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Determining the Applicable Law in Matrimonial Property Regimes

On the Interpretation of Article 26 Regulation (EU) No 2016/1103 in the Absence of Choice-of-law and Common Habitual Residence

Wishing to remain faithful to the alleged principle of immutability of the law governing matrimonial property regimes, the literature interprets Art. 26 para. 1 Regulation (EU) No 2016/1103 such that if the spouses have their habitual residence in different States at the time of marriage, it is necessary to wait for a period of time to ascertain whether they will move it to the same State. If so, only the law of that State is to apply (retroactively); if not, one of the other two laws indicated in Art. 26 is to apply (once and for all). This position gives rise to uncertainty in the determination of the applicable law and is contradicted by literal, systematic and teleological interpretations of the Regulation, which show that, in the absence of a common habitual residence, the law governing the matrimonial property relationships is, depending on the circumstances, the one provided for in letters b or c of para. 1 of Art. 26. However, this law may change the moment the existence of a first common habitual residence is ascertained, regardless of whether it was established immediately, shortly, or long after the conclusion of the marriage.

Bestimmung des anwendbaren Rechts in Ehegütersachen. Zur Auslegung von Artikel 26 EuGüVO bei Fehlen einer Rechtswahl und eines gemeinsamen gewöhnlichen Aufenthalts. Im Bestreben, dem Grundsatz der Unveränderlichkeit des Güterstatuts treu zu bleiben, legt das Schrifttum Art. 26 Abs. 1 VO (EU) Nr. 2016/1103 so aus, dass, wenn die Ehegatten zur Zeit der Eheschließung ihren gewöhnlichen Aufenthalt in verschiedenen Staaten haben, eine Frist abzuwarten ist, um festzustellen, ob sie ihn in denselben Staat verlegen werden: Wenn ja, ist nur das Recht dieses Staates (rückwirkend) anzuwenden; wenn nicht, soll eines der beiden anderen in Art. 26 genannten Rechte (endgültig) angewandt werden. Dieser Standpunkt führt zu Unsicherheit bei der Bestimmung des anwendbaren Rechts und widerspricht einer wörtlichen, systematischen und teleologischen Auslegung der VO, wonach mangels eines gemeinsamen gewöhnlichen Aufenthalts für die ehelichen Güterrechtsverhältnisse je nach den Umständen das in Art. 26 Abs. 1 lit. b oder c vorgesehene Recht maßgeblich ist. Letzteres kann sich jedoch ändern, wenn das Bestehen eines ersten gemeinsamen gewöhnlichen Aufenthalts festgestellt wird, sei dieser nun unmittelbar, kurz oder lange nach der Eheschließung begründet worden.

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I. Introduction

As regards Art. 26 para. 1 Regulation (EU) No 2016/1103[1] on matrimonial property regimes, an interpretation is gaining ground in the literature which, by wishing at all costs to remain faithful to the principle of immutability of the applicable law in absence of a choice of law by the spouses, does not attach due importance to the changes, some of them radical, that certain rules underwent between proposal and final text. Though the European Commission heralded it as one of the fundamental principles of the proposal for a regulation on the subject,[2] as we shall see in the following, such changes may have at least attenuated, if not discarded, the aforementioned principle.

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1 Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L 183/1.

2 See the "Impact Assessment" accompanying the European Commission proposals for a regulation on matrimonial property regimes and for a regulation on property consequences of registered partnerships, SEC(2011) 327 final, 27–28, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0327:FIN:EN:PDF> (7 May 2024). – According to the majority of the scholars, the principle of immutability would, together with those of universality and unity of the applicable law, also constitute one of the three fundamental principles of the Regulation; see, most recently, *Ignacio Paz-Ares*, La autonomía privada y la organización de los matrimonios transfronterizos, Revista de Derecho Civil 2023, 261–436, 297.

Pending an intervention by the Court of Justice, it would seem appropriate to offer a critique of this interpretation with the dual aim of sparking a debate among the scholars and of providing practitioners with an attempted solution to the problems it leaves open.

The following section sets out an exegesis of Art. 26 Reg. that will provide the necessary premises for this critique, which is explicated in section III, the reading of which now commands the reader's patience, because to show that the interpretation of mainstream literature "est *incomplète*, il nous faut de longues et arides dissertations".[3]

II. Applicable law in the absence of choice by the spouses

In the absence of *professio iuris*,[4] Art. 26 para. 1 Reg. stipulates that the matrimonial property regime is governed by:

(a) the law of the State of the spouses' first common habitual residence after the conclusion of the marriage or, failing that
(b) the law of the State of the spouses' common nationality at the time of the conclusion of the marriage or, failing that
(c) the law of the State with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

The adoption of these connecting factors and the order in which they are presented do not come as a surprise.

1. First common habitual residence

The prevalence of the habitual residence criterion derives from the fact that it ensures consistency between the new instrument and other regulations in the field of private international law on family matters,[5] as well as from the observation that it brings undeniable benefits in terms of proximity and predictability.

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3 As pointed out in another field of the humanities by *Frédéric Bastiat*, Sophismes économiques, Première serie, in: Oeuvres complètes, vol. IV (1854) 2 (original italics).

4 Provided for and regulated by Arts. 22–24 Reg.

5 In which this criterion is widely spread; see e. g. Art. 3 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1; Art. 5 para. 1 lit. a and b and Art. 8 lit. a and b Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10; Art. 21 Regulation (EC) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201/107; Arts. 3, 7 and 8 Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and

Like other instruments before it, Regulation (EU) No 2016/1103 does not define habitual residence; however, the characteristics of this criterion have long since been clarified by the Court of Justice, so its practical application should not cause excessive problems.

