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The *Professio Iuris* in EU Regulations**

I Introduction

The *current* so-called *professio iuris,* i.e. the party autonomy in private international law, or otherwise the possibility/power of those involved to choose the law applicable to a relationship, has deep roots in a remote past. The main source of inspiration for the choice-of-law possibility by a person, especially in the field of contractual obligations, is considered to be Charles Dumoulin (Molinaeus) in the 16th century.[1] Party autonomy, besides the contractual obligations where it has had a relatively long tradition in national conflict-of-laws systems and international instruments, extended its domain over the last decades to other relations too.

The aim of this paper is to overview the innovative – to some extent – adoption of the *professio iuris* by some of the EU Regulations regarding patrimonial, family and succession matters. There is no intention to present a complete and exhaustive analysis of this phenomenon but rather an attempt to touch upon two main problems and make comments on the issue at hand.

These problems exclusively concern choice-of-law and not choice-of-court rules, even though a choice-of-law agreement may have considerable effects on a court's jurisdiction. It is worth mentioning, for example, Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[2] (hereinafter: Succession Reg). According to it, a court of a Member State whose law had been chosen by the deceased shall have jurisdiction under some conditions or even exclusive jurisdiction on any succession matter,

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** This study is based on a report (by the author) for the 4th Greek-Hungarian Symposium on Recent Trends in European Private Law and Private International Law, held on October 9, 2015, at ELTE Law School, Budapest. The author wishes to thank Dr. A. Matakou for a careful review of the English text.

1 F. Meili, 'Argentraeus und Molinaeus und ihre Bedeutung im internationalen Privat- und Strafrecht' [1895] NiemeyerʼsZ 363-380, 367; Max Gutzwiller, *Geschichte des Internationalprivatrechts: Von den Anfängen bis zu den grossen Privatrechtskodifikationen* (Helbing & Lichtenhahn Vertrag 1977, Basel und Stuttgart) 69 ff, 78.

2 [2012] OJ L201/107.

if the parties so agreed, on one hand, while, on the other, a court already seised may, under certain conditions, decline its jurisdiction if the law chosen by the deceased to govern his/her succession is the law of another Member State.[3]

II How Broad is the Party's Autonomy?

Regarding this question, one may discern two different answers on the basis of the preponderant nature of each relationship.

1 Relationships with Preponderant Patrimonial Character

In those Regulations where, patrimonial elements are preponderant, party autonomy is very large. Parties can choose any law of any State, Member or non-Member of the EU.

a) Contractual obligations

This very extended party autonomy is established in Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter: Rome I Reg),[4] which replaced in principle[5] the Rome Convention 80/934/ECC of 19 June 1980 on the law applicable to contractual obligations.[6]

b) Non-contractual obligations

(ba) This is also the case in Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter: Rome II Reg),[7] regarding many, but not all of the non-contractual obligations falling within its scope.[8] The insertion of party autonomy in Rome II Reg may be an important innovation; however, it seems rather difficult to envisage a frequent use of it in practice. This Regulation does give to the parties involved in a delictual obligation the possibility to choose (with reasonable certainty depending on the circumstances of the case and without prejudicing the rights of third parties) the law of any country as applicable to that obligation (the abuse of this freedom reserved),

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[3] See art 5-7.

[4] [2008] OJ L177/6.

[5] But see art 24 para 1 of Rome I Reg.

[6] OJ L266/9.10.1980; entered into force 1 April 1991; hereinafter: *Rome Convention on contractual obligations.*

[7] [2007] OJ L199/40.

[8] The *professio iuris* is excluded in cases of infringement of intellectual property rights (art 8 para 3), of unfair competition and of acts restricting free competition (art 6 para 4, with a slight exception in the last case in favour (under conditions) of the *lex fori,* i.e. of the law of the court seised [art 6 para 3 *(b)*]. The Regulation does not offer any explanation for this exception. It simply affirms (recital no 22) that 'in cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.' One may wonder why the victim should not be able to do the same, if he/she sustained the damage (any damage arising from any tortuous act) in more than one country.

albeit under strict conditions, either 'by an agreement entered into after the event giving rise to the damage occurred'[9]; or 'where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.'[10] The recitals of the Regulation do not offer us any convincing explanation regarding either the adoption of the *professio iuris* or the conditions imposed.

