

INTERNATIONAL JURISDICTION UNDER THE EU PROPERTY REGIMES REGULATIONS – BRINGING COHERENCE INTO CROSS-BORDER COUPLES’ PROPERTY DISPUTES

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Summary

The paper thoroughly examines the rules on jurisdiction of the Property Regimes Regulations, analysing both the expected benefits as well as the existing and potential problems in the application of the new rules. The main accomplishment of the Property Regimes Regulations in the field of jurisdiction is that they established more coherence in the cross-border family law adjudication. Namely, they align the international jurisdiction regarding the couple’s property to that of the situation at the origin of the need to adjudicate on such property, i.e. separation of the couple or else the death of one of the spouses or partners. Such joinder of proceedings is the general rule in the Property Regimes Regulations and even mandatory when succession proceedings are pending. Questions concerning property relations between spouses or registered partners must, however, sometimes be resolved without an underlying separation or succession proceedings and Property Regime Regulations also provide for the international jurisdiction of courts in such “independent” cases. The main connecting factor is then the common habitual residence of the spouses or registered partners, in line with the general tendency in EU Private International Law of enhancing the importance of the habitual residence, rather than of the nationality.

Keywords: *Property Regimes; Regulation 2016/1103; Regulation 2016/1104; matrimonial property; registered partners’ property.*

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1 INTRODUCTION

1.1 Broader Context: European Family Law

In recent years, three regulations entered into force in the EU, which bring more clarity into the legal aspects of the management of couples' property in cross-border situations, namely the Succession Regulation,¹ the Matrimonial Property Regimes Regulation (hereinafter: the MPR Regulation)² and the Property Consequences of Registered Partnerships Regulation (hereinafter: the PCRPR Regulation)³ (the latter two hereinafter also referred to as the Property Regimes Regulations). Collectively, 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 significant breakthrough in the unification of European private international law and have helped achieve legal certainty in resolving cross-border family disputes.

The new regulations comprise part of the so-called European Family (Private International) Law, which also encompasses the Brussels II bis Regulation,⁴ regulating procedural aspects of divorce and parental responsibility, the Maintenance Regulation,⁵ and the Rome III Regulation⁶ determining the applicable law in divorce and legal separation.

- 1 Regulation (EU) N° 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.
- 2 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.
- 3 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.
- 4 Council Regulation (EC) N° 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 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 1 August 2022.
- 5 Council Regulation (EC) N° 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.
- 6 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.

1.2 Territorial, Temporal and Material Scope of Application

The mentioned regulations 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),⁷ 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 18⁸ for the Property Regimes Regulation.⁹ 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 initiated on or after 29 January 2019 (Article 69 of the Property Regimes Regulations).¹⁰

Regarding the substantial (material) scope of application, Article 1 of the Property Regimes Regulations states that the MPR Regulation applies to “matrimonial property regimes” and the PCR Regulation to “matters of the property consequences of registered partnerships”. Further definitions follow in Article 3,¹¹ and a “negative”

7 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.

8 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 accessed on 8 February 2021.

9 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 Lucia Ruggeri, Ivana Kunda and Sandra Winkler, *Family Property and Succession in EU Member States, National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf.

10 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 Filip Dougan, “Matrimonial property and succession – The interplay of the matrimonial property regimes regulation and succession regulation,” in: *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law, Working Paper*, eds. Jerca Kramberger Škerl, Lucia Ruggeri, Francesco Giacomo Viterbo (Camerino: Università degli Studi di Camerino, 2019): 75-82.

11 Article 3 of the MPR Regulation provides: ‘matrimonial property regime’ means a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution’; Article 3 of the PCR Regulation provides: ‘property consequences of a registered partnership’ means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution’.

definition via the exclusions, in Article 1. Article 27 of the regulations, defining the scope of applicable law, can also be of help. In general, it must be emphasised that the material scope of application is to be interpreted autonomously. In case of a doubt, the competence of interpretation lies with the Court of Justice of the EU (hereinafter: CJEU). Even a brief look into the national definitions of the property regimes of different forms of couples shows a very rich spectrum of different solutions. The autonomous interpretations will therefore not be an easy task. Furthermore, such interpretation will inevitably lead to more or less different understanding of the notion of couples' property regimes within the Member States, depending on whether there is a cross-border element or not.¹² Many additional issues arise, concerning mostly the characterisation of different types of unions in relation to the substantial applicability of the regulations. We will not be able to elaborate further on them here, for reasons of limited length of this paper.

