

Título: Party autonomy in international jurisdiction in respect of personal and financial consequences of cross-border marriages

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Party Autonomy in International Jurisdiction in Respect of Personal and Financial Consequences of Cross-Border Marriages

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1. Introduction

This paper deals with an area of law where party autonomy has traditionally been less entrenched than in others: Family Law. The policies traditionally underpinning this legal field (public policy reasons, the protection of the weakest party or the State sovereignty) alongside the specific characteristics of family relationships may explain the slower embedment of party autonomy in Family Law.¹

EU Private International Law rules have followed this trend: freedom of choice of court and law in contractual and non-contractual obligations has traditionally been promoted,² whereas the admission of party autonomy in International Family Law has been – is being – part of a more conservative process. However, in the last years, party autonomy has been seriously considered by the European legislator in EU Family Law Regulations dealing with cross-border marriages and the patrimonial consequences thereof.³

There are actually several reasons to support the inclusion of freedom of choice in the regulation of personal and financial consequences of cross-border marriages.⁴ Firstly, it encourages the couple's freedom to regulate their private life. Secondly, spouses'/ex-spouses' choice increases legal certainty and contributes to the free movement of people, since they will be less reluctant to move within the European Union if the effects of their family status have been previously agreed. This is obviously related with the protection of the expectations of the spouses, i.e. they seek – and trust on – the validity of the family agreements they have entered into. Finally, party autonomy is an effective tool to improve the coordination and coherence of EU Family Law Regulations. Allowing the spouses/ex-spouses to choose

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¹ MAULTZSCH, F., Party autonomy in European private international law: uniform principle or context-dependent instrument? (2016) 12-3 *Journal of private international law*, pp. 468-469.

² For a general overview of party autonomy in Private International Law for contractual and non-contractual obligations see, MILLS, A., *Party autonomy in Private International Law*, Cambridge 2018.

³ CARRUTHERS, J., Party autonomy in the legal regulation of adult relationships: what place for party choice in private international law?, (2012) 61 *International & comparative law quarterly*, p. 888.

⁴ PALAO MORENO, G., Crisis matrimoniales internacionales y autonomía de la voluntad, in F.J. Quel López (dir.), *Cursos de Derecho internacional y relaciones internacionales de Vitoria-Gasteiz 2013*, Cizur Menor (Navarra): Thomson Reuters Aranzadi 2013, pp. 459-464. See also for the counter-arguments below.

the competent court and/or the applicable law would prevent the fragmentation of related disputes under the courts of different States and/or would contribute to align the law applicable with the forum.

There are also few counter-arguments that may explain the slow spread of party autonomy for adult relationships in Family Law. In first place, it is important to remember that Family Law is directly related with the ethical, moral and religious conceptions of each State, where public policy reasons arise. There is also the tug-of-war between the public or private interests behind Family Law, which would explain a more liberal or restrictive approach towards party autonomy. Finally, another classical argument is the protection of the weakest party, i.e., the less-informed spouse.⁵

This paper departs from this debate to examine whether and how party autonomy is provided in the regulation of cross-border marriages and the patrimonial consequences thereof. It particularly focuses on the Private International Law sector of international jurisdiction to analyse the rules dealing with a marital breakdown and the most relevant financial consequences, such as the establishment of maintenance obligations and the dissolution and liquidation of the matrimonial property regime. However, this is obviously only a slice of the cake. Alongside the marital breakdown and the above-mentioned consequences, parental responsibility issues may arise if the spouses have a child in common. Nevertheless, international jurisdiction rules in these cases will not be considered in this paper, since its values and principles are completely different from those that may interest/affect (exclusively) the spouses: they are shaped in the light of the best interests of the child.⁶

To this end, this paper will be divided in two different parts. On the one hand, information will be given with regard to the role of party autonomy in international jurisdiction in EU Family Law Regulations 2201/2003,⁷ 4/2009⁸ and 2016/1103⁹ (2). In this regard, an individual analysis of every single Regulation in relation to the possibilities and limits of party autonomy will be provided. On the other hand, the joint application of these Regulations will be considered, stress-testing the principle of party autonomy in international jurisdiction (3). Although it is acceptable – and makes sense – that each Regulation could promote different values or principles, the truth is that it is possible to detect some problems of coherence and coordination among them. This paper seeks to provide a – feasible? – solution to improve the current situation in the context of party autonomy.

2. EU Family Law Regulations: Party Autonomy in International Jurisdiction

In this section, party autonomy provisions in international jurisdiction of the above mentioned instruments will be reviewed. In this regard, it is important to remember that in the field of Private International Law, the European machinery has been working steadily ever since the entry into force of the Amsterdam Treaty on 1 May 1999.¹⁰ At an early stage, the European Union Regulations focused on international jurisdiction and recognition and enforcement of decisions rules. In recent times, though, the European Union has also carried out a process of unification in the field of applicable law. Family Law has been the main field of activities of this phenomenon. In fact, it is possible to refer to a real process of

⁵ In the sector of the applicable this argument can be clearly refuted nowadays, since both spouses, *a priori*, choose in an equal position and with due formal and material guarantees (DIAGO DIAGO, M.P., El matrimonio y su crisis ante los nuevos retos de la autonomía de la voluntad conflictual, 66-2 (2014) *Revista española de derecho internacional*, pp. 73-74).

⁶ ARENAS GARCÍA, R., Principios inspiradores del sistema actual de competencia judicial internacional en materia de persona y familia, in C. Esplugues Mota & M. Guzmán Zapater (dirs.), *Persona y familia en el nuevo modelo español de Derecho internacional privado*, Valencia: Tirant Lo Blanch 2017, p. 31.

⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (*OJ L* 338, 23.12.2003).

⁸ 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 L* 7, 10.1.2009).

⁹ Council Regulation (EU) 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 L* 183, 8.7.2016).

