CROSS-BORDER COUPLES PROPERTY REGIMES IN ACTION BEFORE COURTS

UNDERSTANDING THE EU REGULATIONS 1103 AND 1104/2016 IN PRACTICE

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ÍNDICE

THE PROPERTY REGIMES OF CROSS-BORDER COUPLES: THE ITALIAN PERSPECTIVE

Lucia Ruggeri[1]

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Summary: I. Statistical relevance of cross-border couples in Italy and numerical irrelevance of decisions. II. The Italian discipline of private international law on property relations. Comparison with the European discipline. III. The principle of unity in the Italian case law in matters of succession relationships: its impact on the property relationships of couples. IV. The qualification of juridical institutions: case law indications. V. Unions registered in the realm of Italian law.

Abstract: The paper offers an updated overview on the Italian case-law regarding property regimes of cross-border couples, analyzing several cases resolved by the Italian Courts. A special focus is dedicated to the Italian discipline of private international law on property relations with a specific regard to the issues offered by the iuridical qualification in private international relationships following the case law indications.

I. STATISTICAL RELEVANCE OF CROSS-BORDER COUPLES IN ITALY AND NUMERICAL IRRELEVANCE OF DECISIONS

The transnational dimension of family property relationships is very significant in a country like Italy, which is traditionally characterised by both incoming and outgoing migratory flows. As revealed by the latest data made available by ISTAT in 2020, 18,832 weddings were celebrated with at least one foreign spouse, a decrease of 44.9% compared to the previous year, a decrease also determined by the spread of the pandemic. However, the share of total marriages remained practically unchanged: 19.4% compared to 18.6% in 2019. Mixed marriages (in which one spouse is Italian and the other a foreigner) amount to over 14,000 (about 10,000 fewer than the previous year) and continue to represent the largest part of marriages with at least one foreign spouse: approximately eight in ten marriages with at least one foreigner are made up of mixed couples. In the areas where foreign communities are more frequent (northern and central Italy), one in four marriages is mixed, while in southern Italy this type of marriages reaches 11.3%. At the regional level, the following regions are at the top of the ranking: Umbria (25.8%), Lombardy (25.2%), Emilia-Romagna (25.1%) and Marche (24.8%).

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The statistical framework outlined above demonstrates the importance of investigations in the legal context[2] on the problems posed by cross-border couples. Following Italy's participation in the international cooperation procedure that led to the adoption of European Regulations 1103 and 1104 of 2016,[3] an important study profile is the management of disputes concerning the property relationships of spouses or of those who are linked by registered partnerships. In this context, there are the powers delegated to the government[4] to modify the procedures aimed at obtaining a declaration of enforceability of a foreign law and those aimed at obtaining primarily a verification of the existence of the preconditions for the recognition of a foreign decision on the basis of Regulations 1103 and 1104 of 2016.

The statistical significance of cross-border couples is not, however, accompanied by the equally numerical significance of judgments that have as their object disputes between transnational couples. The reasons for this are mainly attributable to the wide use by these couples of negotiating tools for resolving disputes, and of the absorption of disputes in procedures such as separation and divorce. In other words, conflict in cross-border couples is managed by resorting to alternative instruments to the legal procedure for reasons of convenience, or the conflict explodes at different times such as at the moment of cessation of cohabitation determined by separation or divorce. In this sense, it seems highly negative that the European regulations have relegated to the recitals[5] reference to non-procedural instruments for settling the dispute, not dedicating a specific discipline to these important institutes. Article 47 of the Charter of Fundamental Rights provides for the effective protection of rights through appropriate tools:[6] the legal professionals involved in the implementation of Regulations 1103 and 1104, in this perspective, have a huge role in suggesting wise use of private autonomy to achieve increasing levels of effective and accessible justice for cross-border couples.

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2 M. Pinardi, 'I Regolamenti europei del 24 giugno 2016 nn 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Europa e diritto privato*, 733-751 (2018).

3 O. Feraci, 'Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate' *Rivista di diritto internazionale*, 529-537 (2016); V. Colonna 'I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate' *Famiglia e diritto*, 839-851 (2019).

4 Law 26 November 2021, no 206, Art 1, paragraph 14 a).

5 Recital 39 provides that 'This Regulation should not prevent the parties from settling the matrimonial property regime case amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the matrimonial property regime is not the law of that Member State'. For an interesting proposal of guidelines on mediation relating to cross-border couples, see C. Maugelli, 'GoInEU Plus Practical Guidelines on Cultural Mediation in Family and Succession Law'; S. Landini ed, *EU Regulations 650/2012, 1103 and 1104/2016: Cross-border Families, International Successions, Mediation Issues and New Financial Assets. GoInEU Plus Project Final Volume* (Napoli: Edizioni Scientifiche Italiane, 2020), 537-545.

6 V.J.I. Signes de Mesa, 'Introduction', in M. J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri, S. Winkler eds, *Property Relations of Cross-Border Couples in the European Union* (Napoli: Edizioni Scientifiche Italiane, 2020), 10, 6-13.

II. THE ITALIAN DISCIPLINE OF PRIVATE INTERNATIONAL LAW ON PROPERTY RELATIONS. COMPARISON WITH THE EUROPEAN DISCIPLINE

The financial relationships of cross-border couples in Italy are considered in Article 30 of L 218 of 1995 which establishes that property relations between spouses are regulated by the law identified to govern their personal relationships.[7] The renvoi made by Article 30 to Article 29, which governs the personal relationships between spouses, determines the application, in the first instance, of the common national law and, in its absence, the application of the law of the State in which married life predominantly takes place.