In general terms, suffice it to recall here that habitual residence is a *de facto* criterion the interpretation of which is independent of the notions of residence or domicile in the Member States' legal systems, and which is to be inferred autonomously from European Union law.[6] According to the Court of Justice, habitual residence is, precisely, "the place [...] in which the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his[/her] interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account".[7] It follows from this definition that the habitual nature of residence depends on two elements – one of an objective nature (the temporal duration of a person's stay in the territory of the State, to which are to be added the nature and characteristics of that stay), the other of a subjective nature (the person's intention to establish there permanently the main centre of his/her life and business interests)[8] – the combination of which must indicate a connection of the person with a specific State, which can be said to be genuine and stable and which is an expression of the integration of the former with the social and cultural environment of the latter.[9]

Having said that, it should be immediately added that the determination of the connecting factor under consideration "must be made in the light of the context of the provisions and the objective of the Regulation" in question, since "[t]he case-law of the Court relating to the concept of habitual residence" in a given area of European Union law "cannot be directly transposed into the context of the assessment of the habitual residence" which is relevant in other areas.[10]

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enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ 2019 L 178/1.

6 See CJEU 2 April 2009 – Case C-523/07 (*A*), ECLI:EU:C:2009:225, no. 34.

7 See CJEU 15 September 1994 – Case C-452/93 (*Magdalena Fernández ./. Commission of the European Communities*), ECLI:EU:C:1994:332, no. 22.

8 See CJEU 22 December 2010 – Case C-497/10 (*Barbara Mercredi ./. Richard Chaffe*), ECLI:EU:C:2010:829, no. 51.

9 See *Ruth Lamont*, Habitual Residence and Brussels II*bis*: Developing Concepts for European Private International Family Law, Journal of Private International Law 2007, 261–281; *Marco Mellone*, La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie, Rivista di diritto internazionale privato e processuale (Riv.dir.intern.priv. proc.) 2010, 685–716; *Mariana Sebalhos Jorge*, A residência habitual no direito internacional privado (2018) 79 ff.; *Alessandra Zanobetti*, La residenza abituale nel diritto internazionale privato: spunti di riflessione, in: Liber amicorum Angelo Davì (2019) 1361–1404.

10 See CJEU 2 April 2009 – *A* (n. 6) nos. 35–36. – In this respect, it should be borne in mind that almost all the Court's decisions concern the habitual residence of minors in the context of Regulation (EC) No 2201/2003. A first decision concerning habitual residence in the context

This warning seems particularly appropriate in reference to Art. 26 para. 1, in which the reference to the "spouses' first *common* habitual residence"[11] would at first glance seem to require not only the presence of both spouses in the same country but also their cohabitation.[12] But this doubt must be rejected because, as we have seen, habitual residence expresses the connection of the individual (or in this case, of both individuals) in question with a given State (and not with a specific physical place within that State);[13] on the other hand, in the absence of cohabitation, it would be unreasonable to reject the law of habitual residence in favour of the other laws referred to in the provision cited above, since the grounds for giving precedence to the law of habitual residence exist even in the event of the absence of a shared home.[14]

The same conclusion applies, of course, where the spouses have their habitual residence in "a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes", each spouse is established in a distinct territorial unit, and there are "internal conflict-of-laws rules of that State" which "determine the relevant territorial unit whose rules of law are to apply". In such case, the applicable law will be determined on the basis of those internal rules.[15] The situation where these internal rules are lacking is more complex. Indeed, strictly speaking, since none of the rules provided in Art. 33 para. 2 can compensate for this deficiency, one would have to opt for the application of one of the other laws provided for by Art. 26 para. 1. As an alternative, the literature proposes – and the suggestion is acceptable – that recourse should be had to the law of the territorial unit with which the spouses have the closest connection, through analogy with lit. b of Art. 33 para. 2.[16]

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of Regulation (EU) No 650/2012, was issued in CJEU 16 July 2020 – Case C-80/19 (*E.E.*), ECLI:EU:C:2020:569.

11 Italics added.

12 See, in a dubitative way, *Natalie Joubert*, La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale: Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés, Revue critique de droit international privé 2017, 1–26, 20.

13 See *Domenico Damascelli*, Rapporti patrimoniali tra coniugi e partner (legge applicabile), in: Enciclopedia del diritto – I Tematici, vol. IV: Famiglia, ed. by Francesco Macario (2022) 1069–1103, 1092; *Neža Pogorelčnik Vogrinc*, Applicable Law in the Twin Regulations, in: The EU Regulations on Matrimonial Property and Property of Registered Partnerships, ed. by Lucia Ruggeri / Agnė Limantė / Neža Pogorelčnik Vogrinc (2022) 101–128, 105.

14 See *Andrea Bonomi*, Art. 26, in: Bonomi / Wautelet, Le droit européen des relations patrimoniales de couple: Commentaire des Règlements nos. 2016/1103 et 2016/1104 (2021) 767–844, 780–781.

15 Art. 33 para. 1 Reg. provides for it.

16 See Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 782; *idem*, Arts. 33–35, ibidem 1075–1095, 1087 ff.; cf. *Paul Lagarde*, Art. 33, in: Bergquist / Damascelli / Frimston / Lagarde / Reinhartz, Commentaire des Règlements européens sur la liquidation des régimes matrimoniaux et les partenariats enregistrés (2018) 134–137, 136.