¹⁰ GONZÁLEZ BEILFUSS, C., España, la Unión Europea y los retos principales para la unificación del Derecho internacional privado, in J. Alcaide Fernández & E.W. Petit de Gabriel (dir.), *España y la Unión Europea en el orden internacional*, Valencia: Tirant Lo Blanch 2017, pp. 447-466.

Europeanization of International Family Law,¹¹ since different Regulations dealing with the legal consequences of cross-border marriages – or its dissolution – have been adopted.

The first instrument of this on-going process was the Regulation 2201/2003. This Regulation, applicable since 1 March 2005, covers two of the three classical sectors of Private International Law: international jurisdiction and recognition and enforcement of decisions. It is applicable in all Member States with the exception of Denmark and is focused on the issue of marital breakdown and parental responsibility. As it can be deducted, no conflict-of-laws rules are included in this Regulation. On the one hand, the law applicable to divorce and legal separation is determined under the conflict-of-laws rules of Regulation 1259/2010,¹² applicable in 17 Member States by the enhanced cooperation procedure.¹³ On the other hand, no EU legal instrument has been drafted to unify the conflict-of-laws rules of the Member States for parental responsibility matters, leaving the determination of the law applicable to the Hague Convention of 1996 in respect of Parental Responsibility and Measures for the Protection of Children.

Secondly, Regulation 4/2009 unifies the rules on jurisdiction, applicable law and recognition and enforcement of decisions related to maintenance obligations “arising from a family relationship, parentage, marriage or affinity” (article 1). Consequently, maintenance obligations between spouses/ex-spouses fall inside the scope of application of the Regulation. It also includes rules concerning cooperation between central authorities. International jurisdiction rules of this instrument are applicable in all Member States – including the United Kingdom – but in the case of Denmark, through the Agreement between the European Community and the Kingdom of Denmark.¹⁴ The Regulation itself does not contain rules on the applicable law, but refers to The Hague Protocol of 2007 on the Law Applicable to Maintenance Obligations, whose application takes place in all Member States with the exception of Denmark and United Kingdom. This has an impact on the application of the rules of recognition and enforcement, where a different regime is provided for Member States bound by the Hague Protocol or not.

The last instrument referring to the cross-border marriages and the consequences thereof is Regulation 2016/1103, whose aim is to cover the three sectors of Private International Law in the field of matrimonial property regimes. This Regulation was prepared concurrently with Regulation 2016/1104,¹⁵ a parallel instrument focused on the property consequences of the registered partnerships. Member States were not able to achieve the necessary unanimity to adopt these EU Family Regulations, since some of them (e.g. Poland and Hungary) were of the opinion that the implementation of these texts was forcing them to change the content of their substantive legislation by introducing a new concept of marriage or registered partnership.¹⁶ As a result of that, a group of Member States (18 at the moment) resorted to the enhanced cooperation procedure for applying in their territories both Regulations.

Party autonomy takes different forms with respect to international jurisdiction in these EU Family Law Regulations. On the one hand, some instruments encourage individual party autonomy by allowing the applicant to choose where to start proceedings among several jurisdictional grounds. On the other hand, others promote joint party autonomy, which would mean that the parties have agreed in an implicit or explicit way that a Member State’s court has jurisdiction to hear a dispute or category of disputes.¹⁷ In the former, the defendant enters an appearance before the Member State’s courts that the claimant has determined. In the latter, an agreement is made to accept the jurisdiction of a court. The validity of such agreement is subject to the fulfilment of the requirements established in every single instrument, e.g. the

¹¹ BAARSMA, N.A., *The uropeanisation of international family law*, Groningen 2010, pp. 79-143 and PINTENS, W., *Europeanisation of Family Law*, in K Boele-Woelki (ed.), *Perspectives for the unification of Family Law in Europe*, Cambridge: Intersentia 2003, pp. 3-33.

¹² Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343, 29.12.2010).

¹³ A good explanation of the Regulation 1259/2010 can be found in ESPINOSA CALABUIG, R., Elección de una ley por las partes al divorcio y a la separación judicial: la solución “limitada” del Reglamento Roma III, in I. Queirolo *et al.* (dir), *Le nuove famiglie tra globalizzazione e identità statuali*, Roma: Aracane 2014, pp. 211-238.

¹⁴ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 149, 12.6.2009).

¹⁵ Council Regulation (EU) 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 L 183, 8.7.2016).

¹⁶ RODRÍGUEZ BENOT, A., Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión Europea, 11-1 (2019) *Cuadernos de derecho transnacional*, p. 26.

¹⁷ Using the expressions “individual” and “joint” party autonomy see WALKER, L., Party autonomy, inconsistency and the specific characteristics of family law in the European Union, (2018) 14-2 *Journal of private international law*, pp. 225-261.

agreement shall be in writing. In this context, the explicit joint party autonomy can be expressed by a choice of court agreement or by an agreement referred to the extension of jurisdiction of the court seised for one matter to another one. To what extent this is provided in the above mentioned instruments will be the aim of the following sections.

2.1. Regulation 2201/2003

Regulation 2201/2003 offers wide list of grounds of jurisdiction dealing with a marital breakdown in article 3.¹⁸ On the one hand, the grounds of jurisdiction listed in article 3(1)(a) indents one to six are formulated by reference to habitual residence, regardless of the nationality of the spouses. On the other hand, article 3(1)(b) refers to nationality as a ground for jurisdiction, irrespective of where the parties have their habitual residence. Within the seven forums contained in article 3 of Regulation 2201/2003 there is no freedom for the spouses to agree upon the court in which the proceedings may be raised: it is up to the plaintiff to choose any of these grounds of jurisdiction when bringing a claim, depending on the circumstances of the case.¹⁹ In other words, the approach of Regulation 2201/2003 is focused on individual party autonomy rather than joint party autonomy.