The formulation of the connecting criteria is the result of the adaptation of the Italian system of private international law to constitutional principles: before the 1995 reform, the connecting factor in the absence of a common law was the application of the law of the country of the husband. This rule, by virtue of the *tempus regit actum* principle, continued to be used contrary to the principles of equality contained in the Constitution and in the international conventions to which Italy adhered. The intervention of the Constitutional Court was necessary to eliminate this inequality of treatment between men and women in matters of property relations characterised by internationality: in 2006,[8] the provision contained in Article 19(1), of the provisions on the general law was hence declared unconstitutional, which, although repealed by L 218/1995, had continued to be invoked for marriages contracted before the reform of private international law.

This decision is part of a phase marked by the great commitment of the constitutional judge to adapt the legislation dedicated to transnational couples to the principles of equality: it is preceded by other judgments which declared as unconstitutional the connecting factor based on the national law of the husband applied by the provision of the general law on the subject of personal relations between spouses[9] and on the subject of parental relations.[10]

Adaptive reading is still a necessity today as the current Italian regulatory system of private international law does not meet the constitutional requirements expressed by Article

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[7] On the subject with some critical points about the non-application of the criterion of the closest connection in property matters, see I. Viarengo, 'Problemi di individuazione della legge applicabile ai rapporti patrimoniali e ruolo della volontà delle parti' *Rivista del Notariato*, 5, 1127-1154 (2000).

[8] Constitutional Court 4 July 2006 no 254, *Rassegna di diritto civile*, 2, 514 (2008). The question of constitutional legitimacy was proposed by the Supreme Court, with the order of 16 July 2005, no 15092. On the consequences of the ruling of constitutional illegitimacy, see C. Di Stasio, 'Rapporti personali tra coniugi', in M. Sesta ed, *Le fonti del diritto italiano. Codice della famiglia*, (Milano: Giuffrè, 2007), 4888.

[9] Constitutional Court 5 March 1987 no 71, *Rivista di diritto internazionale*, 1987, I, 1365; in *Giurisprudenza Italiana*, 1987, I, 1153, with a note by A. De Cupis, 'Eguaglianza coniugale e conflitto di leggi?'; *Foro italiano*, 1987, I, 2316, with a note by Poletti Di Teodoro, 'Una svolta storica nel diritto internazionale privato italiano: il primo intervento «abrogativo» della Corte costituzionale'.

[10] Constitutional Court 10 December 1987 no 477, in *Rivista di diritto internazionale*, 1988, I, 314; in *Foro italiano*, 1988, I, 2830, with a note by Pagano, 'La legge regolatrice dei rapporti personali tra coniugi e dei rapporti tra genitori e figli dopo la declaratoria di incostituzionalità degli art. 18 and 20 Preleggi'. The decision made by the Constitutional Court is important because it denies the 'neutral' nature traditionally attributed to the norms of private international law and considers them capable of conflicting with constitutional principles. On the subject, see U. Villani, in Ugo Villani - Marcello Di Fabio Francesco Sbordone, *Nozioni di diritto internazionale privato, Parte generale e obbligazioni* (Napoli, Edizioni Scientifiche Italiane, 2013), 24.

117 of the Constitution, as amended in 2001. The constitutional charter imposes a functional limitation of sovereignty on compliance with Euro-unitary and international principles, with the consequent need to abandon the vision of international rules of private law based on the logic of conflict between legal systems and the adoption of a logic for identifying the regulation that can more satisfactorily realize the interests of foreign people and cross-border families.

The intensification of the mobility of couples has raised a question: is the reference made by Article 30 to Article 29 static or dynamic in nature?

The issue was addressed by the Court of Appeal of Catania[11] in a case involving a real estate purchase by an Italian married to a Kenyan in the State of Virginia in the USA. Based on Article 51 of L 218/1995 when the attribution of a real right derives from family relationships, the connecting factor is established by Art 30.[12] In the present case, at first, the couple established their residence in the State of Virginia. Shortly before leaving Virginia for Mozambique, the husband bought a property in the State of Virginia, a state that does not know the institute of community of property. The couple, after a further transfer to Kenya, entered into a crisis and the wife asked for the property purchased in Virginia to be re-entered into community, invoking the application of the law of Mozambique or Kenya, both states that consider community of property. The Italian judge denied that the change in the applicable law determined by the change of the State of residence may produce retroactive effects because in the present case the principle *tempus regit actum* was applicable, serving the purpose of ascertaining legal relationships.

According to the Sicilian judge, both third parties and cross-border couples rely on the static application of the connecting factor in organising their property relationships and a change would amount to unfairness. The solution proposed by the Court of Appeal has matured through interpretation and in the absence of legislative indications. The regulatory framework offered by Regulation 1103 is quite different, which in Article 26 makes it possible to concretely evaluate the country that the spouses have taken as a reference for the planning and organisation of their property relationships, with possible consideration also of the time spent in a particular state. Undoubtedly, therefore, the European Regulations will go beyond static readings, and possibly also the logic of the *tempus regit actum* which, in the present case, has led to the automatic exclusion of the possibility that an act signed in a state a few days before departure could be regulated only by the law of the country in which the deed was made.

Dynamic readings of the connecting factors have already been proposed by the Italian case law with regard to the identification of the law applicable to marital separation. As established by the Supreme Court in 2011,[13] the location where married life takes place can be identified

[11] The question refers to the Court of Appeal, 24 September 2018, at Ilfamiliarista.it, 13 November 2018.

[12] Art 51 makes a distinction between the title on which the property is based or other real right and the content and method of exercise. The conflict-of-law rules are in this case based on the *lex rei sitae* for the acquisition and loss of possession, while they are governed by the rules on succession or by those on family or contractual matters when the right *in rem* is part of a succession, in a family property relationship, or it is the result of a contract. On the subject, see F.P. Lops 'I rapporti patrimoniali tra coniugi', in M. Ieva ed, *La condizione di reciprocità – La riforma del sistema italiano di diritto internazionale privato – Aspetti di interesse notarile* (Milano: Giuffrè, 2001), 170.

