opone firmemente a su aceptación.

PALABRAS CLAVE: *Acuerdos prematrimoniales; acuerdos previos a la convivencia; reglamentos UE.*

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I. INTRODUCTION.

When Member States reached in the Council of the EU a general approach on the Regulations 2016/1103 and 2016/1104 (an outcome that only few months before could not be taken for granted) a few delicate issues were drawing the political attention, notably on jurisdiction. The focus was therefore shifted away from other aspects, yet of paramount importance, which were deemed less politically attractive.

Amongst them, the possibility for spouses and partners to enter into agreements in view of an overall composition of their economic situation and – even more interesting – to settle those issues in advance of the establishment of their family relationship (future spouses or future partners).

This is a complex issue which is strictly intertwined with different aspects of substantial national laws: notably, property, succession, and contract law.

Nevertheless, the outcome of the negotiation led the Member States' representatives to approve a piece of legislation that will bring more legal certainty in this regard, since the new Regulations duly consider the needs of international couples and their increased mobility.

Families are now provided with a set of uniform rules which will streamline the planning of their "ménage" and will positively impact on foreseeability and circulation of decisions in such a sensitive matter[1].

1 On the Regulations, see, *inter alia*: Bonomi, A., Wautelet, P. (ed.): *Le droit européen des relations patrimoniales de couple*, Bruylant, 2021; Viarengo, I., Franzina, P.(ed.): *The EU Regulations on the property regimes of international couples. A commentary*, Edward Elgar, 2020; Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffré Francis Lefebvre, 2019; Viarengo, I.: "Effetti patrimoniali delle

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II. DEFINITORY PROBLEMS AND SCOPE OF THE REGULATIONS.

Similarly to what has been done in other EU Regulations in the field of judicial cooperation in civil matters, in order to prevent different interpretations due to specific domestic patterns of certain elements of the texts, both Regulations contain some definitions which deserve an autonomous interpretation.

The Regulations define – respectively in art. 3, par. 1, lett. b) and c) – as "matrimonial [partnership] property agreement" any "agreement between spouses or future spouses [partners or future partners] by which they organise their matrimonial property regime [the property consequences of their registered partnership]"[2].

Those definitions are then complemented by a more detailed explanation in recitals 47 and 48, according to which "a matrimonial [partnership] property agreement is a type of disposition on matrimonial [partners'] property the admissibility and acceptance of which vary among the Member States. In order to make it easier for [matrimonial] property rights acquired as a result of a matrimonial [partnership] property agreement to be accepted in the Member States, rules on formal validity of a matrimonial [partnership] property agreement should be defined. At least the agreement should be expressed in writing, dated and signed by both parties".

From the analysis of the text, it seems evident that a functional approach must be followed in ascertaining the material characteristic of such an agreement; irrespective of the shape they assume in national laws, what emerges is the necessary link between the family tie and the organization of the inherent property regime.

As for the content of the agreement, the definitions do not indulge in detail: they satisfy themselves with a reference to the organization of the property regime between (future) spouses and partners and do not set any limit to their will.

unioni civili transfrontaliere: la nuova disciplina europea", *Riv. dir. int. priv. proc.*, 2018, no. 1, p. 33; Marino, S.: "Strengthening the european civil judicial cooperation: the patrimonial effects of family relationships", *Cuadernos de Derecho Transnacional,* 2017, no. 3, vol. 9, pp. 265-284; Feraci, O.: "Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate", *Riv. dir. int.*, 2016, p. 529; Lagarde, P.: "Règlements 2016/1103 et 1104 du 24 Juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Riv. dir. int. priv. proc.*, 2016, no. 3, p. 676.

2 According to the case-law of the Court of Justice of the EU, a difference can be traced already between issues falling in the scope of the EU regulations on the property regimes and on successions. See ECJ, VI, 14th June 2017, *Todor Iliev vs. Blagovesta Ilieva*, C-67/17, par. 30: "in the case of a dispute between former spouses relating to the liquidation of movable property acquired during the marriage, since that dispute concerns proprietary legal relationships between those persons resulting directly from the dissolution of the marriage, such a dispute does not come within the scope of Regulation no.1215/2012 but comes rather within that of the second category".