It should be further pointed out that where, at the time of the wedding, the spouses habitually reside in the same State, the law governing their property relationships will be the law of that State, since it is the law of the State of their first common habitual residence already even an instant after the conclusion of the marriage.

In light of what has been said so far, if the spouses were initially resident in different locations in the same State but subsequently go to live together in another State, or if they initially live together in the same State and subsequently move to another State (even only shortly after the wedding), the law of their common habitual residence at the time of the wedding will not be affected.[17] Indeed, under the Regulation, a change of habitual residence can only lead to a change in the applicable matrimonial property law subject to the conditions set out in Art. 26 para. 3.

2. Escape clause

According to the first paragraph of Art. 26 para. 3, the application of the law of the State of the spouses' first common habitual residence after the wedding may be disabled by the court in favour of the law of the State of the last common habitual residence, provided that:

(a) the duration of the latter common habitual residence was significantly longer than the duration of the first common habitual residence established after the wedding;
(b) the spouses have adopted that different law for "arranging or planning their property relations".

This derogation from the law of the first common habitual residence must be requested by (at least) one of the parties and is granted by the court on a discretionary basis. However, the court's discretion is not absolute: the rule lays down the criteria that must guide the court in reaching its decision (duration of the habitual residence and reliance of the spouses on that different law), and it makes clear that the application of the alternative law may only take place in exceptional cases (i.e., only when the aforementioned criteria are the direct result of the overall circumstances).

Moreover, the illustrated mechanism cannot apply if the spouses have concluded a marriage contract under the law of the first common habitual residence after the wedding (see Art. 26 para. 3 sent. 4) or an agreement on the choice of the applicable law under Art. 22 para. 1.[18]

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17 Contra Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14), thereby implicitly admitting (but in conflict with the position taken by the same author in general; see section III.2 below) the mutability of the objectively applicable law.

18 This follows not only from reasons of logic (since it would be inconsistent for a law elected jointly with the other spouse to be rejected unilaterally), but also from the definition in Art. 3 para. 1 lit. b Reg., according to which a marriage contract is "any agreement between spouses or future spouses by which they organize their matrimonial property regime".

Since one of the conditions for deciding to apply the alternative law is that the spouses have settled their property relationships under such law, it seems reasonable that this law should apply from the moment of the conclusion of the marriage; however, opposition by one of the spouses can prevent such retroactive application of the law, in which case the alternative law applies only from the moment when the spouses established their new common habitual residence (see Art. 26 para. 3 sent. 2).

Finally, the derogation from the law of the first common habitual residence should apply only within the court proceedings in which it is invoked; outside the courtroom, the applicable law remains that provided for by Art. 26 para. 1 lit. a.[19]

In any case, the application of the law of the last common habitual residence "shall not adversely affect the rights of third parties deriving from the law" of the first common habitual residence after the conclusion of the marriage (see Art. 26 para. 3 sent. 3).

3. Common nationality

Where the connecting factor set out in Art. 26 para. 1 lit. a is not practicable, the law governing the matrimonial property regimes shall be the common national law of the spouses in compliance with lit. b.

At least in the majority of cases, the criterion of the spouses' common nationality has the two-fold advantage of being easily ascertainable (even years after the conclusion of the marriage) and of leading to the application of a law with which the spouses have a significant connection.

However, it should not be overlooked that the Regulation does not require the common nationality to be effective, and hence in practice the law based on it may lack in proximity to the spouses (think, for instance, of the case of second- or third-generation immigrants who retain the citizenship of their ancestors, or of those who are granted the citizenship of a given State as a result of investments made there).[20]

The application of the common national law must be maintained even where one or both spouses hold – in addition to a common nationality – one or more non-common nationalities; whereas, in the event that the spouses have more than one common nationality, application of the common national law is excluded pursuant to Art. 26 para. 2.

In this respect, no relevance can be given to national rules which, by conferring prevalence on the nationality of the *forum* or on the actual nationality,[21] could, in a

19 Therefore, if the spouses wish to not apply it, they have the burden of proceeding with an *optio legis*.

20 On the latter topic, see *Jelena Džankić*, The Global Market for Investor Citizenship (2019).

21 See, for instance, Art. 19 para. 2 Legge n° 1995-218 Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale della Repubblica Italiana no. 128 of 3 June 1995, suppl. ord. no. 68, p. 3.

concrete case, entail the disablement of common nationality, or an obligation to choose only one. Irrespective of the compatibility of such rules with European Union law (at least when one of the nationalities involved is that of a Member State),[22] their disqualification originates, in fact, from the obligation of uniform interpretation of the Regulation, which would be irreparably thwarted if unilateral interpretations thereof were allowed.[23]

4. Closest connection

In the absence of a common nationality (or in case of multiple common nationalities), the last criterion set out in Art. 26 para. 1 Reg. leads to the application of the law of the State "with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances" (lit. c).

This criterion (long since known in the European context),[24] by aiming to identify the legal system with which the case is most significantly connected, ensures, at least in principle, the application of an effective law.

Its identification requires the evaluation of all the pertinent factual circumstances of the case, such as, for example: the residence of the spouses (not only registered residence), their nationality (if they have different nationalities or more than one common nationality), the place where they habitually meet, the place where their marriage was celebrated, the place of birth of any children, the place where the family's main assets are located, the language spoken in the course of family relations, etc.