It is true, however, that there is a certain scope for direct party choice in the event of a joint application. In this regard, article 3(1)(a) indent four allows the courts of the Member State in which either of the spouses is habitually resident to have international jurisdiction in cases where there is a joint application. The parties' freedom to choose the court is restricted to the Member State of the habitual residence of either of the spouses at the date of application, i.e. it is not possible to agree *ex ante* on the competent courts having jurisdiction.²⁰

Alongside this, the possibility for a spouse to confer jurisdiction upon a Member State court merely by entering appearance before it (tacit submission) is not encompassed.

In fact, Regulation 2201/2003 only contains one single rule referred to prorogation of jurisdiction. In particular, article 12 allows the courts of a Member State exercising jurisdiction by virtue of article 3 on an application for divorce, legal separation or marriage annulment to have jurisdiction in any matter relating to parental responsibility. The application of this rule, however, only takes place when certain requirements are fulfilled. One of them is precisely the acceptance of both spouses.

To sum up, the role of party autonomy with regard to international jurisdiction in Regulation 2201/2003 is really narrow and apparently inexistent in cases of marital breakdown.

In November 2004 the European Council called upon the Commission to present a Green Paper on conflict-of-law rules in matters relating to divorce, where the possibility for the parties to agree that a court or the courts of a certain Member State should have jurisdiction in divorce proceedings arose. This led to the inclusion of choice of court agreements in the 2006 Commission proposal to amend the Regulation. In particular, spouses were allowed to choose any of the grounds of jurisdiction contained in article 3 of Regulation 2201/2003 and two additional forums – the last common habitual residence of the spouses for a period of three years and the nationality, or in the case of the UK and Ireland the domicile, of either of the spouses. Oppositely, the 2006 Commission proposal did not encompass a provision to provide for jurisdiction based upon submission by the defendant.

The end of this 2006 Commission proposal is more than well known. In the JHA Council Meeting of 5-6 June 2008, the Ministers had to accept that it was not possible to reach the required unanimity among Member States within a reasonable period of time. This situation opened the door for a new instrument dealing exclusively with the law applicable to the legal separation and divorce: the Regulation 1259/2010,

¹⁸ QUINZA REDONDO, P. & VERHELLEN, J., Guide for application. Chapter 2: international jurisdiction rules in cases of marital breakdown, in TMC Asser Institute (dir.), *Cross-border proceedings in family matters before national courts and CJEU* (JUST/2014/JCOO/AG/CIVI7722), pp. 51-56.

¹⁹ However, from a practical point of view, in most instances the dissolution of the marriage is made by consent of both of the spouses and thus, despite the fact that the Regulation 2201/2003 is referred to the applicant, both spouses are actually deciding where to start proceedings (BORG-BARHET, J., Jurisdiction in matrimonial matters-Reflections for the review of the Brussels IIa Regulation, (2016) *European Parliament Committee on Legal affairs* (JURI), p. 14.

²⁰ PALAO MORENO, G., Crisis matrimoniales internacionales y autonomía de la voluntad, *op. cit.*, p. 472.

adopted by the enhanced cooperation procedure. Consequently, an amendment on international jurisdiction rules on marital breakdown was abandoned.²¹

Finally, it is important to remember that Regulation 2201/2003 is under revision. The 2016 Commission proposal to amend the Regulation does not include the possibility for the spouses to conclude choice of court agreements. To what extent this is a lost opportunity to improve the coordination of related instruments will be considered in the last section of this paper.

2.2. Regulation 4/2009

Regulation 4/2009 contains a hierarchical structure of grounds of jurisdiction,²² including special rules for spouses/ex-spouses.

In first place, parties can enjoy a higher degree of joint party autonomy. On the one hand, there is the possibility of implicit submission not restricted to any Member State (article 4 Regulation 4/2009). On the other hand, Regulation 4/2009 allows for explicit submission in article 5, provided that the choice of court agreement is made in writing or by electronic means which provide a durable record of the agreement. In contrast to implicit submission, the Member States that can be chosen by the parties are restricted. In general terms, they are able to agree on the jurisdiction of the Member State of the habitual residence or nationality of any of them. In particular, for maintenance obligations between spouses/ex-spouses, it is possible to conclude an extension of jurisdiction agreement in order to concentrate maintenance claims before the courts of the Member State where the marital breakdown is settled in order to avoid the fragmentation of related disputes. Spouses/ex-spouses have also the possibility to choose the courts of the Member State of their last habitual residence for a period of a year.

Failing the explicit or implicit submission, the application of the general grounds of jurisdiction of article 3 takes place. In these instances, individual party autonomy is provided by an alternative list. In general, the applicant can choose the courts of the Member state of his or her habitual residence together with those of the habitual residence of the defendant. Alongside this, and taking into account that maintenance proceedings are connected in most instances with matrimonial or parental responsibility matters, there is the possibility for the applicant to start proceedings before the courts of the Member State where the “principal” matter is being conducted. In practice, this is an indirect reference to Regulation 2201/2003, despite the fact that concentration of proceedings is also possible if the courts of the Member State having jurisdiction for the matrimonial or parental responsibility matters are based on the domestic international jurisdiction rules, with the exception of the forum of the nationality of either of the parties, which would make this forum unusable for maintenance proceedings.

Where no court of a Member State has jurisdiction pursuant to articles 3, 4 and 5 and no court of a State party to the Lugano Convention 2007 which is not a Member State has jurisdiction pursuant to the provisions of that Convention, there is a rule on subsidiary jurisdiction (article 6 Regulation 4/2009). The forum provided is referred to the courts of the Member State of the common nationality of the spouses.

Finally, in order to avoid situations of denial of justice, Regulation 4/2009 provides for a *forum necessitatis* (article 7). This forum allows the courts of a Member State, on an exceptional basis, to hear a case closely connected with a third State in which the proceedings will not – or does not seem to – be conducted. It is necessary that the courts of the Member State should have sufficient connection with the dispute required.