[13] This refers to the Supreme Court 4 April 2011 no 7599, Civil Law Abstracts 4, 536 (2011).

having regard to the main centre of the couple's interests and affections, which does not always coincide with the place of residence.

The distinction in Italian law between the primary and the secondary property regime[14] has led to a restrictive reading of Article 30 which is considered to be applicable exclusively to the secondary regime (legal and conventional property regime),[15] while contribution obligations, assistance obligations and family solidarity are governed by Article 29.[16]

This determines the first difference between Italian private international law and European legislation: the 2016 Regulations, in fact, are also applicable to the so-called primary family regime. In the Italian legislation, for personal relationships there is no opportunity to choose the applicable law, while the European Regulations give ample space for the possibility of choice. As most of the matters that are now regulated by the Regulations have been subtracted in an interpretative way from the core of Article 30, it is rare in Italian practice to resort to instruments of choice of the applicable law that the Italian legislator provides exclusively for property relations. Unlike Article 29, Article 30 allows for an agreement on the applicable law: the choice may fall on that of a State of which at least one of the spouses is a citizen or in which at least one of them resides. The *professio iuris* contemplated by the European regulations in Article 22 adds as a possible choice the law of the country in which the spouses have common residence and, with a specific provision contained in Article 69(3), also allows those who had married before the entry into force of the Regulations to carry out a *professio iuris* subsequently, expanding the scope of application of Regulation 1103/2016. Similar provisions are envisaged for couples linked by registered partnerships with the addition of the possibility for such couples to choose the law of the State in which the registered partnership was established.

Similarities with the discipline contained in the Twin Regulations can also be found in relation to the protection of third parties. Article 30 of L 218/1995 establishes that if the regime of property relations between spouses is governed by a foreign law, this can be considered

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[14] For a description of the family property relationships in the various Member States of the European Union, see L. Ruggeri, I. Kunda, S. Winkler (eds), *Family Property and Succession in EU Member States: National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), 1-709. For a comparison between Italian and Croatian property relations, see L. Ruggeri and S. Winkler, 'Neka pitanja o imovinskim odnosima bračnih drugova u hrvatskom i talijanskom obiteljskom pravu' *Zbornik Pravnog fakulteta u Rijeci* 40, 1, 167-197 (2019).

[15] See 'Article 30', in *Codice della famiglia e dei minori commentato*, available online at One Legale, (Alphen aan den Rijn: Wolters Kluwer, 2022), 2 according to which the Italian secondary property regime includes the ownership and administration of assets, the prohibition or any limitations on sales between spouses, the property fund, the powers of representation, the modification of property relationships following separation, the prenuptial agreements admitted in some legal systems, aimed at identifying the future applicable national law and at regulating the property relations between spouses, as well as at regulating a possible marriage crisis. During a divorce procedure, prenuptial agreements signed by two Italian citizens residing abroad were considered valid on the basis that according to Art 30 of L 218 of 1995, it was possible to subject property relations to foreign law when both citizens had their residence abroad. See the Supreme Court 28 May 2004 no 10378, Rivista Diritto Internazionale Privato e Processuale, 2005.

[16] See R. Clerici, 'Articolo 29', in F. Pocar, T. Treves, S. Carbone, A. Giardina, R. Luzzatto, F. Mosconi and R. Clerici (eds), *Commentario del nuovo diritto internazionale privato* (Padova: Cedam, 1996), 155; L. Garofalo *I rapporti patrimoniali tra coniugi nel diritto internazionale privato* 2 (Torino: Giappichelli, 1997), 145; G. Carella 'Rapporti di famiglia (diritto internazionale privato)' Enciclopedia del diritto. Update (Milano: Giuffrè, 2001), V, 908.

against third parties only if they have knowledge of it or have ignored it through their own fault and with regard to real rights over immovable property. In the European Regulations, there is a specific regulation of the protection of third parties with recourse to a series of presumptions contained in Article 28 of both regulations. Based on Article 30, however, the opposition to the third party 'is limited to cases in which the forms of disclosure prescribed by the law of the State in which the assets are located have been respected'. This determines a series of problems that linger even in the case of the application of the Regulations given that, even in these, one of the criteria of the presumption of knowledge concerns precisely the fulfilment of the obligations of disclosure or registration of the matrimonial property regime or of the property effects of the registered partnership.[17] Only thanks to the creation of a consolidated case law orientation in respect of foreigners residing in Italy who have entered into marriage abroad is it allowed to enter a notation into the register of marriages for the purposes of enforceability against third parties.[18] These notations were rejected by the officials of the registry offices on the basis of the provisions contained in a circular[19] interpreting Article 19 of Presidential Decree 396/2000, which considered the transcription of such acts as a mere reproduction of foreign acts and as such was unsuitable for producing effects and justifying additional notations.

This interpretation, thanks to an opinion given by the Council of State,[20] led to the adoption of an interpretative circular[21] which allowed foreigners residing in Italy to proceed with the notation. Foreigners who are not resident in Italy and who have entered into a marriage or registered partnership abroad are still precluded today from noting their union in the registers of the civil state with the consequent impossibility of fulfilling the disclosure obligations for potential property regimes chosen by them. The impediment derives from Article 19 of Presidential Decree 396/2000.[22]

To overcome this inconvenience, the practice of resorting to real estate registers by recording property regimes has been developed:[23] a ploy adopted to overcome the prohibition on notation which strongly discriminates between resident and non-resident foreigners in Italy. As evidenced by the doctrine, recourse to the recording pursuant to Article 2643 of the Civil Code makes the single legal situation determined by the application of the foreign

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17 M. Giobbi and L. Ruggeri, 'Property Regimes and Land Registers for Cross-Borders Couples', in L. Ruggeri, A. Limante, N. Pogorelcnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 266-291.