For a simpler and more 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, it also is important that all regulations in this field are applied in a coherent manner and that the same notions are interpreted, as far as possible, consistently.

1.3 General Information on Jurisdiction in Property Regimes Regulations

The Property Regimes Regulations regulate, *inter alia*, the international jurisdiction, i.e. the question regarding in which of the Member States, participating in the enhanced co-operation, the proceedings will be held. By contrast, national rules on territorial jurisdiction will determine the exact place in that country where proceedings are conducted. 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,¹³ provided that the Member States made such information available and provide updates when necessary. When the dispute falls into the scope of application of the regulations, national rules of Member States on international jurisdiction no longer apply.¹⁴

The Property Regimes Regulations primarily align the international jurisdiction regarding the couple's property with the international jurisdiction regarding the

12 Cf. Sandra Winkler, "Imovinski odnosi u obitelji: nacionalna pravna rješenja i europski trendovi", *Godišnjak Akademije pravnih znanosti Hrvatske*, N° 1 (2019): 462.

13 See the European Judicial Atlas in Civil Matters: https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do accessed on 5 February 2021.

14 For nuance, see Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 47.

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 with such underlying proceedings, the new regulations eliminate the potential need for the couples or the heirs to seize a court in a different country from that of the separation or succession proceedings, to regulate the questions regarding couple's property. Said alignment also eliminates the positive conflict of jurisdiction (i.e. 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.¹⁵

Nevertheless, the questions concerning property relations between spouses or registered partners must sometimes also be resolved outside of the two mentioned situations, i.e. without parallel 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 want to obtain 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 main connecting factor for such jurisdiction is the common habitual residence of the spouses or registered partners, which is in line with the general tendency in EU Private International Law of enhancing the importance of the habitual residence, rather than that of the nationality, which is still the prevailing connecting factor in national rules on cross-border family issues.¹⁶

1.4 Admissibility and Service of Documents

Under Article 15 of the Property Regimes Regulations, the court is required to examine its jurisdiction on its own motion and refuse to rule on the matter if the rules of the regulations do not provide for a base of jurisdiction.

It is important to emphasise that the document instituting the proceedings must be served on the defendant not only where the seized court has jurisdiction under the Regulation, but also in all cases where jurisdiction could result from the defendant's appearance (i.e. the "silent" choice of court agreement, which will be discussed below). Namely, if the court failed to serve the claim, even though it lacked jurisdiction under the other rules of the regulations, there could never be a silent choice of court agreement. In order to establish whether the defendant had the possibility of entering an appearance, the court must verify whether the defendant was duly served (Article

15 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 49.

16 Connecting factors of habitual residence and domicile have a further advantage in that a person usually just has one, whereas dual nationality is not rare and can pose considerable problems when used as connecting factor (cf. Thalia Kruger and Jinske Verhellen, "Dual Nationality = Double Trouble?", *Journal of Private International Law*, Vol 7, N° 3 (2011), 601-626). However, the establishing of the habitual residence is not always simple either. Cf. Agne Limante, "Establishing Habitual Residence of Adults under the Brussels IIa Regulation: Best Practices from National Case-law", *Journal of Private International Law*, Vol. 14, N° 1 (2018), 160-181.

16 of the Regulations).

The due service of the introductory document means that the defendant had to actually receive the document or that all necessary steps were taken in that regard, as well as that the defendant had enough time, after the service, to prepare a defence. If the service must be performed across the border of the Member State of the forum, the Regulations prescribe service pursuant to the EU Service Regulation,¹⁷ or, if not applicable, pursuant to Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.¹⁸

2 GENERAL RULES ON JURISDICTION

2.1 *Derived (Ancillary) Jurisdiction in Case of Ongoing Succession or Separation Proceedings*

Recital 32 to the Property Regimes Regulations states: "To reflect the increasing mobility of couples and facilitate the proper administration of justice, the rules on jurisdiction set out in this Regulation should enable citizens to have their various related procedures handled by the courts of the same Member State. [...]" The related procedures the regulations reference are, first, succession proceedings, and second, separation proceedings.

The EU Succession Regulation unifies the rules on international jurisdiction in succession proceedings. It is critical to examine this Regulation when searching for the courts competent to decide on the division of property of spouses and registered partners following the death of one of them.