2.3. Regulation 2016/1103

Regulation 2016/1103 sets forth a comprehensive body of rules on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes.

The rules concerning jurisdiction are dealt with in Chapter II of Regulation 2016/1103 and follow the model provided by Regulations 4/2009 and 650/2012. In particular, the provisions that confer

²¹ CAMPUZANO DÍAZ, B., Uniform conflict of law rules on divorce and legal separation via enhanced cooperation, in B. Campuzano Díaz et al. (eds.), *Latest developments in EU private international law*, Cambridge: Intersentia 2011, pp. 23-26.

²² Some of the most recent papers dealing with international jurisdiction rules in Regulation 4/2009 are VARGAS GÓMEZ-URRUTIA, M., Litigios sobre la obligación de alimentos. Normas de competencia y problemas procesales en el Reglamento 4/2009, in M. Guzmán Zapater & M. Herranz Ballesteros (dirs.), *Crisis matrimoniales internacionales y sus efectos. Derecho español y de la Unión Europea. Estudio normativo y jurisprudencial*, Valencia: Tirant lo Blanch 2018, pp. 317-352 and CASTELLANOS RUIZ, E., *Derecho de alimentos. Aspectos internacionales y transfronterizos*, Valencia 2017, pp. 41-67.

jurisdiction to a Member State participating in the enhanced cooperation are mainly set out in articles 4 to 12. General jurisdiction is addressed in articles 4 to 8 where a distinction is made among subject matters connected with a succession or a marital breakdown case or not. In these provisions, the role of joint party autonomy is heterogeneous and is embodied differently, as it will be seen below. Articles 10 (subsidiary jurisdiction) and 11 (*forum necessitatis*) apply when no court of a Member State has jurisdiction to rule on the matter under the previous rules, leaving no room for the application of domestic international jurisdiction rules. Apart from this, there is a ground on which a court may decline its jurisdiction if the marriage in question does not fit into the standard of the forum (article 9).

The joint application of these rules is far from easy. On the contrary, it is possible to foresee different scenarios depending on, on the one hand, whether the property dispute arises in connection with a principal matter – the death of one of the spouses or a marital breakdown – or not and, on the other hand, the incidence of the use of party autonomy.²³ This difficulty is probably explained by the fact that this Regulation is the last one of a comprehensive set of instruments dealing with Family and Succession Law and, thus, it has to establish some coherence and coordination with the previous ones.

Since this paper is concerned with the provisions dealing with adult relationships in a marital breakdown, attention will be paid particularly to articles 5 to 8, where international jurisdiction rules are provided for property matters. It is true, however, that the application of articles 9, 10 and 11 can also take place in the same event, but their application seem to be more residual than that of the formers.

The starting point is that the court seised to rule on an application for divorce, legal separation or marriage annulment in accordance with Regulation 2201/2003 shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with such application. However, a distinction is made between “strong” (article 5.1) and “weak” (article 5.2) grounds of matrimonial jurisdiction set out in Regulation 2201/2003.²⁴

On the one hand, when the court seised for the marital breakdown is based on indents one to four of article 3.1.a) of Regulation 2201/2003, the concentration of both issues under the courts of the same Member State is automatic (article 5.1.).

On the other hand, when the court seised for the marital breakdown is based on indents five and six of article 3.1.a) or articles 5 and 7 of Regulation 2201/2003, the agreement of the spouses is necessary in order to extend the jurisdiction for any property dispute (article 5.2.). As it can be deducted, it is here where the principle of joint party autonomy arises. The concentration of jurisdiction under the courts of the same Member State will not take place if the spouses do not agree so. It goes without saying that his agreement cannot be considered a choice of court agreement in strict sense: spouses are not agreeing on the Member State whose courts should have jurisdiction for property disputes, they are agreeing to accumulate related proceedings under the jurisdiction of the same Member State. The room for party autonomy left by article 5.2 actually aims to avoid abusive strategies of the applicant, usually the wealthier spouse.²⁵

When the spouses do not agree to extend the jurisdiction of the courts of the Member State dealing with the marital breakdown – obviously, in those circumstances in which the concentration is not automatic – the Pandora’s box opens. These situations are covered by different provisions, where it is possible to distinguish two scenarios. On the one hand, spouses are allowed to agree on the competent court, explicit or implicitly. On the other hand, failing this, the competent court would be designated by the application of article 6 of Regulation 2016/1103.

²³ GUZMÁN ZAPATER, M. & PAZ-ARES RODRÍGUEZ, I., La competencia judicial internacional en material de disolución del régimen económico del matrimonio en el Reglamento UE núm. 2016/1103, in M. Guzmán Zapater & M. Herranz Ballesteros (dirs.), *Crisis matrimoniales internacionales y sus efectos. Derecho español y de la Unión Europea. Estudio normativo y jurisprudencial*, op. cit., pp. 227-316.

²⁴ There is a lack of explanation in the Regulation regarding such distinction. In fact, it does not go in line with the non-hierarchical order of the forums derived from the article 3 of the Regulation 2201/2003. However, it is not difficult to foresee the *ratio legis* behind the different treatment of the forums regarding the marital breakdown. With this distinction, the EU legislator is trying to mitigate, by requiring the agreement of the defendant, the “benefit of the claimant’s position” derived from article 3.1.a) indents five and six of the Regulation 2201/2003. See FRANZINA, P., Jurisdiction in matters relation to property regimes under EU private international law, (2017-2018) 19 *Yearbook of private international law*, pp. 172-173.

²⁵ VINAIXA MIQUEL, M.: “La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de uniones registradas”, 2 (2017) *Indret* (Número especial de Acto homenaje a la Dra. Nuria Bouza Vidal: El orden público interno, europeo e internacional civil), p. 296.