Therefore, the first aspect that has to be ascertained is the scope of this organization: notably, whether or not all the assets of the couple must be included in the agreement.

Secondly, whether the agreement can include also different aspects from the settlement of all the economic issues and possibly falling outside the scope of the Regulations.

As for the first aspect, lacking any other interpretative element, it seems preferable to follow a pragmatic approach. The organization of the property regime (or of the property consequences of the registered partnership) should pursue as much as possible a positive effect, able to settle all the economic consequences of the regime and even if some asset is not included in the agreement.

Let assume, for instance, that a couple concludes an agreement including all the assets of their property regime (immovable and registered movable property, cash, bonds, shares, etc.) except for a holiday property that – for whatever reason can be imagined, among which the fact that it was bought as purely financial investment and never considered as a long-term family property – should not be considered as being part of the overall property regime. In this case, considering invalid the agreement since it lacks one asset which has never been contemplated as a permanent part of the regime would be an excessively rigid decision.

On the other hand, in a different scenario, including several minor assets of the regime without the only one which has an important economic value would not make sense and would not confer to the agreement the necessary stability and efficacy. Future disputes on the ownership or use of that asset would be likely to occur.

After all, what is necessary for an asset to be considered part of the property regime is (apart from the evidence that it belongs to the parties) the consideration given to it by the owners. If two persons bought a real estate before the marriage in order to purely speculate on its value, and then some years after they decide to marry or enter into a registered partnership, one can assume that that property should not necessarily be considered as part of their matrimonial regime.

Turning to the second aspect mentioned above, it is quite frequent in practice to come across comprehensive agreements which are not strictly limited to the organization of the property regime. It is indeed common for spouses or partners to include also parental responsibility and maintenance aspects, as well as – where this is permitted under the law governing the agreement – succession issues.

In this case a reasonable decision would be to preserve the validity of the agreement, irrespective of its scope and as long as its enforcement would not be detrimental to the will of the parties and to the objective of the pact signed by them. An approach which emphasizes the partial validity of the agreement would make justice to the efforts of the couple in settling all their pending issues and preventing future disputes.

In practice, however, the various parts of the overall "package" concluded by the spouses or partners can be so strictly intertwined that it would prove difficult to enforce only part of it without undermining the delicate balance reached by them.

Another interesting aspect to be explored – which touches upon the timing for concluding the agreements[3] – is whether those falling within the scope of the Regulations can be signed also after the divorce or the dissolution of the registered partnership.

The question cannot be answered based on the mere provisions of the Regulations, as nothing in the text clarify whether the persistent existence of the marriage or the registered partnership is a pre-condition of validity for the agreement. Art. 3 defines the agreements, the court settlements, and the decisions in matters of property regimes and property consequences of registered partnerships, yet nothing in those definitions is decisive to draw a clear distinction in terms of timing for the conclusion of the agreement.

It therefore seems that a reference to the substantive applicable law be necessary, to answer the question; after all, in some legal system a marriage or a registered partnership can be dissolved without any decision being taken on some important aspects as parental responsibility or maintenance. In this case it is possible to settle all the economic issues between the parties after the divorce is granted or the court settlement is approved by the court.

One can question that – in this case – the agreement is not concluded by spouses or future spouses (or partners) but by former spouses or partners, therefore it should be understood as a mere contractual agreement between persons no longer bound by a family tie.

However, as also anticipated above when describing which assets can or cannot be included in the agreement, what seems important in this case is the link between the will of the parties and the assets. A final settlement of all the pending economic issues between the parties should therefore be possible also within a

3 Which is considered as immaterial by Rodriguez Benot, A.: "Art. 3 – definitions", in *The EU Regulations*, cit., 3.11.

reasonable period of time after the divorce or the dissolution of the registered partnership and – as such – it should be able to circulate under the conditions set by the Regulations.

As to the form of the agreements, art. 25 of the Regulations foresees that they should be expressed in writing, dated, and signed by both spouses or partners, and that any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. Additional requirements can, however, be requested according to the law of the State of habitual residence of the parties or to the law applicable to the property regime.

Also in this case a definitory problem arises, as the wording of art. 25 refers only to spouses or partners without the usual reference to "future" that in art. 3 is present.

Notwithstanding this apparent contradiction, presumably attributable to a clerical error, the provision should however be understood as encompassing also the agreements signed before the establishment of the family tie.