However, as there is a certain margin of discretion when weighing these factual circumstances,[25] the criterion of the closest connection jeopardizes the uniform application of the Regulation and is ill-suited in circumstances where professionals and consultants (who are not vested with the authoritative powers of judges) need to

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22 See CJEU 7 July 1992 – Case C-369/90 (*Mario Vicente Micheletti and others ./. Delegación del Gobierno en Cantabria*), ECLI:EU:C:1992:295; CJEU 2 October 1997 – Case C-122/96 (*Stephen Austin Saldanha and MTS Securities Corporation ./. Hiross Holding AG*), ECLI:EU:C:1997:458; CJEU 2 October 2003 – Case C-148/02, (*Carlos Garcia Avello ./. Belgian State*), ECLI:EU:C:2003:539; CJEU 16 July 2009 – Case C-168/08 (*Laszlo Hadadi (Hadady) ./. Csilla Marta Mesko, épouse Hadadi (Hadady)*), ECLI:EU:C:2009:474.

23 See Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 803–804.

24 See Art. 4 para. 1 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, OJ 1998 C 27/34, as well as Art. 4 para. 3 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6. On the problems raised by this connecting factor, see *Roberto Baratta*, Il collegamento più stretto nel diritto internazionale privato dei contratti (1991).

25 See *Joubert*, Dernière pierre (n. 12) 20, according to whom identifying the law of the State with which the spouses have the closest connection "pourra certainement être assez divinatoire".

know what legal framework applies to the married persons. This is probably why it has been subordinated to the criterion of common nationality.

III. Functioning of Art. 26 para. 1 Regulation (EU) No 2016/1103

1. Literal interpretation of the provision

We have now reached the heart of the matter. At first sight, the provisions of Art. 26 para. 1 Reg. appear to be clear.

Let us consider the case of X and Y, exclusively French nationals, whose habitual residence at the time of their wedding was Italy. By virtue of lit. a of the aforementioned provision, the law governing their property relations should be the Italian law.

But if at the time of the wedding of X and Y the habitual residence of X is Italy and that of Y is France, lit. a does not apply. By virtue of lit. b, the law which governs their property relationships is the French law, since it is the law of their common nationality.

Finally, in the event that X is an Italian national and Y is a French national, and at the time of the wedding their respective places of habitual residence were Italy and France, neither lit. a nor lit. b applies, and so lit. c will have to be applied, and hence the law governing their property relationships will be the law of the closest connection.

In the second and third cases, however, were X and Y to take up their habitual residence in the same State, the applicable law would be that State's law. This follows from the wording of lit. a, which declares applicable the law "of the spouses' *first* common habitual residence *after*" – without any further specification – "the conclusion of the marriage".[26]

Additionally, it follows that, should the spouses take up habitual residence in the same State, during the initial period of marriage the law applicable to the property relationships between these spouses will be, in the second case, the law of their common nationality and, in the third case, the law of the closest connection. Thereafter, and until dissolution of the marriage (subject to the application of Art. 26 para. 3), the applicable law in both the second and third case will be the law of the State of the spouses' common habitual residence.

26 Italics added.

2. Current interpretation of the provision

This basic reconstruction of the functioning of the rule being examined here, which derives from its literal wording,[27] goes against most of the legal literature. By virtue of Recital no. 46 of the Regulation (which provides that "no change of law applicable to the matrimonial property regime should be made except at the express request of the parties") and of Recital no. 49 (which provides that the first connecting factor set out in Art. 26 para. 1 leads to the application of the law of the State of common habitual residence when the latter is established "*shortly* after marriage"[28]), most of the literature has come to the conclusion that where the spouses have their habitual residence in different States at the time of the wedding, it is necessary to wait for a certain amount of time in order to ascertain whether they will transfer it to the same State, and that if they do, only the law of the latter will have to be applied,[29] with retroactive effect (that is, from the moment of the conclusion of the marriage).[30]

More generally, this line of reasoning maintains on one hand that Regulation (EU) No 2016/1103 drew inspiration from the abovementioned principle of immutability of the objectively applicable law.[31] But on the other hand, it maintains that – since immutability means it is not possible to apply the law of the State of the spous-

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27 Already supported by *Domenico Damascelli*, La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo, Rivista di diritto internazionale 2017, 1103–1155, 1139; *idem*, Applicable Law, Jurisdiction, and Recognition of Decisions in Matters Relating to Property Regimes of Spouses and Partners in European and Italian Private International Law, 25 (2019) Trusts & Trustees 6–16, 9; *idem*, Rapporti patrimoniali tra coniugi e partner (n. 13) 1094 ff.; cf. *Fabrizio Vismara*, Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (UE) no. 2016/1103 in materia di regimi patrimoniali tra i coniugi, Riv.dir.intern.priv.proc. 2017, 356–371, 361.

28 Italics added.

29 See *Paul Lagarde*, Art. 26, in: Bergquist / Damascelli / Frimston / Lagarde / Reinhartz (n. 16) 113–120, 114–115; *María del Pilar Diago Diago*, Art. 26: Ley aplicable en defecto de elección por las partes, in: Buigues / Palao Moreno, Régimen económico matrimonial y efectos patrimoniales de las uniones registradas en la Unión europea (2019) 247–259, 250–251; Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 767 ff., 784 ff.