The jurisdiction rules regarding the separation of couples are, however, only unified when there is marriage (whereas the term "marriage" is not (yet) subject to autonomous interpretation by the CJEU). The courts competent for divorce, legal separation or marriage annulment under the Brussels II bis Regulation will thus also have jurisdiction concerning the liquidation of the matrimonial property. In the case of registered partnerships (of persons of the same or opposite sex), the jurisdiction concerning the property consequences of the partnership will follow national rules on international jurisdiction concerning the dissolution of the registered partnership. These rules vary in different Member States (and are even non-existent in some of them). Therefore, the lack of legal security is much more important for registered partners than for the spouses.

The importance the European legislator attributes to the joinder of the mentioned proceedings in the same Member State can be deduced, *inter alia*, from the fact that, under the Property Regimes Regulations, the joinder of proceedings with the existing

17 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10 December 2007.

18 78 States are currently members to the said Hague Convention: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> accessed on 8 February 2021.

succession proceedings supersedes even the choice of court agreements the parties might have concluded regarding their property disputes.¹⁹ Contrary to Article 8 of the Brussels I bis Regulation, the joinder is not even subject to the will of the plaintiff.²⁰ The imperativeness of the joinder is somewhat mitigated when property proceedings are joined to divorce proceedings of married couples: the spouses' agreement is necessary, if "the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction" (Recital 34 of the MPR Regulation)²¹ from Article 5, para. 2 of the MPR Regulation. Lastly, the joinder of property proceedings to the separation proceedings of registered partners is entirely conditioned by the partners' agreement.

In both types of joinder, the property disputes have to "arise in connection with" succession or separation proceedings. Disputes can arise about the interpretation of the connection which is necessary to provoke the joinder, since this is not further determined by the regulations. It is questionable whether the interpretation of the connection from the Brussels I bis Regulation can be of assistance in resolving this dispute. Namely, the primary goal of the rules on joinder of proceedings from Article 8 of the Brussels I bis Regulation is the prevention of irreconcilable judgments. Practical reasons, such as saving time and money, are also important, but not essential. In contrast, the Property Regimes Regulations do not mention the necessary risk of irreconcilable judgments; instead, procedural economy is at the forefront.²² Therefore, the necessary connection with the first proceedings will probably have to be defined in a different manner. To ensure uniform application of the EU law, this interpretation should be euroautonomous. Bonomi contends that the Regulations should also be "construed in a quite wide and flexible way",²³ which is definitely in line with the fact that ancillary jurisdiction is the general rule of the Property Regimes Regulations.

Another important issue of interpretation that arises pertains to the delimitation between succession and couples' property matters, which is especially important when

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- 19 Nonetheless, this imperative joinder does not by itself guarantee that the same law will be applied to the "anchor" proceedings and to the property dispute, since the list of possible applicable laws and that of possible jurisdictions are not identical. Cf. Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 193).
- 20 Poretti warns that the imperativeness of the joinder sometimes puts the surviving spouse in a difficult procedural situation and reminds that the consent of the surviving spouse to the joinder was discussed in the preparation of the Property Regimes Regulations: Paula Poretti, "Deciding on Matters of Matrimonial Property in the Proceedings for Succession under Regulation 2016/1103 on Matrimonial Property Regimes", *Zbornik Pravnog Fakulteta Sveučilišta u Rijeci* Vol 38, N° 1 (2017), 466.
- 21 Dougan deems that the spouses' agreement is necessary when jurisdiction for divorce is based on connecting factors which might be disadvantageous for one of the spouses: Filip Dougan, "Nova evropska pravila o pristojnosti, pravu, ki se uporablja, ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov", in: *Liber amicorum Dragica Wedam Lukić*, Aleš Galič and Jerca Kramberger Škerl, eds., (Ljubljana: Pravna fakulteta Univerze v Ljubljani, 2019), 238.
- 22 Cf. Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 53, 55-56.
- 23 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 56.

different law is applicable to those issues and/or when different courts within the same Member State decide on those matters.^{24, 25} Bonomi draws attention to the fact that such delimitation can also be difficult with regard to maintenance, and that, generally, concentration of proceedings on family issues should also encompass maintenance; this is possible on grounds of Article 3 of Maintenance Regulation which allows for a joinder with divorce proceedings.^{26, 27}