In any event, although nothing in the Regulations prescribes any minimum standard as regard the consent of the parties to the agreement, it seems natural that its substantial validity must be ascertained in the light of it. Irrespective of the content of the agreement, a complete understanding of all the economic consequences should therefore be indispensable for all the parties (notably when the agreement is prepared by one of them and merely signed by the other).

Two further aspects concerning the validity of the agreements in question seem worth clarifying: the possible participation of a third person, and the problem of an agreement signed by (or on behalf of) a minor.

On the first topic, it should be presumed that the vast majority of agreements would bind only the couple; however, the property regime (and the property consequences of a registered partnership) is defined in art. 3 as a set of rules concerning the property relationships between the spouses or partners "and in their relations with third parties". Art. 28 is also devoted to regulating the effects in respect of third parties.

It is therefore clear that the door is open to a tri-lateral agreement expressly involving a third person[4] (who can be a relative, but not only) or to an agreement whose effects are directly affecting a third person.

4 An example of which is the Italian "fondo patrimoniale" based on articles 167-171 of the Civil Code. For a description of its functioning see also WAUTELET, P.: "Art. 3", in *Le droit européen*, cit., p. 289.

It goes without saying that – this being the case – in the first scenario the agreement would conceptually be composed by two parts that will not necessarily follow the same rules as regards recognition and enforcement; in the second case, the effects towards third parties are explicitly addressed in the Regulations.

Finally, as regards the participation of a minor in the agreement, while this is not prevented by the Regulations (which does not touch upon the validity of the marriage and the registered partnership, nor the age required to conclude them) it is to be regulated according to the applicable law as designated by the Regulations or chosen by the parties.

Issues like the legal capacity of the parties are indeed outside the scope of the EU Regulations and, accordingly, can vary among the Member States, in some of which minors can conclude a marriage or a registered partnership (and consequently can sign a property agreement) provided that they are represented by a guardian or authorized by the court[5].

III. INFORMAL AGREEMENTS, COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS.

As anticipated in par. 2, the form of the agreements that parties can conclude is regulated in the texts (art. 25). Similarly, authentic instruments and court settlements are described as acts able to contain provisions on the property regime of the marriage or on the property consequences of the registered partnership (art. 3).

However, while decisions and court settlements share the characteristic of being conceived and drafted in occasion of a civil proceeding, private agreements and authentic instruments can be drafted prior to the issue being brought before the court.

In particular, as for the authentic instruments, reference can be made not only to other pieces of legislation and their explanatory report[6] but also to the case-law of the European Court of Justice[7] which clarified the essential aspects thereof. The Court established, in this regard, that the involvement of a public authority

5 In Italy, for example, a minor acquires the legal capacity to marry when granted judicial authorization (see art. 84 of the Italian Civil Code): the assistance of a guardian or other representative during the marriage should therefore be understood as a requisite for its validity, without meaning *per se* that the traditional bilateral relation at the basis of the marriage would turn into a tri-lateral relationship. The same is valid for the signature of a property agreement based on art. 90 of the Italian Civil Code.

6 See in this regard the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) on 30th October 2007 and, before it, the Report by Mr. P. Jenard and Mr. G. Möller on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16th September 1988.

7 See ECJ, V, 17th June 1999, *Unibank*, C-260/97.

is essential for an instrument to be capable of being classified as an authentic instrument.

Coming to the substantial difference between private agreements and authentic instruments, still the Court of Justice clarified that since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.

A common denominator among these different acts is to be found in a characteristic which relates to the evidence of the agreement: all of them must be done in written form and must be able to be reproduced. Therefore, also a digital recording is accepted for their formal validity.

The same can be said for those agreements reached before the court and enclosed in the minutes of the hearing made by the clerk or the judge itself (depending on the different procedural rules and practice in the Member States).

The fact that an agreement on the property regime of the couple is transcribed into a private act, an authentic instrument, a decision, or a court settlement, does not change its substance provided that all the necessary element for its enforcement are included.

It can therefore be assumed that an informal agreement – that is one orally reached, but not transcribed in a tangible instrument – does not have the necessary characteristics for being considered as agreement for the purposes of art. 25 of the Regulations.