18 Thus Court of Saluzzo, Decree, 11 August 2010, Rivista di Diritto Internazionale Privato e Processuale, 2011; Court of Massa, 22 July 2010, Rivista del notariato, 2011, 2, 403; Court of Monza, 31 March 2007, Rivista del notariato, 1171, with a note by R. Zisa 'Scelta della legge regolatrice dei rapporti patrimoniali da parte di coniugi cittadini stranieri e annotazione a margine dell'atto di matrimonio' and Court of Venice, decree 470, 15 September 2006, Guida al diritto - Il Sole 24-Ore, no 1, November 2006, 82.

19 This is the MIACEL Circular no 2/2001 (Direzione Centrale delle Autonomie Servizio Enti Locali Divisione Servizi Locali d'Interesse Statale) no 00102161-15100 / 397 - 26.3.2001 of 26 March 2001, Guida al diritto - Il Sole 24-Ore, November 2006, no 1, 82.

20 Reference is made to the Council of State, opinion of 8 June 2011 no 1732.

21 Circular of 3 August 2011, no 10307.

22 Presidential Decree of 3 November 2000, n 396 - Regulation for the revision and simplification of the civil status system.

23 See D. 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*, 1114 (2017).

law the reason for opposing, rather than the foreign law itself, which could not be concretely known by third parties.[24]

III. THE PRINCIPLE OF UNITY IN THE ITALIAN CASE LAW IN MATTERS OF SUCCESSION RELATIONSHIPS: ITS IMPACT ON THE PROPERTY RELATIONSHIPS OF COUPLES

In this scenario, in order to understand the interpretation and application of the rules of private international law on the property regimes of transnational couples, it may be useful to examine a recent ruling issued by the Italian Supreme Court in matters of succession.

This ruling was adopted in Joint Sections on 5 February 2021, no 2867,[25] which set the principles of law concerning a key feature of private international family law such as the principle of unity. On the basis of the principle of unity, the law applicable to the property regimes of couples is applicable to all assets regardless of where they are located. The principle is applicable both when the law has been identified following an agreement on the basis of Art 22 of both regulations and when it is the result of the application of the rules contained in Art 26, which identifies the applicable law in the absence of a choice made by the couple. The principle of unity is opposed to the principle of scission which instead leads to the application of different laws depending on the nature of the assets;[26] this principle is also adopted by Regulation 650 of 2012 in matters of succession, and characterises Italian private international law.[27]

With this decision, based on the rules of Italian private international law, the Joint Sections consider the principle of unity as a principle that is not always applicable, allowing the entry into Italy of rules based on the principle of scission. The decision is interesting for those who study international family property law as it emerges that the principle of unity is not always absolute and that consequently criteria for applying the law based on different logics such as the *lex rei sitae* can find their place.

The solution proposed by the Joint Sections differs from that offered by other European judges.

In 1985 the High Court, Chancery Division,[28] found itself deciding on the will of Christopher William Adams, domiciled in England, who had left all his real estate assets to

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[24] Thus Vecchi, 'La scelta della legge regolatrice il regime patrimoniale dei coniugi', in *Familia*, 2003, 67. The recording contributes to generating in third parties an innocent trust regarding the legal situation: on the subject, see Art 30, 20.

[25] The decision can be consulted in Giurisprudenza italiana, 2022, 598, with a note by R. Grimaldi, 'Tramonto (a colpi di rinvio) dell'universalita`/unita` della successione?' For an examination of this decision, in Foro it., see below, Section II.

[26] V.D. Martiny, sub Art 21, in I. Viarengo, P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham Glos: Edward Elgar Publishing, 2020), 192.

[27] It was already present in Art 23 of the Provisions on the general law and was confirmed by the 1995 reform of private international law (see Art 46).

[28] This is the Sentence of the High Court of Justice Chancery Division 31 July 1985 in Re Estate of Christopher William Adams deceased. See L. Fumagalli, 'Rinvio e unità della successione nel nuovo diritto internazionale privato italiano', *Riv. dir. int. priv. proc*., 829, 837 (1997).

his wife. The real estate that was the subject of the will was in Spain, a state which, unlike England, protects the position of the relatives of the deceased. For this reason, the son of the deceased asked for the application of Spanish law invoking the renvoi of the English law to the *lex rei sitae*. The decision made by the English court was to deny the application of the renvoi as the unity of the succession was a fundamental principle of Spanish law that prevented the application of Spanish law to assets located in Spain, but belonging to a foreign owner.[29]

The decision made by the English court was to deny the application of renvoi as the unity of succession was a fundamental principle of Spanish law which prevented the application of English law to the real estate located in Spain.

This principle was considered equally insuperable by the Spanish Supreme Court[30] in a case of the challenge of a will by the pretermitted son of an Englishman domiciled in Spain. The deceased had in fact appointed his wife as sole heir, the movable assets consisting of an art collection were located in Spain, and the son invoked the application of Spanish law on the basis of the renvoi made by the rules of English private international law to Spanish law. In this case, the scission applicable on the basis of English law would allow the pretermitted child to benefit from the safeguards offered to his position by Spanish law as the law of domicile is applicable to movable property. The movable assets consisting of an art collection were located in Spain and the son invoked the application of Spanish law on the basis of the renvoi made by the Spanish private international law rules to English law. In this case, the scission applicable on the basis of English law would allow the pretermitted child to benefit from the safeguards offered to his position by Spanish law. However, even in this case, the judge considered the principle of unity to prevail, considering that the renvoi could not always be the result of automatism, but that it could rather be applied flexibly taking into account the concrete situation. This led to the result that Spanish law was deemed inapplicable and English law was deemed the only law applicable to the succession.