(bb) On the contrary, a far greater practical effectiveness would be achieved and greater justice would be satisfied, if Rome II Reg would dare, against many objections from various sides, to give *to the victim,* who is the weak party in a delictual obligation, some possibility to choose the applicable law[11] (choosing, for example, between the *lex loci damni, or* the *common habitual residence* of the parties, which usually are the laws designated by Rome II Reg as applicable in the absence of choice,[12] or the *lex loci actus*).[13] Notwithstanding that 'protection should be given to weaker parties',[14] this has not been done, the Regulation having reserved the possibility of choosing, instead of the law of the *locus damni,* the *lex loci actus* (i.e. the law of the country in which the event giving rise to the damage occurred), exclusively in cases involving environmental damage.[15] In my view, it is a thousand pities that this has not been done.

2 Relationships with a Preponderant Personal or Family Character

a) What are the relationships concerned?

A different answer to the question on the broadness of party autonomy is to be found in those Regulations where important personal or family elements overshadow patrimonial elements. In all these matters, the power of the persons involved to choose the applicable law is restricted to some degree. The relations belonging to this second category have to do with:

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[9] Art 14 para 1 (a).

[10] Art 14 para 1 (b). At this point, the main difference between the two Regulations is that, as far as contractual obligations are concerned, in Rome I Reg (art 3) the choice may be made before or after the conclusion of the contract without any prior condition required.

[11] Cf. Spyridon Vrellis, 'La protection de la Vie Privée et de la Réputation Dans le Domaine des Règles de Conflit des Lois: Aspects Comparatifs,' in *Future of Comparative Study in Law: The 60th anniversary of The Institute of Comparative Law in Japan, Chuo University* (Series of the Institute of Comparative Law in Japan, vol. 81, Chuo University Press 2011, Tokyo, 505-523) 514-517.

[12] The main, unless otherwise provided for some specific torts, connecting factors in Rome II Reg are the country in which the direct damage occurred (the *locus damni*) and the place of the common habitual residence of both, the person claimed to be liable and the person sustaining damage (art 4 paras 1-2). Regarding liability for damages caused by an industrial action, an exception to the *lex loci damni* is adopted: the law of the country where the action is to be, or has been, taken, is designated as applicable (art 9).

[13] With regard to environmental damage, Rome II Reg provides that, instead of the law of the *locus damni,* which is applicable according to art 4 para 1, 'the person seeking compensation for damage [may] choose [...] to base his or her claim on the law of the country in which the event giving rise to the damage occurred' (art 7).

[14] Recital no 31.

[15] See n 13.

aa) Maintenance obligations

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 (hereinafter: Maintenance Reg),[16] quite correctly adopted by reference The Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter: The Hague Protocol).[17] This Protocol was the upshot of a very long and fruitful experience within the frame of The Hague Conference on Private International Law after its first Convention of 1956.[18]

ab) Divorce and legal separation

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 (hereinafter: Divorce Regulation),[19] made a bold step, recognising that 'spouses should be able to choose the law of a country with which they have a special connection or the law of the forum as the law applicable to divorce and legal separation […]'.[20]

ac) Matters of succession to the estates of deceased persons

When the Succession Reg adopted the *professio iuris* in succession matters, it had already forerunners in national legislations, such as Switzerland as from 1987, Italy, Belgium and other countries, as well as in the Hague Convention on the Law applicable to succession to the estates of deceased persons of 1 August 1989 (not yet in force) (hereinafter: The Hague Succession Convention).

ad) Matrimonial property regimes

In these matters it seems rather easy to insert choice of law in the conflict of laws area, as The Hague Convention on the law applicable to matrimonial property regimes of 14 March 1978 (hereinafter: The Hague Matrimonial Property Regimes Convention)[21] had already done, since the spouses have at their disposal the choice among various matrimonial regimes in domestic law.[22] The European Union has drafted two Council Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions, in matters of *matrimonial property regimes* on one hand (hereinafter: Proposal on matrimonial property regimes)[23] and in matters of the

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16 [2009] OJ L7/1.

17 Entered into force 1 August 2013.

18 See text to n 41ff.

19 [2010] OJ L343/10.