It is also interesting to note that the concentration of proceedings does not work both ways: if the proceedings regarding the matrimonial/partners' property begin (but not necessarily end) before succession or separation proceedings, the latter will not be joined to the property proceedings,²⁸ nor will the court which started them lose its jurisdiction in favour of the succession or divorce court (*perpetuatio fori*). Also, if proceedings regarding succession or separation are no longer pending, the property relations proceedings are treated autonomously.²⁹ Under the same principle of *perpetuatio fori*, the court, which had jurisdiction because it was first seised in succession proceedings, remains competent even if the "anchor" proceedings are terminated without a judgment on the merits.³⁰

2.2 Jurisdiction in Case of Autonomous Proceedings

Court proceedings in matters relating to matrimonial property or property of registered partners can also be instituted autonomously, i.e. with no relation to succession or divorce/separation proceedings. In such cases, the Property Regimes Regulations define connecting factors determining the competent courts.

The main connecting factor is the "habitual residence" of the parties. In the case where there is a common habitual residence of spouses/partners at the time the proceedings are instituted, the courts of the Member State of that habitual residence hold jurisdiction. If spouses/partners do not (anymore) have their respective habitual residence in the same Member State (whereas it is irrelevant if they reside in different

24 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 53; Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 194.

25 For one resolved question of such delimitation, see CJEU judgment in *Mahnkopf*, N° C-558/16 of 1 March 2018.

26 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 72-73.

27 This possible combination of couple's property disputes seems, however, not to work well in common law systems. Maebh Harding, "The Harmonisation of Private International Law in Europe: Taking the Character out of Family Law?", *Journal of Private International Law*, Vol 7, N° 1 (2011), 203-229; C. M. V. Clarkson, "Matrimonial Property on Divorce: All Change in Europe", *Journal of Private International Law*, Vol. 4, N° 3 (2008), 421-442.

28 Bonomi is of different opinion and deems that joinder should be admitted in such cases. Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 55.

29 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 55.

30 Cf Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 55.

places within the same country), the regulations provide for subsidiary connecting factors: the last common habitual residence, if one of the spouses/partners still lives there; the habitual residence of the respondent (i.e. defendant) at the time the court is seised; or the spouses' common nationality at that same time. These connecting factors must be examined in this order, i.e. the next one only comes into consideration if the previous one does not exist.³¹ Franzina speaks of a "ladder" of grounds for jurisdiction.³²

2.3 Jurisdiction Regarding Assets Located in Third States

In principle, the court having jurisdiction under the Property Regimes Regulations, can (and must) decide on the entirety of the spouses' or partners' property. Normally, this is beneficial for the parties, because it allows them to settle their dispute and obtain a binding decision on the whole property in a single proceeding.

However, this rule can prove problematic in situations when part of the property is located in a third State (i.e. a State not participating in the enhanced co-operation), especially if the property is immovable. Namely, many States reserve to their national courts the exclusive jurisdiction to rule on such property located within their territory, and, consequently, decline recognition and enforcement of foreign judgments regarding this issue.³³ If part of the property is located in such a country, it is clear that another (second) procedure will have to be initiated in that country and there is no sense in obliging the parties to litigate the same issue twice. Article 13 of the Property Regimes Regulations therefore provides for what might be thought of as a *forum non conveniens* clause because it allows the competent court to decline ruling on one or more of the spouses'/partners' assets (movable or immovable) "if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third state". This option is, however, only available when the couple's property regime proceedings are joined to succession proceedings. The solution provided by Article 13 of the Property Regimes Regulations is aligned with a similar provision of Article 12 of the Succession Regulation and offers the possibility to the court to limit both succession and property regime proceedings to the same assets.³⁴

The Regulations further provide that "paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised". Franzina explains that this is just a confirmation of the self-evident option of the parties to limit the actions of the court to particular assets if this

31 It is interesting to note that all connecting factors relate to the parties and none of them relate to the assets in the couple's property, as this is common in national legislations. Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 196.

32 Pietro Franzina, "Jurisdiction in Matters Relating to Property Regimes under EU Private International Law", *Yearbook of Private International Law*, Vol. 19 (2017/2018), 177.

33 Cf. Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 189-190.

34 Cf. Pietro Franzina, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 131.

is possible under the *lex fori*. The policy interest sought to be advanced by Article 13 lies in situations where parties do not agree on such limitation. The court is then authorised to proceed to the limitation under the conditions of Article 13.³⁵

3 SPECIAL RULES

The Property Regimes Regulations provide for several special rules, applicable in cases where general rules are not applicable or/and adequate.