Since this paper is essentially focused on the principle of party autonomy in the recent Regulations, attention will be paid to the first possibility, i.e. to explicit (article 7) and implicit submission (article 8). In general terms, it is possible to anticipate that Regulation 2016/1103 allows the spouses to agree on the competent court for matrimonial property disputes in a limited way, both in terms of the Member States whose courts can be chosen and the type of dispute that arises.

Firstly, according to article 7 of Regulation 2016/1103 the parties may agree that the courts of the Member State whose law is applicable pursuant to art. 22 (choice of applicable law) or point (a) or (b) of article 26(1) (applicable law in the absence of choice by the parties),²⁶ or the courts of the Member State of the conclusion of the marriage, shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

The possibility to conclude this agreement, however, is very narrow. It is explicitly limited for those situations covered by article 6, namely where no court of a Member State has jurisdiction pursuant to articles 4 or 5 or in other cases than those provided in these articles. Leaving aside those instances related with the death of one of the spouses –they go beyond the purposes of this paper – this would mean, in particular, that choice of court agreements are allowed in the following situations:²⁷

- In those instances related with the divorce, legal separation or marriage annulment when the concentration of jurisdiction under the courts of Regulation 2201/2003 is not automatic or is not agreed by the spouses, depending on the forum.
- In those instances where the competent court for the marital breakdown was one of a Member State not participating in the enhanced cooperation or a non-Member State, provided that the dissolution and liquidation of the matrimonial property regime was not conducted in that State. In these situations, subsequently, the parties would be able to start proceedings for property disputes in the courts of the Member State under article 7 of Regulation 2016/1103.
- In cases different than those related with the divorce, legal separation or marriage annulment. Good examples can be the dispute of the spouses regarding the ownership of a specific asset, the responsibility of one spouse for liabilities and debts of the other spouse or conflicts arising with third parties.

Together with the above, the implicit submission is foreseen in article 8 of Regulation 2016/1103. This provision allows a defendant to confer jurisdiction by entering appearance before the courts of the same Member States provided for the explicit submission, with the exception of the those where the marriage was celebrated, which are not available. In the same way as article 7, the application of article 8 of Regulation 2016/1103 cannot take place in every kind of dispute. On the contrary, it is explicitly foreseen for situations different from those covered by articles 4 and 5.1 of Regulation 2016/1103, namely, those indicated above for the explicit submission.

3. The Joint Application of EU Family Law Regulations: Stress-Testing Party Autonomy in International Jurisdiction

The analysis carried out in the previous section shows that the availability and extent of individual and joint party autonomy in international jurisdiction is clearly heterogeneous, since each EU Family Law Regulations dealing with the personal and financial consequences of cross-border marriages takes a different approach.

²⁶ An analysis of the law applicable in the Regulation 2016/1103 can be seen in PALAO MORENO, G., La determinación de la ley aplicable en los reglamentos en materia de régimen económico matrimonial y efectos patrimoniales de las uniones registradas 2016/1103 y 2016/1104, 71-1 (2019) *Revista española de derecho internacional*, pp. 89-117 and AÑOVEROS TERRADAS, B., El régimen conflictual de las capitulaciones en los nuevos reglamentos de la Unión Europea en materia de regímenes económicos matrimoniales y efectos patrimoniales de las uniones registrada, 17 (2017) *Anuario español de Derecho internacional privado*, pp. 821-845.

²⁷ QUINZÁ REDONDO, P., Artículo 6, in J.L Iglesias Buhigues & G. Palao Moreno (dirs.), *Persona y familia en el nuevo modelo español de Derecho internacional privado*, Valencia: Tirant lo Blanch 2019, pp. 95-98.

Firstly, Regulation 2201/2003 does not allow (both) spouses to agree, neither in an explicit nor in an implicit way,²⁸ the court in which the proceedings of their marital breakdown may be raised, without prejudice to the parties' freedom to choose the court of the habitual residence of either of them at the date of application in the event of a joint application (article 3(1)(a) indent four Regulation 2201/2003).

Secondly, in Regulation 4/2009, the prominence and importance of joint party autonomy is more than evident: spouses/ex-spouses can conclude choice of court agreements in favour of the courts of the Member State of the habitual residence or nationality of either of them (article 3.1.a) or the last common habitual residence for a period of at least one year (art. 3.1.c.ii) Regulation 4/2009) but can also extend the jurisdiction of the Member State dealing with the marital breakdown to maintenance disputes (article 3.1.c.i) Regulation 4/2009). Alongside this, the jurisdiction based on the appearance of the defendant is not restricted to any Member State (article 4 Regulation 4/2009).

Thirdly, in Regulation 2016/1103 the room for party autonomy is very narrow both in terms of the Member States that can be chosen and the situations in which it is possible to be exercised (articles 5.2, 7 and 8 Regulation 2016/1103). When the dispute is connected with the divorce, legal separation or annulment of the marriage and the concentration of related proceedings under the courts of the same Member State is not automatic, it is up to the spouses to conclude an extension of jurisdiction agreement if they wish such concentration. Failing that, the application of articles 6, 7 and 8 is possible. Apart from this, choice of court agreements are generally provided for "other cases" and are restricted to the choice of the courts of the Member State whose law is applicable or those where the marriage was celebrated. The same holds true for the implicit submission, where the available Member States are limited.

3.1. The Policy behind this Approach

Having a different approach of party autonomy in international jurisdiction is not negative *per se*. In particular, when property or maintenance matters do not arise in the context of a marital breakdown – i.e. they are an independent dispute – , the problem of having different Regulations with their own possibilities does not necessarily constitute a problem. On the contrary, it is understandable that party autonomy – or its lack of – is provided in accordance with the principles and values that every single Regulation might protect or promote.

For example, the aim of Regulation 2201/2003 with regard to international jurisdiction rules for a marital breakdown goes in line with the *favor divortii* principle:²⁹ spouses are provided with different forums in order to ensure that there will be at least one court of a Member State having jurisdiction in those instances where there is a real connection with the European Union.³⁰ For this purpose, individual party autonomy is a valid – though not the only one – option.