The same applies obviously for those agreements concluded by future spouses or future partners before entering into a family relationship, orally or in a different form than that admitted by the Regulations. In both cases their validity and attitude to circulate will be put into question, as we will clarify in paragraph 6.

IV. APPLICABLE LAW AND RELATED SHORTCOMINGS IN THE PLANNING OF PRE-NUPTIAL AND PRE-UNIONAL AGREEMENTS.

To facilitate the management of their property to spouses and partners, the Regulations authorise them to choose the law applicable to their property regime[8],

8 It seems worth mentioning that in the original proposal of the EU Commission [COM (2011)127] the choice of law was not foreseen for the registered partnerships, and that it was subsequently added after the European Parliament pleaded for it in its Report [A7-0254/2013] to avoid any discrimination with the married couples.

regardless of the nature or location of the property, among the laws with which they have close links because of habitual residence or their nationality. This choice may be made at any moment, before the marriage, at the time of conclusion of the marriage or during the marriage.

This is what the Regulations foresee to ensure legal certainty and provide the parties with an important tool for planning the economic aspects of their "ménage". At the same time, attention is paid also to third-party rights, to which different provisions are devoted.[9]

According to art. 22, moreover, the spouses or future spouses [partners] may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following: (a) the law of the State where the spouses or future spouses [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 or future spouse [partners] at the time the agreement is concluded.

In an attempt to provide the parties with legal certainty, the Regulations therefore limit the choice of law to those indicated in art. 22, implying a strong link between them and a certain territory (habitual residence) or a formal connection (nationality) but in both cases at the time of the agreement is signed[10].

Lacking a choice, the applicable law is limited by art. 26 to the law of the first common habitual residence, or of the spouses' common nationality or with which they have the closest connection at the time of the marriage (while for the registered partnership the law applicable by default in the absence of choice is that of the State where it was registered).

This means, in other words, that the choice of law made before the marriage or the registered partnership – and in view of it – cannot be made with reference to the law of the prospective country where possibly the parties have already decided to settle in the near future (as it frequently happens for those couples that marry shortly before moving to another Member State).

Moreover, once an agreement on the applicable law is concluded, the couple cannot rely on the escape clause set out in art. 26, par.3, which grants the possibility to ask the judge to apply the law of the State where the spouses or

9 See on this also Rademacher, L.: "Changing the past: retroactive choice of law and the protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships", *Cuadernos de Derecho Transnational*, 2018, no. 3, vol. 10, p. 7.

10 See on this, *inter alia*, Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", *Riv. dir. int.*, 2017, no. 4, p. 1103; Calò, E.: "Variazioni sulla *professio iuris* nei regimi patrimoniali delle famiglie", *Riv. not.*, 2017, no. 6, p. 1093.

partners have established their last habitual residence (and which they relied on, in arranging or planning their property relation). This possibility is not applicable when "the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State".

This means that the parties – although they have a specific reason to do so – will not have the possibility to simply ask the judge to disregard the law chosen beforehand and apply the law of the country where they have settled, and their property regime will continue to be regulated by the law of a State with which they no longer have a valuable connection.

If they want the new law to be applied, they must change the property agreement (something that cannot be taken for granted, if there is the spouses or partners do not concord on the details or the relation between them deteriorated).

As it seems clear, the European legislator somehow weakened the added value of a pre-nuptial agreement whenever the parties did not carefully examine *pros* and *cons* of the applicable law and created the conditions for possible disputes in case the consent to the original choice was given without proper consideration.

Lacking a deal for changing the agreement (and if the judge will not make use of his discretionary power, as allowed in par. 3, first sentence) the couple will be trapped in a pre-nuptial or pre-unional agreement which does not correspond to their will and to the aim of planning their property regime.

Considering the complexity of the two Regulations, a professional and independent advice should always be sought when deciding to enter into such an agreement.

V. COMMON FEATURES OF THE CIRCULATION OF AGREEMENTS IN THE AFSJ…

It is well known that one of the most valuable achievements of the European legislator is the streamlined circulation of decisions, court settlements and authentic instruments within the Area of Freedom, Security, and Justice. Thanks to the rules set out in the *acquis* it is today possible to easily relocate within the European Union and have a decision on the *status* and on other aspects of a family relationship automatically recognized and easily enforced.