This decision confirms an orientation expressed in a previous case by the Spanish Supreme Court in 1996,[31] confirming the need to adequately balance the legal solution and bearing in mind the importance of the principle of unity. It is understood that the choice made by the European legislator in Regulations 1103 and 1104 not only feeds on the legal solutions adopted by Regulation 650/2012,[32] but is also affected by the case law formed on the subject of renvoi determined by the application of domestic rules of private international law. In this complex scenario, the case law that will be formed in the matter of property relations between spouses will necessarily be affected by the strong choice made by the Twin Regulations, which on the one hand exclude recourse to renvoi and on the other adopt as a basic criterion for

[29] The case is analysed in a fact sheet written by C. Olivier, dedicated to developing practical cases which can be consulted at the following site: https://elibrary.fondazionenotariato.it/ Articolo.asp?art=28/2811&mn=3#note.

[30] *Denney v Denney (Royde Smith) Spanish Supreme Court 21 May 1999 Appeal no 3086/1995.* See E. Castellanos Ruiz, 'Sucesión hereditaria', in A.-L. Calvo Caravaca - J. Carrascosa González (eds), *Derecho Internacional Privado*, *8, II*, Granada, 2007, 283, 291.

[31] Reference is made to Tribunal supremo 15 November 1996, Lowenthal. See, in this regard, M. Virgós Soriano and E. Rodríguez Pineau, 'Succession Law and Renvoi: The Spanish Solution', *Festschrift für Erik Jayme* (München, 2004) vol I, 977.

[32] For the link between the Twin Regulations and Regulation 650/2012 see, among others, V. Lagarde, 'Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partnerships enregistrés', *Riv. dir. int. priv. proc.*, 677 (2016).

identifying the applicable law the principle of unity,[33] without providing for attenuations or mitigations that can be found in Regulation 650/2012.

Indeed, in Regulations 1103 and 1104, the rigid application of the principle of unity is accompanied by greater flexibility in matters of jurisdiction. Article 10 introduces a subsidiary jurisdiction to the Court of the State in which a specific immovable property is located; the dispute relating to such property may in this case be dealt with by the judge of that State. The exception to the principle of unity is based on considerations of expediency for the case to be dealt with by the judge of the *locus rei sitae*;[34] likewise, the decision of the court seised to exclude from the decision assets located in States that do not participate in the enhanced cooperation procedure may also be based on the evaluations of expediency when the dispute concerning the assets of a couple is connected with a succession dispute. Based on Article 13 of the two Regulations, the judge, at the request of a party, could exclude from the ruling certain goods that are located in third States if, on the basis of the rules of international law of these States, they consider that their decision could not be recognised or enforced.[35]

On closer inspection, the entry of the scission system applied by the Supreme Court is based on the presence of the renvoi in the Italian rules of private international law. The Twin Regulations, however, unlike the Italian private international law system, expressly exclude the renvoi: in Article 32 it is clearly excluded that the applicable rules may include the rules of private international law. The exclusion of renvoi is frequent in private international law of European derivation: it is applicable in numerous provisions such as those relating to contractual and non-contractual obligations, separation and divorce, and maintenance obligations. It appears to be rigidly inspired by the doctrine of immutability,[36] deviating moreover from the choices made in matters of succession where Article 34 of the Succession Regulation allows partial renvoi to the law of a Member State or a third State.

Consequently, it seems possible to affirm that the application of the foreign law based on the scission criteria cannot be implemented when it is a question of family property relationships governed by the Twin Regulations, while it can find its application for as long as the Italian rules of private international law are applied. There is still a long way to go in respect of this application since, based on Article 69(3) of the Regulations, the entire chapter III, including Article 32, applies exclusively to married couples starting from 29 January 2019.

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[33] For an examination of the renvoi in connection with the application of the principle of unity, see A. Davì, 'Le renvoi en droit international privé contemporain', *Recueil des cours*, vol 352, 471, (2010).

[34] Thus P. Franzina, 'sub Art. 10', in I. Viarengo, P. Franzina (eds), *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Edward Elgar Publishing, 2020) 114.

[35] V.F. Marongiu Bonaiuti, 'Article 13', in Alfonso-Luis Calvo Caracava, Angelo Davì and Heinz-Peter Mansel (eds), *The EU Succession Regulation* (CUP 2016), 216.

[36] V. M. Gebauer, 'Art 32', in I. Viarengo, P. Franzina (eds), *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Edward Elgar Publishing, 2020), 314.

IV. THE QUALIFICATION OF JURIDICAL INSTITUTIONS: CASE LAW INDICATIONS

The decision made by the Joint Sections 2867/2021 is also interesting because it addresses the issue of the qualification of institutes in Italian private international law.[37] Based on Article 15 of L 218 of 1995 'the foreign law is applied according to its own criteria of interpretation and application over time'. Consequently, the foreign law, operating in the Italian legal system by virtue of the rules of private international law, must be applied by the Italian judge making use of all the interpretative tools posed by the foreign legal system.

According to the Joint Sections, however, Article 15 'does not give an answer as to the profile of the qualification and therefore of the nature of the law of another State, which has to be dealt with, therefore, according to the lex fori'. The judge must determine the meaning of the juridical expressions 'that connote the categories of the case in point' according to the canons of qualification pertaining to the Italian legal system (*lex fori*) rather than on the basis of the *lex causae*.

In the present case, the revocation of the will that English law includes in family property law would fall under succession law precisely because the qualification would then be removed from the interpretative rules of the foreign law and the court seised would have the prerogative to apply the *lex fori*.