3.1 Alternative Jurisdiction

If the matrimonial property case is joined with the divorce proceedings, the court deciding on the divorce clearly accepts the fact that there is marriage. However, if the matrimonial property case is joined with succession proceedings or is to be resolved autonomously, it can happen that the Member State with jurisdiction under the MPR Regulation does not recognize the existence of the marriage. In such cases, Article 9 provides for “alternative jurisdiction” in that the court may decline jurisdiction if it “holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings”. The jurisdiction will then go either to the court chosen by the parties, or to any other competent courts under the MPR Regulation, or, as a last resort, to the courts of the Member State where the marriage was concluded. The PCR Regulation contains a very similar rule in Article 9: if the court of the Member State that has jurisdiction pursuant to other rules of the Regulation holds that its law does not provide for the institution of registered partnership, it may decline jurisdiction. The jurisdiction then goes to the court agreed by the parties, or, if there was no choice of court agreement, any other court which has jurisdiction under the Regulation. If the parties already obtained a dissolution or annulment of a registered partnership which is capable of being recognised in the Member State of the forum, then the court cannot decline jurisdiction to rule on the property consequences of such partnership.

3.2 Subsidiary Jurisdiction

In case the courts of none of the Member States participating in the enhanced co-operation has jurisdiction according to the above rules, Article 10 of the Property Regimes Regulations confers jurisdiction to the courts of the Member State where immovable property of one or both spouses is located (*forum rei sitae*), but only with regard to that immovable property.

With this rule, the regulations vary from the otherwise enshrined principle of unity of proceedings regarding moveable and immovable property. The reason for this deviation is probably to ensure that the participating Member States are able to decide on at least a part of the couple’s property. The connecting factor is the location of immovable property, which is a common in international jurisdiction for reasons

35 Pietro Franzina, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 132-133.

of the specific national rules and registers of such property. An important reason to determine such possible jurisdiction is probably also the fact that immoveable property often constitutes the most important (valuable) part of the couple's property and states are interested in reserving such jurisdiction for their domestic courts. The probability is high that the Member State of the location of immoveable property would also have jurisdiction on the basis of national rules. Nonetheless, for reasons of legal certainty, which the EU strives to protect as a matter of judicial policy, it is better to have a unified rule, which also ensures the application of the Regulations' conflict of law rules. As Pogorelčnik Vogrinc points out,³⁶ the applicable law will be the same, even if the immoveables are located in different Member States and the jurisdiction of the courts of each of these states can only be based on Article 10 of the Regulations.

3.3 *Forum necessitatis*

In line with the fundamental procedural right of access to court, private international law developed mechanisms in order to prevent the so-called *déni de justice*, i.e. a situation where no court is competent to adjudicate a dispute over civil rights and obligations. Firstly, legislators are mindful of preventing such a situation by enacting rules on jurisdiction which cover all predictable disputes. However, since extraordinary situations can occur for any number of reasons such as inadequate legislation, unpredictable events, or simply by chance, legislators often choose to provide, as a last resort, a *forum necessitatis*. As mentioned, access to court is a fundamental right and the competence to prevent the denial of justice could also be based on general principles, constitutional rules and international conventions, but it is surely more practical for the judges to have a specific provision in the legislation to that effect.

Article 11 serves the above purpose in providing that when no court of a Member State has jurisdiction pursuant to other jurisdictional rules of the Regulations “the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected.” The Regulations also demand a “sufficient connection” of the case with such Member State. The Succession Regulation was the first to enshrine the *forum necessitatis*.³⁷ The fact that the wording of the relevant article is the same in both the Succession Regulation and in the Property Regimes Regulations enables a uniform interpretation not only of the necessity of such jurisdiction but also of the connection with the forum.

A *forum necessitatis* clearly constitutes an exception to the predictability of forum, which is a highly esteemed value in the EU private international law. Also, in view of the criteria utilized in its application, it can breach the principle of international comity in that one state seizes the capacity of another state to conduct civil proceedings. The MPR Regulation hints at the restricted use of this jurisdiction in Recital 41. This states that a reason for applying the *forum necessitatis* would be,

36 Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 200.