Common provisions to several Regulations in the field of judicial cooperation in civil and commercial matters foresee a limited number of grounds for refusing recognition and enforcement, thus considerably narrowing the possibility to prevent the circulation of the acts above mentioned.

As for the agreements, however, things are different.

While Reg. (EC) 2003/2201 (Brussels II *bis*) deals only with enforceable agreements (thus limiting their scope to those focusing on parental responsibility matters) the subsequent Reg. (EU) 2019/1111 (Brussels III, applicable since 1st August 2022) contains provisions on the circulation of agreements in matrimonial matters as well. All the other Regulations do not.

As for maintenance, Reg. (EU) 2009/4 does not specifically tackle the issue, and the provisions therein relating to recognition and enforcement apply only to decisions, court settlements and authentic instruments.

Therefore, an agreement between the parties in matters falling within the scope of that Regulation would circulate in the EU only if it is transposed in one of the acts above mentioned, while an informal agreement they possibly have reached – even if in writing – would not be recognizable or enforceable *per se.*

We have already assumed in par. 2 that the validity of an agreement, and the applicability of the provisions concerning its recognition and enforcement, are strictly depending on its scope. Moreover, the validity aspect of the agreement and the requisites for its circulation should be kept distinct.

This should imply that, in case one of the parties questions the validity of the agreement before the judge, the latter would probably be obliged to preserve only the part of it which falls within the scope of the applicable Regulation in the specific case.

This is a major disadvantage of the way the European Regulations are structured and interact each other: it depends on the different timing they were approved and on the different sensitivity of the matters they tackle, which in turn required different approaches at the time they were negotiated.

Nevertheless, it can result in additional difficulties for the parties to find an overall compromise on their pending issues.

VI. … AND PECULIARITIES CONCERNING THE CIRCULATION OF PRE-NUPTIAL AND PRE-UNIONAL AGREEMENTS.

As we have seen in the preceding paragraph, the circulation of decisions, authentic instruments and court settlements is normally admitted within the AFSJ subject to the compliance with some strict requirements.

The Regulations on the property regimes of international couples set out an automatic recognition and a simplified exequatur procedure (as it proved impossible a complete abolition of the latter). They also tend to make uniform the requisites of the agreements on the applicable law and on the property regime – respectively described in articles 22 and 25 – prescribing that they have to be expressed in writing and should respect possible additional requirements set out by the law applicable to the property regime.

As for the pre-nuptial and pre-unional agreements, however, their circulation in the European Union will mainly depend on the form they have been concluded. In this regard, what we anticipated on the difference between their validity and their attitude to freely circulate is even more evident.

While the formal validity of an agreement can be respected in a specific case (for example because it includes the transfer of a registered moveable property and was drafted in writing, dated, and signed by the parties) its attitude to be enforced can be questioned. The party asked to deliver the property in a Member State different from the one where the agreement was concluded could oppose that the agreement – although formally valid – is not enforceable based on the European rules and should be subject to the specific enforcement procedure established in the private international rules of that Member State.

Moreover, it is easy to predict that many pre-nuptial or pre-unional agreements would be included in a single act along with a choice of law in view of a possible dispute; in this case it would be perfectly coherent to have them written, dated and signed by the parties without necessarily the assistance or the intervention of a Notary. However, while the choice of law would be perfectly valid and could be invoked before the competent judge, the same would not for the financial part of the agreement.

It is a matter of fact that prenups worldwide enforceable do not exist; there are so many differences in the way they are recognized and enforced, and nothing revolutionary is contained in the two Regulations; therefore, it seems of paramount importance to seek for a reliable expert in the jurisdiction of enforcement.

VII. THE ITALIAN EXPERIENCE IN THE LIGHT OF THE SUPREME COURT OF CASSATION'S CASE-LAW.

While the domestic law on registered partnership has been enacted only in 2016, therefore it's still early for the consolidation of a jurisprudence on agreements concluded by partners, Italy's long-standing opposition to pre-nuptial agreements

is enrooted in the assumption that this tool could be detrimental to the position of the weaker party.

The case-law of the Italian Supreme Court (Corte di Cassazione) are well-established and, except few different decisions quoted hereafter, they remain rather negative.