30 See *Anatol Dutta*, Das neue internationale Güterrecht der Europäischen Union: Ein Abriss der europäischen Güterrechtsverordnungen, Zeitschrift für das gesamte Familienrecht 2016, 1973–1985, 1982; *Dieter Martiny*, Art. 26, in: Viarengo / Franzina, The EU Regulations on the Property Regimes of International Couples: A Commentary (2020) 241–259, 250; Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 788–789; *Pogorelčnik Vogrinc*, Applicable Law in the Twin Regulations (n. 13) 106.

31 See *Paul Lagarde*, Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés, Riv.dir.intern.priv.proc. 2016, 676–686, 683; *Cyril Nourissat*, Art. 26, in: Corneloup / Egéa / Gallant / Jault-Seseke, Le droit européen des régimes patrimoniaux des couples: Commentaire des règlements 2016/1103 et 2016/1104 (2018) 253–265, 255–256; *Andrea Bonomi*, Introduction, in: Bonomi / Wautelet (n. 14) 21–70, 38 ff.; *Paz-Ares*, Autonomía privada (n. 2) 297.

es' common habitual residence once the other laws indicated by Art. 26 para. 1 Reg. have been applied, and for reasons of proximity to (and predictability on behalf of) the spouses the first law should be given priority over the others – it is worth waiting some length of time before falling back, once and for all, on the law of common nationality or on the law of the closest connection.

How long the wait should be, however, is unclear.

According to some scholars, the wait should not be more than one month;[32] according to others, it should be at least three[33] or at least six months,[34] but not more than twenty-four;[35] others set the term at one year, after which the common habitual residence becomes irrelevant;[36] still others deem these temporal indications to be totally arbitrary and suggest a flexible solution that varies, within the limits of reasonableness anyway, according to the circumstances of the case at hand (which include the spouses' intention to establish a common habitual residence "comme conséquence immédiate du marriage").[37]

The undeniable uncertainty that would derive from the acceptance of this position (one variant would even require that, in addition to the objective elements of the case, the psychological attitudes of the persons concerned[38] be taken into account) constitutes sufficient grounds for closely exploring the matter in order to decide which of the two approaches should be endorsed.

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32 See *Jean-Louis Van Boxstael*, Le règlement européen "régimes matrimoniaux" et la pratique notariale, in: Tapas de droit notarial, ed. by Fabienne Tainmont / Jean-Louis Van Boxstael (2019) 189–229, 219.

33 See *Johannes Weber*, Die europäische Güterrechtsverordnung: Eine erste Annäherung, Deutsche Notar-Zeitschrift 2016, 659–697, 672; *Dagmar Coester-Waltjen*, Die objektive Anknüpfung des Ehegüterstatuts, in: Die Europäischen Güterrechtsverordnungen, ed. by Anatol Dutta / Johannes Weber (2017) 47–61, 53.

34 See the stance of *Expertgroep IPR van het LOVF Familie-en Jeugdrecht*, Aanbeveling LOVF inzake het eerste huwelijksdomicilie onder de Europese Verordening huwelijkvermogensstelsels (2019), <https://www.rechtspraak.nl / SiteCollectionDocuments / Aanbeveling-LOVF-eerste-huwelijksdomicilie-onder-de-Europese-Verordening-huwelijksvermogensstelsels.pdf> (6 May 2024), approved by *Fatih Ibili*, Binnen zes maanden na de huwelijkssluiting?, Weekblad voor Privatrecht Notariaat en Registratie 2019, 727–729.

35 See Bergquist / Damascelli / Frimston / Lagarde / Reinhartz / *Lagarde*, Art. 26 (n. 29) 114; *Pogorelčnik Vogrinc*, Applicable Law in the Twin Regulations (n. 13) 106.

36 See *Bettina Heiderhoff*, Die EU-Güterrechtsverordnungen, Praxis des Internationalen Privat- und Verfahrensrechts 2018, 1–11, 5.

37 See Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 786–787, according to whom it appears reasonable, "suivant les circonstances, un délai de six mois ou parfois même d'une année".

38 Which, in addition to the spouses, should include third parties, as it is deemed that the intention of the former should be "objectivement reconnaissable" by the latter; see Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 786.

3. The role of Recitals in the interpretation of provisions of EU law

As we have seen, the opinion under examination is based mainly on the contents of Recitals no. 46 and no. 49. But according to the consolidated case-law of the Court of Justice, the preamble to a European legislative act does not have binding legal force and cannot be used to derogate from the provisions of the act in question or to interpret them in a sense that is openly contrary to their literal wording.[39] The Court adds that it may be of use – at most – to dispel the ambiguities present in such provisions[40] or to define their exact scope of application.[41]

This means that the well-known general rules of legal hermeneutics also apply to the preambles of European legislative acts, according to which recourse to materials additional to the norm is justified only for the purpose of elucidating or confirming its meaning, as derived from its literal and systematic interpretation.[42]

4. Systematic interpretation in light of changes to the Regulation prior to the final text

We have already touched on the literal interpretation.

As regards systematic interpretation, it must be noted that the Recitals in question – except for the addition of the adverb "shortly" in Recital no. 49 – literally follow the text of the corresponding recitals in the proposal for a regulation,[43] whereas the rules referred to in the latter underwent significant changes in the process of reaching the final text.