The goal of Regulation 4/2009 is the protection of the creditor – the weaker party – i.e., is to ensure that the applicant is able to find a Member State where maintenance debts may be satisfied.³¹ To this effect, a broad individual and joint party autonomy with respect to international jurisdiction is an effective tool.

Finally, Regulation 2016/1103 tries to find a balance between the concentration of proceedings under the courts of the same Member State and the promotion of the autonomy of the parties.³² Actually, both goals are fulfilled in the Regulation, having a different role depending on the subject matter. On the one hand, in cases connected with a marital breakdown, the principle of party autonomy arises when it is necessary to align the jurisdiction of related proceedings and the concentration is not automatic, i.e. party autonomy can be seen as a means to an end – the concentration –. On the other hand, the limitation of explicit and implicit submission seeks to align forum and law, i.e. to avoid the application of a foreign law by the competent court.

²⁸ As previously stated, a different issue is that, in practice, the divorce takes place in most instances by consent of the spouses and thus, the spouses decide together where to start their proceedings. However, spouses are clearly deprived to formally agree the courts of the Member State with international jurisdiction for their marital breakdown.

²⁹ MAGNUS, U. & MANKOWSKI, P., *Brussels IIbis Regulation*, Munich 2010, p. 90.

³⁰ QUINZA REDONDO, P. & VERHELLEN, J., Guide for application. Chapter 2: international jurisdiction rules in cases of marital breakdown, in TMC Asser Institute (dir.), *Cross-border proceedings in family matters before national courts and CJEU*, *op.cit.*, p. 49.

³¹ See Recital 15 Regulation 4/2009.

³² See Recitals 32 and 36 Regulation 2016/1103.

3.2. Difficulties of Coherence and Coordination

As already stated, the different EU Family Law Regulations dealing with international jurisdiction provide for an unequal degree of individual and joint party autonomy, which is not necessarily a concern. On the contrary, there are – enough? – arguments to support this policy. However, from a practical point of view, the current situation may cause problems of coherence and coordination between the Regulations 2201/2003, 4/2009 and 2016/1103,³³ since in most of the cases maintenance and property matters arise in the context of the dissolution of the marriage.

The point of departure will be the possibility for the spouses/ex-spouses to conclude an extension of jurisdiction agreement to align the jurisdiction of the courts of the Member State dealing with the marital breakdown to maintenance and property matters. The aim of these agreements is more than evident: to prevent the fragmentation of related disputes, and thus, cases being heard by multiple jurisdictions. To this end, in Regulation 4/2009, the spouses can choose, among other forums, the courts having jurisdiction to settle their marital breakdown dispute, i.e. the concentration is an option for the spouses. In Regulation 2016/1103, the general rule is the opposite: the concentration operates unconditionally provided that the court seised for the marital breakdown is based on forums contained in article 3.1.a) indents one to four of Regulation 2201/2003.³⁴ In other situations, the agreement of the spouses is necessary to align both jurisdictions.

Notwithstanding the different approach of the aim of concentration, the truth is that both Regulations – referred to “accessory” matters in the case of a marital breakdown – are apparently “ready” for the coordination with Regulation 2201/2003 – referred to the “principal” matter –. In the latter, however, there is no room for explicit or implicit submission. From a theoretical point of view, this would mean that joint party autonomy provided by Regulations 4/2009 and 2016/1103 – in the latter, only in those forums where the concentration is not automatic – is a tool to extend the jurisdiction of a court of a Member State that has been chosen by the applicant by means of individual party autonomy.³⁵ The first concluding remark is consequently that the aim of concentration is apparently possible in the light of the current wording of the above-mentioned Regulations.

However, difficulties of coherence and coordination may arise regarding the date of the conclusion of the extension of jurisdiction agreement.³⁶ Neither the article 5.3 of Regulation 2016/1103 nor the article 4.1.a) of Regulation 4/2009 temporarily restrict this agreement, but it is obvious that it must be concluded before the court is seised to rule on maintenance and property matters, since without this agreement the extension of jurisdiction of the courts of the marital breakdown will not take place. The “deadline” for the agreement is consequently clear.

It is also undeniable that the extension of jurisdiction agreement can be concluded once the court is seised to rule on the dissolution or annulment of the marriage. In fact, this will be typical case, i.e. spouses/ex-spouses agree to concentrate all related disputes before the courts of the same Member State once they have decided to “legally” split up.

The question is whether it is possible to conclude an extension of jurisdiction agreement before this moment, i.e., when the spouses are not undergoing a divorce, legal separation or marriage annulment

³³ See the following literature regarding the coordination of EU Family Law Regulations: ÁLVAREZ GONZÁLEZ, S., Una visión general posible del Derecho internacional privado de familia en la Unión Europea, 17 (2018) *Diario La Ley Derecho de familia* (nº coordinado por J.C. Fernández Rozas), pp. 1-22; GRIECO, C., The role of party autonomy under the Regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks of coordination between the legal regime established by the new Regulations and other relevant instruments of European private international law, (2018) 10-2 *Cuadernos de derecho transnacional*, pp. 457-476 and VÁLKOVÁ, L., The interplay between jurisdictional rules established in the EU legal instruments in the field of Family Law: testing functionality through simultaneous application with domestic law, (2017) 9-2 *Cuadernos de derecho transnacional*, pp. 551-568.

³⁴ RODRÍGUEZ RODRIGO, J., Régimen económico matrimonial y de las parejas registradas, in A.L. Calvo Caravaca & J. Javier Carrascosa (dirs.), *Derecho internacional privado*, Vol. II, Valencia: Tirant Lo Blanch 2018, p. 173.