It should be noted that the position taken by the Joint Sections of the Supreme Court is in line with a concept traditionally applied for the rules of private international law that separates interpretation from qualification. This interpretation of Article 15 of L 218 of 1995 serves the purpose of ensuring uniformity in the national territory of the reading of foreign laws, but leaves open the problem of consistency with opinions now present in other fields of legal science that advocate interpretation for the purpose of application. In this different perspective, qualification is the natural landing place of interpretation and, in turn, interpretation is nourished by qualification in a circular type of procedure. In this scenario, the scission between the qualification phase, always attributed to the *lex fori*, and the phase of the interpretation that can be carried out on the basis of the *lex causae*, does not appear entirely convincing.[38] In a systematic reading of the legal system, the rules of private international law serve to identify the law applicable to the case characterised by international profiles, assuming legality because they respond to a fundamental function: they ensure adequate regulation of all facts without excluding some due to the circumstance that they are characterised by elements of internationality.[39]

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[37] For an analysis of the operative modalities of the qualification in private international law see, U. Villani, n 10 above. On the subject, see in various ways, P. Fedozzi, 'Il diritto internazionale privato. Teorie generali e diritto civile', in P. Fedozzi and Santi Romano eds, *Trattato di diritto internazionale*, IV (Padova: Cedam, 1935), 181-185; G. Pacchioni, 'Diritto internazionale privato' (Padova: Cedam, 1935), 171; E. Betti 'Problematica del diritto internazionale' (Milano: Giuffrè,1956), 188-190; E. Vitta, 'Diritto internazionale privato', 1 (Torino: UTET, 1972), 311-313.

[38] See G. Barile, 'Qualificazione (dir. intern. Privato)' *Enciclopedia del diritto* (Milano: Giuffré, 1987), XXXVIII, 10, 1-22. G. Barile points out that 'the legal operator finds the solution to a problem of private international law through much more complicated ways than those of formal logic'.

[39] For some time, studies have been developed, especially in the United States, aimed at finding the best solution for the case that presents elements of internationality. On the topic, see E. Vitta 'Diritto internazionale privato (voce)', *Digesto*, (Alphen aan den Rijn: Wolters Kluwer, 1990), 54.

In this perspective, the legal nature of foreign regulations is not the result of their reference by the *lex fori*, but it seems to be inherent in their function of regulating cases characterised by transnationality.[40] It is therefore easy to understand how even the institutes unknown to the domestic legal system, but present in a particular foreign legal system, can produce effects in the territory of a particular State without being qualified on the basis of internal categories.

It should be noted that the scission between interpretation and qualification is not envisaged for the rules of private international law present in international Conventions: for these, in fact, on the basis of Article 2(2), of Article 15 of L 218 of 1995, interpretation is done for application purposes aiming at guaranteeing uniformity in an international context. The interpretative indications contained in the Vienna Convention on the Law of Treaties also operate in this sense.[41]

The elaboration of an autonomous qualification connotes private international law of a Euro-unitary matrix: in this context, in fact, the Court of Justice guarantees uniform interpretation of the rules in the context of the European Union, avoiding the impact of fragmentation caused by readings based on the *lex fori*.

In Regulations 1103 and 1104 of 2016, the issue of qualification and recognition of institutes present in one State and absent in another is extremely delicate, having regard to profiles such as family and property. With regard to the notion of marriage or registered union, therefore, providing an autonomous notion of a European type by classifying this problem as a preliminary question that can be resolved by the judge on the basis of domestic law (Recital 21) is to be avoided, while the solution adopted for the qualification of rights *in rem* is different.

Article 29 of the Regulations establishes, in fact, that when a right *in rem* envisaged by the applicable law is not recognised as a right *in rem* by the law of the State in which the application is invoked, that right is 'adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it'. Adaptation is also a solution present in Regulation 2012/650: it is a demonstration of how the judge must adopt an interpretation that is attentive to factual, actual profiles and not rigidly anchored to the legislative dictate.[42]

As can be seen, the theme of interpretation and qualification holds a central place in private international law whose interpretation cannot be monolithic, but can vary according to the techniques used to achieve the objective of attributing a discipline to cases characterised by transnationality.

In the Italian context characterised by the application of Article 15 of L 218/1995, understanding which foreign law is applicable serves the purpose of identifying the meaning

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[40] The consideration of foreign regulations as facts to which relevance is to be attributed is the subject of wide debate.

[41] F. Mosconi 'Sulla qualificazione delle norme di diritto internazionale privato di origine convenzionale', in *Scintillae iuris: Studi in memoria di Gino Gorla*, (Milano: Giuffrè, 1994), II, 1459.

[42] See also P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milano: Giuffrè, 2019), 220-221 and L. Ruggeri, 'I regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border, in EU Regulations 650/2012, 1103 and 1104/2016' in S. Landini ed, *Cross-border Families, International Successions, Mediation Issues and New Financial Assets* (Napoli, 2020), 122-123.

of the expressions used by the conflict-of-law rules to indicate the abstract categories, and at the same time of verifying the existence in the specific case of the characters of the abstract case contemplated by the conflict-of-law rule for the purpose of the subsumability of the former in the latter.[43] By virtue of internal coherence,[44] a double qualification is envisaged: in a first phase, the qualification is carried out to identify the competent rules of private international law, while in a second phase the rules thus identified would allow the cases to be qualified. Many objections have emerged against this approach which, with various perspectives, have led to a profound rethinking of the qualification operated by the rules of private international law and, more generally, regarding the subject matter of private international law.