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39 See CJEU 19 November 1998 – Case C-162/97 (*Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn*), ECLI:EU:C:1998:554, no. 54; CJEU 25 November 1998 – Case C-308/97 (*Giuseppe Manfredi ./. Regione Puglia*), ECLI:EU:C:1998:566, no. 30; CJEU 24 November 2005 – Case C-136/04 (*Deutsches Milch-Kontor GmbH ./. Hauptzollamt Hamburg-Jonas*), ECLI:EU:C:2005:716, no. 32; CJEU 2 April 2009 – Case C-134/08, (*Hauptzollamt Bremen ./. J. E. Tyson Parketthandel GmbH hanse j.*), ECLI:EU:C:2009:229, no. 16; CJEU 19 December 2019 – Case C-418/18 (*Patrick Grégor Puppinck and Others ./. European Commission*), ECLI:EU:C:2019:1113, no. 76.

40 See CJEU 20 November 1997 – Case C-244/95 (*P. Moskof AE ./. Ethnikos Organismos Kapnou*), ECLI:EU:C:1997:551, no. 78; CJEU 27 November 2007 – Case C-435/06 (*C*), ECLI:EU:C:2007:714, no. 52.

41 See CJEU 29 April 1999 – Case C-288/97 (*Consorzio fra i Caseifici dell'Altopiano di Asiago ./. Regione Veneto*), ECLI:EU:C:1999:214, no. 23.

42 On the subject, see *Tadas Klimas / Jūrate Vaičiukaitė*, The Law of Recitals in European Community Legislation, 15 ILSA Journal of International and Comparative Law 61–93 (2008); *Maarten den Heijer / Teun van Os van den Abeelen / Antanina Maslyka*, On the Use and Misuse of Recitals in European Union Law (30 August 2019), Amsterdam Law School Research Paper No. 2019–31, Amsterdam Center for International Law No. 2019-15, <https://ssrn.com/abstract=3445372> (7 May 2024).

43 See Recital no. 46 Reg. in relation to Recital no. 23 of the proposal and Recital no. 49 Reg. in relation to Recital no. 21 of the proposal.

This goes, first of all, for Art. 18 of the proposal – entitled "Change of applicable law", and commented on by Recital no. 23 – the content of which was merged with that of the preceding Art. 16, giving rise to Art. 22 Reg.

Well, it is true that the last rule provides that the spouses "may agree to *designate*, or to *change*, the law applicable to their matrimonial property regime";[44] but in the new context, instead of enshrining the principle of immutability of the applicable law unless there is an act of will of both spouses,[45] the rule appears to play a more modest role: namely that an *optio legis* subsequent to the first *optio legis* (or to further ones) is also effective, provided it is directed towards a law other than the one chosen previously.

If this is the case, Recital no. 46 Reg. has no connection with the provisions of the Regulation.

Even more interesting indications are to be found in Art. 26 of the Regulation, which – compared to the corresponding article in the proposal[46] – contains an amendment to para. 2 and adds para. 3.

As we have seen, the first sentence of the latter provision allows the court to disable, under certain conditions, the application of the law of the State of the spouses' first common habitual residence after the wedding, in favour of the law of the State of their last common habitual residence.

The rule shows that according to the Regulation, a change of the objectively applicable law is conceivable,[47] but that such change can only be made if it leads to the application of a law that is more effective than the former one (which, in this specific case, depends on a comparison of the duration of the first with that of the last habitual residence, and on an assessment of the spouses' expectations).

Now, considering that, from the point of view of the European legislator, the connecting factor of the spouses' common habitual residence is the one that best expresses the couple's current and genuine connection with a given State, the literature that is being critiqued here has deemed it inconsistent to allow the law of the last common habitual residence to replace that of the first common habitual residence but to deny the same substitution with respect to the law of common nationality or of the closest connection.[48]

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44 Italics added.

45 A principle which is difficult to deduce, at least in such general terms, even from Art. 18 of the proposal.

46 It is, precisely, Art. 17.

47 As deemed also by Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 788.

48 See *Coester-Waltjen*, Objektive Anknüpfung (n. 33) 55; *Heiderhoff*, EU-Güterrechtsverordnungen (n. 36) 6; Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 816–817; cf. *Mònica Vinaixa Miquel*, La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104), in: El orden público interno, europeo e internacional civil: Acto en homenaje a la Dra. Núria Bouza Vidal, catedràtica de Derecho internacional privado, Indret 2017,

But that criticism is unfair, because the inconsistency is only apparent.

In order to understand this, it is necessary to return to para. 2 of Art. 26 Reg., according to which "[i]f the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply".

This provision implies that if, at a given moment, in the pursuit of the applicable law, we have arrived at Art. 26 para. 1 lit. b (because no first common habitual residence has been ascertained), and the application of the common national law has to be excluded (because the spouses have more than one common nationality), the applicable law will have to be determined by means of the criterion set out in lit. c below. However, the simultaneous reference in Art. 26 para. 2 to both lit. a and lit. c of the preceding paragraph implies that the first connecting factor contemplated therein is not to be definitively cast aside if, in the specific case, the third criterion had originally been invoked. If the first connecting factor were to be considered definitively cast aside in that case, the rule need only have referred to the third criterion. Instead, by referring to the first criterion as well, the rule makes clear that the law of the closest connection at the time of the conclusion of the marriage must give way to (i.e., must be replaced by) the law of the first common habitual residence from the time it is established by the spouses.

Once one has acquired this interpretation – which is the only one capable of giving full meaning to Art. 26 para. 2 Reg.[49] (any other being an inadmissible abrogation of a rule consciously dictated by the lawmaker)[50] – it is necessary, for reasons of consistency, to acknowledge that the same substitution occurs between the law of common nationality and the law of the first common habitual residence.