37 It was proposed, but later rejected, in the Brussels I bis Regulation.

for example, the ongoing civil war in the third state (the PCR Regulation contains such mention in Recital 40). Possibly a more common example of the use of *forum necessitatis* could be “when a spouse/partner cannot reasonably be expected to initiate or conduct proceedings in that State”, for the reason that it could offer the possibility of conducting proceedings to couples, the unions of which are not recognized in the country, which court would otherwise hold jurisdiction.³⁸

4 CHOICE OF COURT AGREEMENTS

The role of party autonomy is eminent in EU private international law. European legislators provided a place for choice of court agreements 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, succession. Therefore, it is no surprise that also in the field of couples’ property, spouses and registered partners can either conclude an express choice of court agreement, or else, accede to jurisdiction by way of appearing before an otherwise non-competent court. This is the case assuming that the rules on joinder with succession or separation proceedings, discussed above, do not prevail. Under the Property Regimes Regulations, the parties can only choose internationally competent courts and not the territorially competent court within the chosen Member State; choice of venue will be subject to procedural *lex fori*.³⁹

The possible choices of the parties are, furthermore, greatly limited. First, the choice of court agreements will not be effective if the couple’s property dispute is joined to the succession or separation proceedings.⁴⁰ Furthermore, according to Article 7 of the Property Regimes Regulations, the parties can only agree on the jurisdiction of the courts of the Member State whose law is applicable pursuant to the conflict of law rules of the Regulations, or on the jurisdiction of the courts of the Member State of the conclusion of the marriage/creation of the registered partnership.

From these limitations, it is possible to deduce the legislator’s wish to simplify the proceedings, rather than to promote the parties’ liberty to choose. Walker is especially critical of the fact that the rules on choice of court contained in the Property Regimes Regulations fail to guarantee that the common choice of the parties will be respected once the proceedings are initiated, and deems that a choice of court should

38 Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 201.

39 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 47.

40 The doctrine denounces the 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. Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 197.

This problem is especially poignant in cases where property regime’s dispute is imperatively joined to succession proceedings and, in some cases, divorce proceedings, but less important when parties need to agree on the joinder – this could be interpreted as a subsequent modification of the choice of court agreement.

only be possible when dispute has already arisen, same as under Article 12 of the Brussels II bis Regulation.⁴¹ 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.⁴²

The first possible choice of the parties results in the so-called *Gleichlauf*, the always desirable application of the domestic law of the forum, which enables judges 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). The second option is more directly linked to the wishes of the parties: there is usually a close connection of the couple with the state where they were married or registered their partnership and they may well want to ensure the jurisdiction of the courts of that state in the event of a dispute, with no regard to their future changes of habitual residence. But also, this second choice will often lead to *Gleichlauf*: since pursuant to Article 26, para. 1, the first connecting factor for the law applicable in the 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 were married or registered their partnership.

Contrary, for example, to the Brussels I bis Regulation, the Property Regimes Regulations do not provide for a conflict of law rule regarding the material validity of the choice of court agreement.⁴³ However, they do regulate the question of the required form, in that the agreement must be in writing and the parties must date and sign it. Communication by electronic means which provides a durable record is deemed equivalent to writing. For procedural requirements, not dealt with in the Regulations, the procedural *lex fori* applies.⁴⁴

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, unlike the more usual solution 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

41 Laura Walker, "Party Autonomy, Inconsistency and the Specific Characteristics of Family Law in the EU", *Journal of Private International Law*, Vol. 14, N° 2 (2018), 260-261.

42 Andrea Bonomi, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 76.

43 Given that the validity of choice of court agreements is excluded from the scope of application of the Rome I Regulation (Article 1 para. 2, point e)) (Regulation (EC) N° 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 2007), national conflict of law rules apply, which could lead to different results. An analogy with the Brussels I bis Regulation, which provides for the application of the law of the chosen State would be much recommended.

44 Cf. Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema*, 198-199.

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.