20 Recital no 16.

21 Entered into force 1 September 1992.

22 Various solutions in domestic private international laws and The Hague Convention of 1978 are indicated by Andrea Bonomi, 'Les régimes matrimoniaux en droit international privé compare', in Andrea Bonomi, Marco Steiner (eds), *Les Régimes Matrimoniaux en Droit Comparé et en Droit International Privé : Actes du Colloque de Lausanne du 30 septembre 2005* (Comparativa vol. 76, Librairie Droz 2006, Genève, 59-75) 62-66.

23 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' Interinstitutional file: 2011/0059 (CNS).

property consequences of registered partnerships[24] on the other (hereinafter: Proposal on registered partnerships).[25]

b) Some observations

Regarding the Regulations of that personal and family category four observations suffice.

ba) The connecting factors

The connecting factors used by the conflict-of-laws rules for designating the applicable law in the absence of choice by the parties, e.g. in particular the habitual residence and the nationality, sometimes the *forum* (= the court seised) too, are the same elements also offered to the parties, using some flexibility, for choosing the applicable law. Nevertheless, the Regulations follow various models of flexibility, combining them in various ways; I shall go through them in a kind of elementary synthesis.[26] For the sake of clarity I shall simplify to some extent the adopted rules, which as a matter of fact are often quite complicated, because of the distinctions, conditions, and exceptions contained therein.

First model: Some Regulations retain as connecting factors some elements *common to the persons involved.* As such, they designate as successively applicable the laws of the *common habitual residence* of the parties or their *last common habitual residence* (as is the case in divorce),[27] or even their *first common habitual residence* after a certain event (e.g. the celebration of the marriage according to the Proposal on matrimonial property regimes),[28] or

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[24] 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships' Interinstitutional File: 2011/0060 (CNS).

[25] The most recent versions of the Proposals seem to be those of November 10 2014. References will be to these very versions. The scope of the Proposals should include all civil-law aspects of matrimonial property regimes/the property consequences of registered partnerships, both their daily management and liquidation, in particular as a result of the couple's separation or the death of a spouse/partner (recital no 11). Both Proposals exclude from their scope, among other issues, maintenance obligations and the succession to the estate of a deceased spouse/partner [art 1 para 3 *(b)* and *(d),* and art 1para 3 *(c)* and *(e),* respectively]. The European Commission submitted on March 2, 2016 a 'Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples covering both matters of matrimonial property regimes and the property consequences of registered partnerships': COM (2016) 108 final, 2016/0061 (NLR).

[26] The technical presentation of the applicable law differs from one Regulation to another: One group of Regulations establishes *primo loco* the *professio iuris* and then, in the absence of choice, the objectively designated applicable laws; on the contrary, another group designates first objectively the applicable laws and after that it continues to the law chosen by the parties. Both approaches are acceptable; it seems nevertheless more logical to prefer the first approach where the parties have a very large power to choose the law of any State (even subject to some general restrictions), and follow the second model where the power of the parties is quite restricted, being considered rather as an exception to the general rule which designates the applicable law objectively. From this point of view, the Divorce Reg or the Proposals on matrimonial property regimes and on registered partnerships, to the extent that party autonomy is restricted, are not quite right when stating as *primo loco* applicable the law chosen by the spouses / partners.

[27] Divorce Reg art 8 *(a)* and *(b).*

[28] The Proposal on matrimonial property regimes designates as applicable, in a scale of succession, *primo loco* the law of the State of the spouses' first common habitual residence after the celebration of the marriage or, failing that, *secundo loco* the law of the State of the spouses' common nationality at the time of the celebration of the marriage or, failing that,

their *common nationality*[29] at a particular time (at the time the Court is seised, according to the Divorce Reg;[30] at the time of the celebration of the marriage, according to the Proposal on matrimonial property regimes).[31]

Instead of the above laws, the parties have the possibility to choose the law of the State of the *habitual residence of the spouses / future spouses / partners / future partners* at the time this choice is made (according to the Divorce Reg[32] and the Proposals on matrimonial property regimes[33] and on registered partnerships);[34] *or of the habitual residence of one of them* at the time this choice is made (according to the Proposals on matrimonial property regimes and on registered partnerships),[35] or the law of the nationality of *either* party at the time this choice is made (this is the case in the Divorce Reg[36] and the said Proposals);[37] or, in maintenance obligations, the law of the habitual residence of the debtor instead of that of the creditor, which is in principle applicable to these obligations in the absence of choice.[38]