In fact, if in the "concurrence entre critère de proximité"[51] – that is, if in the competition between the criterion of the closest connection and the criterion of the first common habitual residence after the wedding – the latter is preferred, it is all the

274–313, 301–302; *Isidoro Antonio Calvo Vidal*, Ley aplicable a los efectos patrimoniales de matrimonios y uniones registradas y a las sucesiones en la UE (2023) 108.

49 In fact, if as the mainstream literature is inclined to believe, the connection criterion set out in Art. 26 para. 1 lit. c were to be employed only and exclusively if there is no longer any possibility of applying lit. a of the same provision, the reference made in para. 2 to the latter criterion would be devoid of meaning (as maintained by *Vismara*, Legge applicabile in mancanza di scelta (n. 27) 369, according to whom Art. 26 para. 2 Reg. shows "sul piano letterale una certa anomalia" ("a certain anomaly on a literal level"); see, even more clearly, Viarengo / Franzina / *Martiny*, Art. 26 (n. 30) 253, according to whom "the reference" in the repeated rule "to the habitual residence of the spouses [...] is meaningless because the common habitual residence has to be examined beforehand").

50 It is worth mentioning that the terms of Art. 26 para. 2 Reg. differ significantly from those of Art. 17 para. 2 of the draft, which merely stated that "Paragraph 1(b) shall not apply if the spouses have more than one common nationality". Such a radical rewording of the text cannot be considered to be the fruit of pure chance or a merely formal intervention.

51 See Corneloup / Egéa / Gallant / Jault-Seseke / *Nourissat*, Art. 26 (n. 31) 265.

more reason for such preference be given when there is competition between the criterion of the first common habitual residence after the wedding and the criterion of common nationality, which is undoubtedly more likely to lead to a law devoid of effectiveness[52] than the criterion of the closest connection.

It follows that, in the opening sentence of Art. 26 para. 3 Reg., the failure to mention the laws indicated in lit. b and c of para. 1 is not the result of forgetfulness or imprecision, but is because the issue of prevalence of the law of the spouses' last common habitual residence over the law of common nationality or the law of the closest connection cannot be raised at all, since, preliminarily, the replacement of the latter two by the the law of the spouses' first common habitual residence is ensured by para. 1 itself, read jointly with para. 2.

Accordingly, this proves that if the spouses do not have a common habitual residence at the time of the wedding, the law applicable to their property relationships will, depending on circumstances, be the law provided for in lit. b or c of para. 1 of Art. 26, but also that this law may change – only once (subject to the application of para. 3), and only for the future[53] – from the moment when the existence of a first common habitual residence is ascertained, regardless of whether it was established *immediately*, *shortly* or *long* after the conclusion of the marriage.

Thus, the argument based on Recital no. 49 Reg. is groundless.

It further follows that the statement according to which the three connecting factors in Art. 26 para. 1 Reg. are to be read in successive order[54] is to be accompanied by the clarification that the last two criteria, taken as a whole, remain subordinate to the first one (in the sense that they apply only until the first criterion does not work).

Nor is this result contradicted by the fact that the three letters of Art. 26 para. 1 Reg. are connected by the expression "or, failing that". Indeed, the presence of that expression in a rule of European private international law does not necessarily mean that the connecting factors provided for by that rule must be read *en cascade*; rather, the relationship between those connecting factors depends on the content of the rule in question, assessed in the light of the context in which it is set.[55]

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52 See supra the passage nearby n. 20.

53 See the following discussion on the retroactivity of the applicable law.

54 See Corneloup / Egéa / Gallant / Jault-Seseke / *Nourissat*, Art. 26 (n. 31) 255; Buigues / Palao Moreno/*del Pilar Diago Diago*, Art. 26 (n. 29) 253; Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 774.

55 See, for instance, *Domenico Damascelli*, Diritto internazionale privato delle successioni a causa di morte (2012) 68; *Antonio Leandro*, La giurisdizione nel regolamento dell'Unione europea sulle successioni mortis causa, in: Il diritto internazionale privato europeo delle successioni mortis causa, ed. by Pietro Franzina / Antonio Leandro (2013) 59–85, 75–76; according to whom lit. a and b of Art. 10 para. 1 Regulation (EU) No 650/2012 (where the same conjunction is used) are on the same level, so that the courts of the Member States of the nationality and of the previous habitual residence of the deceased may have concurrent jurisdiction.

5. Identifying the applicable law before the couple establishes a common habitual residence

The conclusion reached in the previous paragraph also avoids an inconvenience – one that the majority of the literature is aware of, and that it solves by standing in contrast with the system of the Regulation or (even) in contradiction to its initial assumptions.

I am referring, precisely, to the issue of identifying the law applicable to property relationships between spouses – who, at the time of their wedding, do not have a common habitual residence – in the interval between the time of the conclusion of the marriage and the expiration of the (alleged) time-limit for establishing that residence.

As mentioned above, to make up for the lack of rules covering that time interval, the opinion being questioned here is forced to argue that if, at the expiration of the time limit, the applicable law is that of the common habitual residence – established in the meantime – then this law applies retroactively, which is to say, from the celebration of the wedding.[56]

This argument clashes with the rules of the Regulation that govern the question of the retroactivity of the applicable law.

Such rules are, precisely, Arts. 22 para. 2 and 26 para. 3 sent. 2, Reg.