It 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 extended beyond the circle of defendants who are the protected weaker parties in a legal relationship. It is most welcome that the Property Regimes Regulations impose such a duty on the court in Article 8, para. 2. In practice, it is not excessively burdensome for the court or other authority or legal profession entrusted with the service of the claim to include the information for the defendant advising of the right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

5 OTHER PROCEDURAL SITUATIONS: COUNTERCLAIM, LIS PENDENS, RELATED ACTIONS

5.1 Counterclaim

Beside the general rules of the Property Regimes Regulations, which provide for a joinder of the patrimonial disputes to succession and separation proceedings, Article 12 regulates one of the classical examples of the joinder of proceedings, a counterclaim, which can be resolved by the court ruling on the “anchor” claim, assuming that the counterclaim also falls within the scope of application of the same Regulation.⁴⁵

The jurisdiction to decide on a counterclaim is traditionally vested in the court deciding on the “anchor” claim, for the typical reasons justifying any traditional joinder. It seems that the legislature has concluded that there always will be a sufficiently close connection between the claim and the counterclaim, if the counterclaim also falls within the scope of application of the same Regulation. This is highly probable, since the scope of application of both Regulations is very restricted.

It is important to note that the notion of what constitutes a “counterclaim” is interpreted autonomously and there is already case-law on that question, issued on the basis of the Brussels I Regulation.⁴⁶

45 Franzina questions the necessity of such a rule in the Property Regimes Regulations, since many other jurisdictional bases are available to the effect of the concentration of connected proceedings. Pietro Franzina, in: Viarengo, Franzina, eds., *The EU Regulations on Property Regimes of International Couples*, 126-127.

46 Most importantly: CJEU, *Danvaern*, N° C-341/93 of 13 July 1995. This judgment concerns the so-called procedural set-off and has been criticized by the doctrine from Member States where such set-off is decided on with a *res judicata effect*, since the CJEU interpreted it as a mere procedural defence and not a counterclaim.

5.2 *Lis pendens and Related Actions*

Article 17 of the Property Regimes Regulations regulates the classical situation of *lis pendens*, i.e. the existence of two (or more) parallel proceedings between the same parties and “involving the same cause of action”. Unsurprisingly, the Regulations provide that ‘any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established’. ‘Where the jurisdiction of the court first seised is established, any court other than the court first seised must decline jurisdiction in favour of that court.’ The courts must inform other seised courts of the time when they were seised.

The central question relates to the interpretation of the time when the first court was seised, given that national laws of the Member States determine this moment at different milestones in the proceedings. For the rules on *lis pendens* to work, the time of the seising of the court must be interpreted autonomously, and preferably already defined in the legislation. Article 14 of the Regulations serves that purpose by defining the time when the court is first seised as follows: “first, the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or, second, if the proceedings are opened on the court’s own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.”

Article 18 of the Regulations further regulates the so-called related actions. According to Article 18 para. 3, the actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

In such cases, the rule is less strict than regarding *lis pendens*. The courts other than the court first seised are not obliged to stay the proceedings, but have the discretion to do so. On demand of one of the parties, the court may also decline jurisdiction altogether, if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. Namely, in such cases, there is no danger of a denial of justice and the purpose of procedural economy (as well as the wish of one of the parties) is served.

6 *PROVISIONAL, INCLUDING PROTECTIVE, MEASURES*

The Property Regimes Regulations also provide for jurisdiction for the issuance of provisional measures, which include protective measures. Such jurisdiction is not conditioned by the jurisdiction of the same court to rule on the substance of the matter. Courts of all participating Member States can thus issue provisional measures regarding matrimonial or registered partners’ property.

This provision promotes the interests of the parties to seek provisional protection in the Member State where that protection is needed, while at the same time permitting proceedings on the merits to be conducted elsewhere. The question, however, arises

as to the recognition and enforcement of such measures in other Member States. The Regulations do not tackle this issue. However, given that the system of recognition and enforcement under the Regulations is based on that of the Brussels I Regulation of 2000, we can look to CJEU case law regarding that regulation for guidance. According to that case law, court decisions pertaining to provisional and protective measures can be declared enforceable in other Member States, under certain conditions; most importantly, they must be issued in contradictory proceedings.⁴⁷

The regulations also provide for the possibility of obtaining a provisional measure (offered by the law of the State of enforcement)⁴⁸ in the Member State of enforcement, when the proceedings for the declaration of enforceability are pending (Article 53). According to the wording of the regulations (“[w]hen a decision must be recognised”), the applicant can apply for protective measures even before lodging the application for the declaration of enforceability.⁴⁹

7 CONCLUSION

The adoption of the Property Regimes Regulation is, without any doubt, a welcome advancement 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 becoming increasingly complex, but simultaneously more comprehensive. The political and social reality in the EU is such that the legislature prefers to pass legislation incrementally, in limited areas and with exceptions, rather than trying to enact sweeping reforms at once and risking failure. As this article has demonstrated, even this fragmented, step-by-step legislative approach has resulted in admirable progress. Hopefully, the time will come, sooner rather than later, when the different acts will be bound into a comprehensible and coherent EU Private International Law Regulation, or at the least, a European Family Law Regulation.