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tertio loco the law of the State with which the spouses jointly have the closest connection at the time of celebrating their marriage, taking all the circumstances into account (art 20a para 1). Cf. the initial Commission's Proposal for this Regulation [COM (2011) 126/2], art 17 para 1. According to the Commission's Explanatory Memorandum, under art 17, 'these criteria are designed to reconcile the life actually lived by the couple, especially the establishment of their first common habitual residence, and the need to be able to easily determine the law applicable to their matrimonial property regime.' – The Proposal on registered partnerships establishes in principle as applicable the law of the State under the law of which the registered partnership was created (art 15 para 1; see the exception to this rule in para 2 of the same article).

29 With regard to a State with two or more systems of law or sets of rules but lacking rules that designate the applicable law in such cases, the Regulations follow various solutions regarding the problem of what is the applicable law of nationality: (i) 'any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection' [Divorce Reg art 14 *(c)*; therefore parties choosing the law of the State of the nationality of one of them are advised to indicate at the same time which territorial unit's law they have agreed upon (recital no 28)]; (ii) in the absence of internal conflict-of-laws rules, any reference to the law of the State of the nationality of the deceased shall be construed as referring to the law of the territorial unit with which the deceased had the closest connection [Succession Reg art 36 para 2 *(b)*]. The Hague Conference prefers that the reference to the nationality be construed as referring to the territorial unit of the habitual residence (*The Hague Matrimonial Property Regimes Convention* art 16 para 2) and, in the absence of such an habitual residence, the unit with which the person (the deceased) had his/her closest connection [*The Hague Succession Convention* art 19 para *(b)*].

30 Art. 8 *(c)*.

31 See n 28. Art 20a para 2 adds, that the law of the spouses' common nationality shall not apply if they have 'more than one common nationality at the time of the celebration of the marriage'; this latter rule recalls art 15 para 2 of *The Hague Matrimonial Property Regimes Convention.*

32 Art 5 para 1 *(a)*.

33 Art 16 para 1 *(b)*.

34 Art 15-03 para 1 *(a)*.

35 See n 33 and 34 respectively.

36 Art 5 para 1 *(c)*.

37 Proposal on matrimonial property regimes art 16 para 1 *(c)*; Proposal on registered partnerships art 15-03 para 1 *(b)*, adding in letter *(c)* the law of the State under whose law the registered partnership was created.

38 See The Hague Protocol art 3 para 1 and art 8 para 1 *(b)*.

Second model: The parties may choose, among other laws, one of the laws provided in absence of choice, e.g. the law of the State where the Court is seised (i.e., the law of the *forum*), which is the last in the scale of those successively designated as applicable laws in matters of divorce,[39] ignoring all previous laws; or they may choose, among other laws, the law of the State under the law of which the registered partnership was created (which is the basic rule in the absence of choice of law by the partners in matters of property consequences regarding registered partnerships)[40].

Third model: Sometimes party autonomy is enlarged. This has happened in matters of maintenance obligations and succession:

(i) As already mentioned, Maintenance Reg adopted The Hague Protocol[41] by reference. This decision is quite correct. The Hague Conference had a very long and fruitful experience of maintenance obligations. Since its first Convention of 24 October 1956 *sur la loi applicable aux obligations alimentaires envers les enfants*[42] the Conference has showed a clear intention to favour the beneficiary of maintenance (the weaker party, in general). The insertion of party autonomy is an innovation of the Protocol, consisting in particular of offering adults capable of defending their interests some power to choose the applicable law.[43] As A. Bonomi indicates,[44] the innovation has two variations: a procedural agreement enabling the parties, with respect to any maintenance obligation, to select the law of the forum for the purposes of a specific procedure (art 7), and an option regarding the applicable law, that may be exercised at any time by adults capable of defending their interests, subject to certain conditions and restrictions (art 8).

Regarding the latter variation, it is provided,[45] that, on one hand, the parties who are adults and in a position to protect their interests may choose, among other laws, the national law *of either party* at the time of designation, (instead of the law of their common nationality, which is applicable under circumstances where there is no choice); or the law of the State of the habitual residence *of either party* at the same time, i.e. of the debtor (instead of the law of the habitual residence of the creditor, which is in principle the applicable law in absence of choice by the

[39] See art 5 para 1 *(d)* and art 8 *(d)* of the Divorce Reg.