³⁵ One can say, obviously, that if the spouses have concluded an extension of jurisdiction agreement for both maintenance and property disputes is because they previously accepted the courts of the Member States where to start their marital breakdown proceedings. No one denies this. However, this is a circumstance derived from the practice and not from the current wording of the EU Family Law Regulations.

³⁶ PEITEADO MARISCAL, P., Competencia internacional por conexión en materia de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relación entre los Reglamentos UE 2201/2003, 650/2012, 1103/2016 y 1104/2016, 9-1 (2017) *Cuadernos de derecho transnacional*, pp. 320-322.

proceeding.³⁷ This situation may cover those couples who are already married as well as those who (manifestly) wish to do so.

At first instance, one might say ‘no’, since it is not possible to extend the jurisdiction of a court which is unpredictable at this stage. This can be explained by the fact that all the forums contained in article 3 of Regulation 2201/2003 are referred to the applicant/respondent whereas, at the same time, it is impossible to conclude a choice of court agreement under this instrument.

The impact of this circumstance in the application of Regulations 4/2009 and 2016/1103 is more than clear. In the former, where the concentration is an option, the spouses/future spouses would be deprived to ensure, at this moment, the concentration of related proceedings. In the latter, the concentration will also have an “uncertain future”: it will be achieved if the court seised for the marital breakdown is based on indents one to four of article 3.1.a) of Regulation 2201/2003 – by means of individual party autonomy – but it will be unsuccessful if the court seised for the marital breakdown is based on indents five and six of article 3.1.a) or articles 5 and 7 of Regulation 2201/2003 and the spouses/ex-spouses do not agree to extend the jurisdiction of these courts to property disputes.

The only possibility for accepting an agreement concluded before the ‘crisis of the couple’ arises would be to draft a generic agreement stating that the dissolution or annulment of the marriage and maintenance and property disputes were to be heard by the courts of the same Member State. This agreement is not prohibited neither in Regulation 2016/1103 nor in Regulation 4/2009 and would allow the spouses to ensure the future concentration of proceedings. However, the specific court having jurisdiction would be unknown until the marital breakdown lawsuit has been filed and, consequently, it could also create a “rush to the court” situation for all proceedings.

In conclusion, the inconsistent regulation of party autonomy in international jurisdiction in Regulations 2201/2003, 4/2009 and 2016/1103 deprives the spouses/future spouses to conclude an *ex-ante* choice of court agreement referred to the choice of jurisdiction of a specific Member State, whose courts will be competent to hear the marital breakdown as well as maintenance and property disputes.

3.3. The Need for Joint Party Autonomy in Marital Breakdown

At this point, the reader may have guessed that the impossibility to conclude a global choice of court agreement for all related disputes before the court is seised to rule on the marital breakdown is directly related with the fact Regulation 2201/2003 does not provide for an explicit choice for the spouses/future spouses. The current wording of neither Regulation 4/2009 nor Regulation 2016/1103 are part of the problem, on the contrary, they are part of the solution. In other words, the difficulties of coherence and coordination arise because the jurisdictional grounds for the “principal” matter do not leave room for a real explicit joint party autonomy, whereas the jurisdictional grounds for the “accessory” matters do so.

The debate regarding the inclusion of choice of court agreements in marital breakdown is not actually new but it is obviously again in the arena due to the revision of Regulation 2201/2003³⁸ and the application of the new Regulation 2016/1103, whose international jurisdictional rules refer to the possibility of concluding an extension of jurisdiction agreement in similar terms as the Regulation 4/2009.

Before carrying on my thesis, I would like to be honest with the reader: at the moment, the inclusion of choice of court agreements does not seem to be feasible in the Recast of Regulation 2201/2003 given the necessary unanimity between the Member States to adopt and/or amend a Family Law Regulation (article 81.3 TFEU).³⁹ What shall we do? Obviously, we should not give up. We should insist on the advantages and conveniences of these agreements in order to keep alive the debate.⁴⁰ Now more than never, when the

³⁷ HAMMJE, P., Article 5, in S. Corneloup *et al.* (dirs.), *Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104*, Paris: Legiscompare 2018, pp. 82-83.

³⁸ See in this regard BONOMI, A., La compétence internationale en matière de divorce. Quelques suggestions pour une (improbable) révision du règlement Bruxelles II bis, (2017) 4 *Revue critique de droit international privé*, pp. 511-534.

³⁹ CAMPUZANO DÍAZ, B., La Propuesta de reforma del Reglamento 2201/2003: ¿se introducen mejoras en la regulación de la competencia judicial internacional?, in C. Esplugues Mota & M. Guzmán Zapater (dirs.), *Persona y familia en el nuevo modelo español de Derecho internacional privado*, *op. cit.*, pp. 94-98.

⁴⁰ This idea is supported not only by the EC (*Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, COM/2014/0225 final) but also by a large number of authors (KRUGER, T. & SAMYN, L., Brussels II bis: successes and suggested improvements, (2016) 12-1 *Journal of private international law*, pp. 12-14).

scenario is completely different as used to be: different EU Family Law Regulations have been adopted since 2006, when the Commission Proposal – where the possibility to conclude choice of court agreements was included – failed.

Taking this into account, the first argument aims to tie up all loose ends – problems of coherence and coordination – showed in the previous section: choice of court agreements in marital breakdown ease the concentration of related disputes before the courts of the same Member State. As it has been demonstrated, the concentration is already possible by using the extension of jurisdiction agreements provided by Regulations 4/2009 and 2016/1003, but these agreements would not allow foreseeing the courts of the Member State where all proceedings will be brought at least until the court will be seised for the marital breakdown. Consequently, allowing for an explicit submission in an hypothetical (new) Regulation 2201/2003 – or the appropriate name – would improve the possibility for concentration itself by allowing the spouses/future spouses to know *ex-ante* where their (possible) future proceedings will take place.