The main accomplishment of the Property Regimes Regulations lies in their bringing more coherence into the cross-border family law adjudication. In order to save time and money and prevent conflicting judicial decisions, it is crucial that the same court (or at least the courts of the same country) is competent: 1) in case of a separation of a couple, for deciding on that separation and on the property issues resulting from such separation, or, 2) in case of a deceased spouse or registered partner, for deciding both on the succession and the questions relating to the couple’s property.

The Regulations’ rules on jurisdiction are built on the long tradition of the Brussels Convention and its “descendants”. Thus, in need of interpretation, the existing CJEU case-law will often be of help. Given the specific nature of the regulated domain, the Regulations, however, also include solution, which are either without precedent

47 CJEU, *Denilauer*, N° 125/79 of 21 May 1980.

48 Ulf Bergquist, in: Ulf Bergquist *et al.*, *The EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 216-217.

49 Ulf Bergquist, in: Ulf Bergquist *et al.* *The EU Regulations on Matrimonial and Patrimonial Property*, 214.

(e.g. the regulation of choice of court agreements) or have only been adopted in the Succession Regulation, such as the *forum necessitatis*. Those provisions, in our view, also bear the most potential for the need of further interpretation by the CJEU or even for a future reform. Authors especially draw attention to the suboptimal regulation of the choice of court agreements, which are often undermined by other Regulations' provisions.

The most poignant questions that will have to be resolved regarding the Regulations, are, however, undoubtedly those regarding the characterisation of different unions for the purposes of the applicability of the regulations. The situation of cross-border same-sex couples and of the unmarried and unregistered heterosexual couples remains especially precarious. Resolving these issues, combined with persuading other Member States joining the enhanced co-operation regarding the Property Regimes Regulations and the Rome III Regulation, are the next challenges in the field of European Family Law.⁵⁰

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50 Cf. Lucia Valentová, "Property Regimes of Spouses and Partners in New EU Regulations – Jurisdiction, Prorogation and Choice of Law", *International and Comparative Law Review*, Vol. 16, N° 2 (2016), 240.

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Sažetak

MEĐUNARODNA NADLEŽNOST PREMA PROPISIMA IMOVINSKIH REŽIMA EU-A – STVARANJE KOHERENTNOSTI U IMOVINSKIH SPOROVIMA PREKOGRANIČNIH PAROVA

Ovim se radom provodi temeljna analiza o pravilima o nadležnosti u Uredbama o imovinskim odnosima, uzimajući pritom u obzir očekivanu korist kao i postojeći te potencijalni problemi koji bi se mogli pojaviti prilikom primjene novih pravila.

Osnovno je postignuće Uredaba o imovinskim odnosima u području nadležnosti to što je predviđena veća koherentnost u pravnom uređenju pitanja prekograničnih obitelji. Napose, uniformiranje međunarodne nadležnosti glede imovine parova s onom koja se odnosi na okolnost koja vodi do izvorne potrebe odlučivanja o tim dobrima, a to jest razvod ili razilazak para ili smrt jednog od bračnih drugova ili partnera. Takvo spajanje postupaka predstavlja opće pravilo u Uredbama o imovinskim odnosima i čak je obvezatno u slučaju postojanja postupka o nasljednim stvarima.

Ponekad je potrebno riješiti pitanja koja se odnose na imovinske odnose među bračnim drugovima ili registriranim partnerima mimo isticanja postupka o razvodu ili postupka o nasljednim stvarima, pa Uredbe o imovinskim odnosima uređuju međunarodnu nadležnost sudova u takvim „nezavisnim“ predmetima. Osnovnu poveznicu čini zajedničko uobičajeno boravište bračnih drugova ili registriranih partnera u skladu s generalnim trendom u europskom međunarodnom privatnom pravu o jačanju važnosti uobičajenog boravišta umjesto državljanstva.

Ključne riječi: *imovinski režimi; Uredba 2016/1103; Uredba 2016/1104; bračna imovina; imovina registriranih partnera.*

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