[40] Art 15-03 para 1 *(c)*, and art 15 para 1 of the Proposal on registered partnerships; an exception is provided in art 15 para 2.

[41] See II.2. *a) aa).*

[42] Entered into force 1 January 1962. This Convention has been followed and in principle replaced by the Convention of 2 October 1973 on the law applicable to maintenance obligations (entered into force 1 October 1977). Both Conventions have been modernised, more than 50 years after the first instrument, by the Protocol mentioned in the text.

[43] While in the Convention of 1956 choice-of-laws agreements were unknown, since the creditor was exclusively *a child* who absolutely needed protection, the Protocol explicitly establishes, under set conditions, such agreements. On the *professio iuris* according to the Hague Protocol, see Spyridon Vrellis, 'Basic principles of the Hague Protocol on the law applicable to maintenance obligations,' in *Essays in honour of Philippos Doris vol. I* (Ant. N. Sakkoulas Publishers 2015, Athens, 103-124) 108-113 [in Greek].

[44] *Explanatory Report on the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (by Andrea Bonomi) para 20.

[45] See art 8 para 1.

parties). On the other hand, the spouses and ex-spouses may choose either the law designated by them as applicable or the law in fact applied to their property regime, or, respectively, to their divorce or legal separation (instead of the law of the habitual residence of the creditor or of their last common habitual residence, otherwise most probably applicable in the absence of choice).

(ii) Regarding matters of succession, where the extent of the *professio iuris* is more restricted than in other relations,[46] the Succession Reg,[47] after having established as a general rule the application of the law of the State in which the deceased had his habitual residence at the time of death,[48] offers to the *de cujus* the possibility to choose, as applicable to his succession as a whole, instead of that law, 'the law of the State whose nationality he possesses at the time of making the choice or at the time of death';[49] and, if the *de cujus* possesses multiple nationalities, he 'may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.'[50] In such a way the options of the *de cujus* are increasing.[51]

Fourth model: The critical time to identify the connecting factors is different where there is a choice of law by the parties than in the absence of choice: The critical time is therefore that of the choice of law agreement and not the time the court is seised, in divorce cases, nor the time of the celebration of the marriage, in matrimonial property cases; in cases of succession to the estates the critical time is a*lternatively* either the time of making the choice or the time of death instead of *exclusively* the time of death in the absence of choice.[52]

bb) The modification of the choice

(i) Regarding the problem of the possibility of persons involved in a relationship modifying the choice of the applicable law already made by them, one may discern three different (or eventually different) solutions in the Regulations.

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[46] The choice of the law of the testator's habitual residence (at the moment of choice), or of the *lex rei sitae,* or of the law applicable to matrimonial property regimes, is excluded; A. Bonomi in Andrea Bonomi, Patrick Wautelet (avec la collaboration d'Ilaria Pretelli et Azadi Öztürk), *Le droit européen des successions: Commentaire du Règlement no 650/2012 du 4 juillet 2012* (Bruylant 2013, Bruxelles) (under art 22) 311-316, paras 32-41.

[47] The Succession Reg also governs maintenance obligations arising by reason of death [art 1 para 2 *(e), a contrario*]; regarding this category of maintenance obligations, see Bonomi (n 46) (under art 1) 86-88, paras 31-34.

[48] Art 21 para 1; this rule is accompanied by an escape clause (art 21 para 2). On difficulties arising in determining the habitual residence, see recitals nos 23-24. According to *The Hague Succession Convention* (art 3), a simple habitual residence is not sufficient for designating the applicable law; nationality of or a long residence in the State of the habitual residence has to be added to this aim; otherwise 'succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.'

[49] Art 22 para 1; cf. *The Hague Succession Convention,* art 5 para 1: 'A person may designate the law of a particular State to govern the succession to the whole of its estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State *or had his habitual residence there*' [emphasis added].

[50] Art 22 para 2.

[51] Due to space restrictions, specific rules (art 24ff of the Succession Regulation) regarding dispositions of property upon death, agreements as to succession, declarations concerning acceptance or waiver of the succession etc., are not dealt with herein.