There are, however, more arguments to support the inclusion of choice of court agreements in marital breakdown. Some of them can be considered “classical”, whereas others are related with the coordination of (new) related instruments *stricto sensu*.⁴¹

First of all, choice of court agreements promote legal certainty and predictability among the spouses. By definition, cross-border marriages are connected with different legal systems – e.g. spouses have different habitual residences or nationalities or assets located in different Member States – and the possibility to agree, particularly *ex ante*, where their possible disputes will be brought eases the organisation of their relations vis-a-vis between themselves and in connection with third parties.⁴²

The second argument is also known. It has been discussed since the negotiations of Regulation 1347/2000. Given the fact that the forums provided for the marital breakdown are alternative (article 3 Regulation 2201/2003), it seems that exclusive choice of court agreements could (partially) avoid the potential risk of *forum shopping*.⁴³ At the moment, it is up to the applicant to decide where to issue a marital breakdown petition – obviously, among the available forums according to their personal circumstances – and given the lack of unification of conflict-of-law rules in all Member States – mitigated by means of Regulation 1259/2010 – this implicitly results into a choice-of-law. Some authors have expressed their preference for a hierarchal list of jurisdictional grounds,⁴⁴ but this does not seem to be feasible at the moment, since this approach could be too narrow and could endanger the principle of *favor divortii*. It is here where choice of court agreements come into play: if the spouses have agreed the competent court, they would be deprived from rushing to the court and, moreover, they would avoid the risk of parallel proceedings and contradictory judgments.

Finally, the coordination between jurisdiction and the applicable law is an advantage that should not be underestimated.⁴⁵ At this moment, the possibility for the parties – spouses – to choose the applicable law for their matrimonial matters and consequences thereof is a reality: Regulation 1259/2010 allows the spouses to choose the applicable law for the separation or the divorce (article 5) from a limited number of the States’ laws and the same approach is taken in Regulation 2016/1103 on matrimonial property regimes (article 22) and the Hague Protocol on maintenance obligations (article 8). Allowing the spouses to choose the competent court for the marital breakdown would facilitate the possibility to conclude a “global” agreement where the competent court and the applicable law would coincide and thus, avoid the expenses derived from the application of a foreign law – if these must be covered by them.⁴⁶

⁴¹ QUINZA REDONDO, P., DE RUYCK, V. & VERHELLEN, J., Recommendations to improve rules on jurisdiction in matrimonial matters, in TMC Asser Institute (dir.), *Cross-border proceedings in family matters before national courts and CJEU* (JUST/2014/JCOO/AG/CIVI7722), pp. 54-57.

⁴² Regarding the protection of third parties in the Regulations 2016/1103 and 2016/1104, see RADEMACHER, L., Changing the past: retroactive choice of law and the protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships, (2018) 10-1 *Cuadernos de derecho transnacional*, pp. 7-18.

⁴³ SÁNCHEZ JIMÉNEZ, M.A., *El divorcio internacional en la Unión Europea (Jurisdicción y ley aplicable)*, Cizur Menor (Navarra) 2013, pp. 137-139.

⁴⁴ REQUEJO ISIDRO, M., *et al.*, Chapter 3. Jurisdiction, in Università degli studi di Milano (dir.), Planning the future of cross-border families: a path through coordination (EUFAM’s) (JUST/2014/JCOO/AG/CIVI7729), p. 103

⁴⁵ SÁNCHEZ JIMÉNEZ, M.A., *El divorcio internacional en la Unión Europea (Jurisdicción y ley aplicable)*, *op. cit.*, pp. 96-113.

⁴⁶ See from a comparative perspective ESPLUGUES MOTA, C. (ed.), *Application of foreign law*, Munich 2011.

4. Conclusion

The importance attributed to joint party autonomy in Family Law grows exponentially. However, its inclusion in the Regulations of the European Union is heterogeneous and diverse depending on the subject matter and the issue covered by Private International Law.

In particular, in respect of international jurisdiction rules dealing with cross-border marriages, it is possible to find Regulations that go from the impossibility to conclude choice of court agreements (Regulation 2201/2003) until the inclusion of a broad – not unlimited – possibility to agree on the competent court (Regulation 4/2009), passing by a regulation of party autonomy in a limited way, both in terms of the Member States that can be chosen and the situations in which it is offered (Regulation 2016/1103).

Probably, one of the greatest advantages of joint party autonomy in international jurisdiction is to “improve” the concentration of related disputes under the courts of the same Member State. According to the current wording of Regulations 4/2009 and 2016/1103, it is already possible for the spouses to extend the jurisdiction of the courts dealing with the marital crisis to maintenance and property matters. However, since the Regulation 2201/2003 does not allow choice of court agreements, spouses/future spouses are deprived from agreeing – and foreseeing –, *ex-ante*, the courts of the Member state where all these proceedings will be heard.

It is more than evident that one of the possible solutions to encourage a “planned” organization of matrimonial disputes and the consequences thereof would be to allow the conclusion of choice of court agreements in the Regulation dealing with the “principal matter” – Regulation 2201/2003 –. In this way, spouses, even before a crisis arises, would be able not only to concentrate related disputes under the courts of the same Member State, but also, to know the particular Member State where they will be brought. This is of utmost importance for cross-border marriages, where changes of habitual residence – or other personal circumstances – will not be infrequent.

Alongside this, the advantages of allowing joint party autonomy in international jurisdiction in respect of a marital breakdown – obviously with the necessary formal and substantive guarantees – are well known: legal certainty and predictability, (partial) reduction of the *forum shopping* and, what is more, the possibility to align the jurisdiction with the applicable law for all these disputes – by means of a combined choice of court and choice of law exercise.

To sum up, it is really valuable the degree of joint party autonomy foreseen in recent EU Family Law Regulations. Nevertheless if the spouses are deprived of choosing the competent court for the principal question, the benefits provided by the other instruments are clearly being reduced. It would be admirable to discuss and amend this legal loophole sooner or latter.

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