It is therefore necessary to ask whether the formulation adopted by Article 15 of Article 218 of 1995 can still be useful today, founded as it is on a rigid split between qualification and interpretation, in an era such as the current one characterised by the use of interpretative techniques based on the balancing of values and on readings that adapt to constitutional, European and international principles. In this context, the subsumption of the specific case into a specific abstract case could lose relevance: the classification of a fact within a provision[45] is not an adequate tool for identifying the applicable discipline which, in order to be specified, requires an assessment of the structure of interest and a comparison with the assessment of value expressed not by a single provision, but by the entire system. In Italian private international law, this new dimension of interpretation understood as a unitary and circular procedure between the legal text and the context is still not fully explored, even if there is no lack of openings towards a non-literal reading of the conflict-of-law rules that leads to a broader and more flexible reading[46] of the terms used in them, not always coinciding with the interpretation given to a certain term by a rule of domestic law applicable to cases without the elements of internationality.[47] Article 15 is therefore read and applied as if it were only a matter of choosing between a provision inserted in an Italian law and a provision inserted in a foreign law (so-called conflicts justice) without the possibility of evaluations of material justice: once the qualification on the basis of the *lex fori* is applied, the application of the foreign law ensues automatically without the qualification being influenced by the content of the applied law.[48]

The European legislator is well aware of all this and in respect of the traditions and cultures expressed by the various countries in matters of family in Recital 21 of Regulations 1103 and 1104, it excludes the fact that these can be applied for preliminary issues such as existence, validity or recognition of marriages or registered partnerships. A complete renvoi to the law of the forum including the rules of private international law is therefore applicable to the preliminary questions. Consequently, if this law contains the renvoi, the qualification of the institutes may also take place through the renvoi to another law.

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43 V.D. Damascelli 'La Cassazione si esprime su qualificazione e rinvio in materia successoria: un'occasione persa per la messa a fuoco di due questioni generali del diritto internazionale privato' *Famiglia e Diritto*, 12,1134 (2021).

44 G. Morelli, G. Morelli, *Elementi di diritto internazionale privato* (Napoli: Jovene, 1982), 34.

45 For a critique of the use of legal reasoning based on formal logic alone, see G. Barile, n 38 above, 8.

46 G. Barile, n 37 above, 12.

47 E. Vitta, n 37 above, 24.

48 E. Vitta, n 37 above, 13.

There is a need for a new interpretation of the internal private international law system so as to be able to apply also in this area the techniques and methodologies that reflect the changed relationship between legal systems established at the constitutional level by the modification of Art 117 of the Constitution.

In the current Italian scenario, the rules of private international law in which internal rules inspired by completely different logics from those expressed by the European Union coexist, it seems necessary to rethink the application mechanisms traditionally adopted, a rethinking based on the dialogue between doctrine, case law and legislator, from which an organic revision of the system of private international law is expected.

V. UNIONS REGISTERED IN THE REALM OF ITALIAN LAW

The Italian legal system is characterised by the recent relevance of registered unions, by the absence of any form of recognition for same-sex marriages and by a body of legislation dedicated to private international law that is not adequate for the numerous innovations made in this area by European Union law.[49] Only in 2016, in fact, were registered unions regulated.[50]

However, Italy reserved exclusively these for same-sex couples: there is, therefore, a regulation that declines the family taxonomy on the basis of sex, with an evident need to apply the legal solutions prepared on the basis of the homogeneity or diversity of the sex of the members of the couple. In this, the Italian legislation appears extremely misaligned with the European regulation which, on the other hand, is applied on the basis of a dichotomy between the institute of marriage and that of the registered union, but which is not at all based on the sex of the persons forming the couple. This peculiar regulatory context makes the absence of case law dedicated to the property issues of cross-border homosexual couples understandable since this taxonomy is so recent that it has not yet resulted in many cases.[51] The regulatory framework of private international law dates back to 1995 and, before 2016, there were no specific rules for the property relations of registered unions: only in 2017, with the adoption of Legislative Decree 19 January 2017, no 7, were provisions introduced relating to marriage contracted abroad by Italian citizens of the same sex and to the civil union between adults of the same sex, with Articles 32-bis to 32-quinquies. The introduction of this new legislation is destined to produce results in terms of case studies only in the future and those who want to analyse the case law approach to the problems posed by the property relationships of cross-border couples are left to investigate those few cases subjected to judges on the basis of the

[49] The regulatory framework of the European Union on family matters is now truly composite and complex. For an interesting analysis of the interpretation problems posed by the different contents and meanings of the 'internal' definitions in relation to the normative definitions present in the European Regulations dedicated to family and food law, see. F.G. Viterbo, 'Claim for Maintenance after Divorce: Legal Uncertainty Regarding the Determination of the Applicable Law', in J. Kramberger Škerl, L. Ruggeri, F. Giacomo Viterbo eds, *Case studies and Best Practices Analysis to Enhance EU Family and Succession Law: Working Paper* (Camerino: University of Camerino, 2019), 176, 171-184.

[50] Law 76 of 20 May 2016 in fact introduced the institute of civil unions specifically dedicated to unions between persons of the same sex.

[51] On the role of legislative policies and case law decisions in the matter of family taxonomy, see the interesting considerations of J.M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' *The Equal Rights Review*, Vol. 10, 83, 83-96 (2013).

rules contained in L 218/1995 not yet amended or affected by coexistence with the European Regulations 1103 and 1104 of 2016.[52]

A first question posed by the peculiar Italian legal framework stems from the so-called downgrading carried out by Article 32-bis of L 218/95 as amended in 2017. Marriage between persons of the same sex is not in fact provided for by Italian law which, in the event that two Italians enter into marriage abroad, has to apply a sort of novation *ex lege* of the relationship regulating it as a civil union, the only institute that can be used for this type of couple. The provision contained in Article 32-bis gave rise to a wide debate:[53] if, in fact, a distinction is made between the marriage-act and marriage-relationship, it is necessary to ask whether the transformation of the marriage entered into abroad concerns the act and the relationship or is limited only to the relationship. Among the rules of private international law, there are also so-called rules for the recognition of situations[54] which allow for the harmonisation of the attribution of effects to cases not provided for in one legal system, but present in another legal system, thus avoiding 'lame' situations,[55] applicable in a single legal context. Article 32-bis could, in this perspective, not be considered a conflict-of-law rule, but a rule that leaves to foreign law the identification of the features necessary to have a marriage act and that reserves the task of attributing to the foreign act those effects that in Italy are attributable to the union of two people of the same sex.[56] The distinction proposed between the act and the relationship is, however, not very convincing if compared with the European regulation which delegates any preliminary question to the law of the judge, attributing to this law the coverage of the matters of existence, validity and recognition of marriages or registered unions. In this perspective, the provision contained in Article 32-bis could be considered a rule that adapts by attributing the effectiveness of a civil union to homosexual marriage entered into abroad: an acceptance of the union entered into abroad in a legal form that is not a marriage.[57] The consequence of the recognition made by Article 32-bis is the subjecting of same-sex marriage entered into abroad to the Italian law dedicated to civil unions, with the consequence that the