While oldest judgments[11] stated that agreements made by the couple before the marriage (but even in the context of the separation) and in view of the divorce are null and void because they infringe the principle of inalienability of the *status* and of the maintenance right, more recent decisions tried to draw a distinction between admissible and inadmissible agreements.

In this regard, the Supreme Court considered in some cases[12] that an anticipated waiver to the maintenance obligation would result in a relative ground of nullity of the agreement (which cannot therefore be raised *ex officio* but only by the damaged party) and later on[13] declared admissible those pre-nuptial agreements where the will of the parties was to settle their economic pending issues and the end of the marriage was not the main reason at the basis of the agreement.

In this particular case, the Court stressed the atypical nature of that agreement, considering it valid and admissible in the light of the factual circumstances of the case and of the general rules governing the Italian law of contracts; at the same time emphasizing the exceptional nature of this consideration and reiterating that in general all the agreements in which the end of the marriage is the condition which triggers the agreement are to be considered null and void.

The last published decision[14] confirmed the traditional approach of the Court and reiterated that where in the case of separation, the spouses, in defining the pending issues between them (including all the possible debt - credit reasons brought by them), have also agreed on the payment of a lifetime maintenance, the judge will have to preliminarily qualify the nature of this agreement and specify whether the annuity constituted "on the occasion" of the family crisis is unrelated to the mandatory principles governing the relations between spouses in family matters.

The judge must then decide whether this agreement is justified for another cause, and if the right to a divorce allowance is still existent.

11 See, *inter alia*, Cass., sez. I, 4th June 1992, no. 6857, *www.italgiure.giustizia.it*.

12 See Cass., sez. I, 14th June 2000, no. 8109; 21st February 2001, no. 2492; 10th March 2006, no. 5302. All in *www.italgiure.giustizia.it*.

13 See, in particular, Cass., sez. I, 21st December 2012, no. 23713, *www.italgiure.giustizia.it*.

14 See Cass., sez. I, 26th April 2021, no. 11012, *www.italgiure.giustizia.it.*

It is therefore evident that – notwithstanding the Italian Supreme Court has on some occasions recognized their profitable function of deflation of disputes in family matters – time is not ripe for a change of attitude towards the agreements in subject.

This is even more deplorable after the implementation in Italy of the law named "divorzio breve" (according to which the waiting time before the separation and the divorce has been reduced to six months) and raises the question whether an *a contrario* discrimination can be found in the different situations of a cross-border couple of spouses or partners and a totally Italian one. The latter would be prevented to agree in advance on the terms of the future settlement of their property regime, according to the well-established case-law quoted above, while the former would be allowed to introduce in the Italian legal system the same agreement through the automatic recognition procedure set out by the Regulations.

VIII. CONCLUSIONS.

The EU Regulations 2016/1103 and 2016/1104 paved the way for the international couples to solve all the issues related to their property regime or the property consequences of their registered partnership. They also contemplate the possibility to organize them in advance, to prevent possible disputes, and for this purpose allow also future spouses and future partners to enter into such agreements.

However, while the European legislator focused on the necessary requisites for the formal validity of the agreements, the international couples might still encounter difficulties in having those agreements recognized and enforced abroad.

The application in practice will show whether those agreements will be recognized and enforced entirely or partially, depending on their content and on the possible objections raised by the parties. Moreover, it remains to be seen how often the public policy clause will be opposed to refuse the circulation of agreements that may conflict with fundamental principles of domestic family law.

As for the pre-nuptial and pre-unional agreements, concluded with a view to predetermine the possible financial consequences of divorce or of the dissolution of a registered partnership, their admissibility is often questioned in the legal literature and in the national jurisprudence. While some scholars and judicial decisions have acknowledged their beneficial impact in avoiding litigation, others doubted of their admissibility referring to fundamental principles of national legal systems like the protection of the weaker party, or the need to assure a full discovery of all the

elements therein (in particular when the agreement is not negotiated within the couple but prepared by one party and simply ratified by the other).

Moreover, considering how the circulation of the agreements in family matters is generally shaped – and the need for them to be framed into decisions, authentic instruments or court settlements – it will be necessary for future spouses and future partners a supplement of professional advice, in order not to discover too late that they made some financial choice on the presumption of some arrangements that are no longer valid or enforceable.

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