According to Art. 22 para. 2, only an agreement between the spouses can give retroactive effect to the chosen law; as for Art. 26 para. 3, sent. 2, the retroactive application of the law of the last common habitual residence may be disabled by the opposition of one of the spouses (relying again on an act of will, even if tacit or implicit). Hence, in the context of the Regulation, any retroactive application of the applicable law must be ruled out when not accompanied by the will of the spouses themselves on the matter.

The literature also offers an unconvincing solution to the additional problem that may arise where, during the "waiting period", it is nevertheless necessary to know which law is applicable to the matrimonial property regime of the spouses (for instance, if they intend to purchase a property).[57]

For such a hypothesis, the literature ends up maintaining precisely what it had initially denied, namely, that the applicable law must be identified by means of the connecting factors set out in letters b or c of Art. 26 para. 1, but that the same law must be superseded by the law of the first common habitual residence as soon as the spouses have established it.[58] With this argument, the (assumed) principle of immu-

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56 See the authors cited in n. 30.

57 The example is offered by Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 788.

58 See *Luca Baldovini*, Die europäischen Güterrechtsverordnungen: Anwendungsbereich, Abgrenzung und Kollisionsrecht, Interdisziplinäre Zeitschrift für Familienrecht 2018, 39–48, 45; Viarengo / Franzina / *Martiny*, Art. 26 (n. 30) 250; Bonomi / Wautelet / *Bonomi*, Art. 26 (n. 14) 788–789.

tability of the objectively applicable law is definitively shattered at the very hands of those who shaped it; nor is it of any help to keep it standing by postulating that the spouses' common habitual residence must be established "shortly after" the wedding (given that, in any case, a change occurs), or by postulating the formula (proven inappropriate) of retroactive application of the law of residence.

The position of those who propose to make a distinction based on the moment when the question of determining the applicable law is raised is more elegant: namely, if such a question is raised "dans les premiers mois du mariage, avant l'établissement d'une première résidence commune", the law indicated by the criteria referred to in Art. 26 para. 1 lit. b or c would apply; while, if the same question is raised "plusieurs années après l'établissement de cette résidence, même pour des actes antérieurs à cet établissement", the law of the first common habitual residence should apply.[59]

Nevertheless, this argument commits a sin of abstraction, since – by opening up the need to envisage two further periods of time ("les premiers mois du mariage" and the "plusieurs années après l'établissement" of the first common habitual residence) but without providing any useful guidance – it entails the exercise of discretionary assessments that are the exclusive prerogative of the courts. This completely ignores the need – which, in practice, arises daily – to be promptly aware of the legal framework that applies to individuals united in matrimony but located in different States.

But the solution to the problem can be found very easily (indeed, in my opinion, the problem does not arise at all) by following the different reading of the rule under consideration that this paper proposes.

6. Suitability of the proposed solution in terms of teleological interpretation

To the foregoing should be added the not-at-all-secondary observation that the present solution appears to be perfectly in line with the teleological interpretation of the Regulation, whose main aims include, on the one hand and in general, "[t]o provide married couples with legal certainty as to their property and offer them a degree of predictability"[60] and, on the other hand and in particular, to "enable spouses to know *in advance* which law will apply to their property relationships".[61]

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59 See Bergquist / Damascelli / Frimston / Lagarde / Reinhartz / *Lagarde*, Art. 26 (n. 29) 115; likewise *Pogorelčnik Vogrinc*, Applicable Law in the Twin Regulations (n. 13) 106.

60 This is stated in Recital no. 15, but reference to "legal certainty" is contained also in Recitals no. 36, 43, 46, 47, 49 and 72.

61 See Recital no. 43. Italics added.

IV. Some final remarks

The combination of the three connecting factors contained in Art. 26 para. 1 with a temporal reference denotes the clear intention of the European legislator to go beyond the precedents offered by some national systems of private international law, in which the variability of the law applicable to property regimes in the absence of a choice of law by the spouses is natural, so to speak, and, potentially, unlimited.[62]

The appropriateness of such a choice[63] is open to question, since, in order to prevent the risk of changes to the applicable law, it fails to consider the possible variations that may occur in married life: for instance, a couple may move their habitual residence from one State to another, or one spouse may take on the nationality of the other or lose one of the nationalities they originally possessed.

Especially in the first case and, in particular, where mobility involves Member States, excluding the application of the law of the State where the couple spontaneously intended to settle may (especially for young and/or mixed-nationality couples, which are naturally more inclined to blend in with the new social setting) constitute a surprising outcome and ultimately result in an obstacle to the process of European integration.

The analysis presented in the preceding paragraphs averts this outcome, at least in the most striking case (i.e., where the couple, potentially after years of living separately since their marriage, finally reunites to live in the same State).

In cases other than that, couples have no other option than resorting to a choice of law,[64] an instrument whose existence is not always known to them and whose diffusion will require an appropriate awareness-raising action on the part of the European institutions.

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62 See, for instance, Art. 54 para. 1 lit. a Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP), FF 1988 I 5 and Arts. 29, 30 para. 1 sent. 1 Legge n° 1995-218.

63 Already adopted by the Belgian legislator with Art. 51 Code de droit international privé. – On the parallel between the mentioned provision and Art. 26 para. 1 Reg. (as well as on the parallel between Art. 19 of the same Code and Art. 26 para. 3 Reg.), see, *Patrick Wautelet*, Relations patrimoniales au sein du couple: les régimes matrimoniaux en droit international privé, Chroniques notariales 70 (2019) 155–208.

64 Pursuant to Art. 22 para. 1 lit. a Reg.