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[52] For a concrete application of Regulation 1104/2016, see F. Dougan and J. Kramberger Škerl, 'Model Clauses for Registered Partnerships under Regulation (EU) 2016/1104', in M.J. Cazorla González and L. Ruggeri eds, *Guidelines for Practitioners in Cross-border Family Property and Succession Law* (Madrid: Dykinson, 2020), 37-42.

[53] See, for all, V. Biagioni 'Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017' *Rivista di diritto internazionale*, 498 (2018); C. Campiglio 'La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso' *Rivista di diritto internazionale* 41 (2017); S. Tonolo 'Articlolo 1 comma 64 — Profili problematici di diritto internazionale privato nella nuova disciplina italiana delle unioni civili e degli accordi di convivenza', in P. Rescigno and V. Cuffaro eds, *Unioni civili e convivenze di fatto: la legge*, (Torino: UTET Giurisprudenza italiana, 2016), 293.

[54] On the importance of forms of recognition in the international private context, with particular regard to the law of persons, see R. Baratta, 'La reconnaissance internationale des situations juridiques personnelles et familiales', *Recueil des cours*, vol 348, 253 (2011); S. Pfeiff, 'La portabilité du statut personnel dans l'espace européen', Bruxelles, 2017.

[55] On the subject, see Picone, 'La teoria generale del diritto internazionale privato nella legge italiana di riforma della materia', *Rivista*, 289, 297 (1996).

[56] Thus, D. 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*, 1114 (2017).

[57] As highlighted by D. Damascelli, ibid 47, 1115, the absence of same-sex marriage in the Italian law in the absence of Article 32-bis would lead to an inexorable nullity of the marriage entered into abroad.

property regime of the couple is subject to the regime of legal communion of assets,[58] unless the parties opt for other regimes.

Nothing is provided for couples made up of an Italian and a foreigner or foreign citizens who have entered into a registered partnership abroad: the silence of the Italian legislation does not prevent, however, extensive interpretations of Article 32-bis which is also considered applicable to so-called mixed couples or to an analogical application of Article 32-ter, paragraph 4, to heterosexual couples who have entered into a registered partnership abroad.[59] As can be understood, the comparison between domestic taxonomies and foreign taxonomies is not resolved with rigid mechanisms but through an elastic reading of the rules of private international law. This method allows the courts to elaborate solutions that substantially make adjustments whenever they see a concrete situation and a structure of interests worthy of applying in the internal legal system, even if not expressly contemplated by it (think, in this regard, of trust[60] or the kafala[61]).

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[58] On the basis of Art 1, paragraph 13, of L 76/2016.

[59] On the topic, V. D. Damascelli, n 43 above, 1130, which highlights that on the basis of Art 32-ter, paragraph 1, civil unions entered into abroad by Italians or foreigners whose law does not know the institute of civil union for heterosexual couples risk not producing effects in Italy. The failure to provide for the institute of civil union for heterosexual couples was considered discriminatory by both the British Supreme Court and the Austrian Constitutional Court. For an examination of these decisions made in 2018 and 2017 respectively, see L. Ruggeri, 'I regolamenti europei sui regimi patrimoniali', ibid 34, 13, spec. notes 42 and 45. The issue was also addressed by the ECHR which, with a decision made on 26 October 2017 in the case of *Ratzenböck and Seydl v Austria*, which had considered the choice of the Austrian legislator to preclude heterosexual couples from having recourse to registered partnerships compatible with the European Convention. See P. Bruno, 'Coppie omosessuali e unione registrata: la Corte di Strasburgo evita la reverse discrimination', in www.ilfamiliarista.it; R. Garetto, 'Opposite-sex Registered Partnerships and Recognition Issues', in J. Jerca Kramberger Škerl, L. Ruggeri, F. G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law*, 2019, 89; J.M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' *The Equal Rights Review*, vol 10, 83-96 (2013).

[60] The trust has been a classic example of an evaluation gap in Italy. See in this regard, G. Barile, n 38 above, 14.

[61] The recognition of the kafala gave rise to an important ruling by the Court of Justice which established that 'it is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned. In the event that it is established, following that assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State'. This is Case C-129/18, SM v *Entry Clearance Officer,* judgment of Grand Chamber, 26 March 2019 *UK Visa Section*, available at www.eur-lex.europa.eu. For a comment on this sentence, see C. Peraro, 'L'istituto della Kafala quale presupposto per il ricongiungimento familiare con il cittadino Europeo: la sentenza della corte di giustizia nel caso S.M. C. Entry Clearance Officer', *Rivista di diritto internazionale privato e processuale*, 319-348 e (2019).

P. Hammje, 'Reconnaissance d'une kafala au titre d'une vie familiale effective avec un citoyen européen aux fins d'octroi d'un droit de séjour dérivé' *Revue critique de droit international privé*, 3, 769-785 (2019). In Italy, among other rulings, see Decree of the Tribunal for Minors Emilia Romagna, 14 March 2019, Diritto di famiglia e delle persone, 3, 1198-1209 (2019), with a note by M. Poli, 'Abbandonare la strada vecchia per quella nuova: l'efficacia dei provvedimenti di kafalah a seguito dell'entrata in vigore della Convenzione dell'Aja del 1996'.