[52] See text to n 27ff and 46ff.

(i-a) A first group of Regulations affirms explicitly the power to modify the choice of law already made (albeit, to a varying extent, with different wording). The pioneer of this solution is Rome I Reg, following the solution adopted by the Rome Convention on contractual obligations. Art 3 para 2 of Rome I Reg explicitly gives to the parties the right to choose the applicable law, even after the conclusion of their contract, modify their choice afterwards, and choose different laws for various parts of their contract *(dépeçage):* 'The parties may at any time agree to subject the contract to a law other than that which previously governed it, *whether as a result of an earlier choice made under this Article or of other provisions of this Regulation* […]' [emphasis added]. This clearly means that the parties have the possibility not only to modify the law which is objectively designated as applicable by the Regulation in the absence of choice, but also to modify their own choice.

The same solution is adopted in divorce and legal separation matters, the Divorce Reg using a different wording with identical meaning: 'an agreement designating the applicable law may be concluded and *modified* at any time, but at the latest at the time the court is seised' [emphasis added];[53] and also in matrimonial property regimes, and in the property consequences of registered partnerships.[54]

(i-b) Less clear is the answer of the question at hand in succession and in maintenance matters.

The Succession Reg deals with the requirements as to the form of any *modification or revocation* of the choice of law governing the succession.[55] In so doing, it implies, although not explicitly formulated, that the Regulation allows a testator to modify or to revoke the choice of the law governing the succession to its estates.[56] Moreover, in view of both the testator's right to choose the applicable law not at a specific time and the wish of domestic material rules to keep a human being free to formulate his last will until the last moment of his life, it seems correct to admit that the Regulation itself allows the modification or the revocation of the choice; otherwise it should have explicitly excluded such a possibility.[57]

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[53] Art 5 para 2. This is provided 'without prejudice to paragraph 3', according to which 'if the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding […]'.Thus, the Divorce Reg sets a time limit to the possibility of the parties to designate the applicable law or to modify their choice (i.e. the time the court is seised), unless the *lex fori* allows them to do that later (during the course of the proceeding). In Rome I there is no such an *a priori* time limit to the parties' agreement; all depends on the *lex fori;* nevertheless the result will usually be identical in practice.

[54] Proposal on matrimonial property regimes, art 16 para 1; Proposal on registered partnerships, art 15-03 para 1: The spouses or future spouses / partners or future partners may agree to designate, or to change the law applicable to their matrimonial property regime / to the property consequences to the institution of the registered partnership. The term *change* has to be interpreted as referring to both the modification of an objectively applicable law and a previous choice-of-law agreement.

[55] According to art 22 para 4, 'any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death'. Cf. art 5 para 3 of *The Hague Succession Convention.*

[56] See recital no 40 last sentence (n 72).

[57] According to Bonomi (n 46) 329-330, para 74, without a specific rule in the Regulation, one has to find the answer of the question *in the chosen law.*

The Hague Protocol (adopted by the Maintenance Reg) does not touch upon the question of the modification or revocation of the choice-of-law agreement. It states, however, that 'notwithstanding Articles 3 to 6, the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation [….] *d)* the law designated by the parties as applicable […] to their divorce or legal separation'.[58] Since the spouses may subsequently modify their choice (already made) of the law applicable to their divorce and legal separation[59] and, to the extent that they have such a possibility, they necessarily can submit a maintenance obligation to the law subsequently chosen by them for their divorce, even though in the past they had chosen for the maintenance obligation the law previously chosen by them for their divorce.[60] If they were unable to modify their first agreement designating as applicable to the maintenance obligation the law chosen by them earlier for their divorce, this rule of the Protocol would then become inoperative.[61]

(i-c) A different approach is adopted by Rome II Reg. On the issue at hand, Rome II Reg remained silent. One could wonder why the parties, who under the conditions provided for in art 14 para 1 'may agree to submit non-contractual obligations to the law of their choice', should be excluded from modifying this choice. The Regulation does not offer us any explanation for this silence. Recital no 31 simply states that 'to respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation […]'. The respect of the principle of party autonomy equally leads to the parties' power to modify their choice. Legal certainty, in its turn, is not diminished by such a power. On the opposite side, one could argue in favour of refusing the parties' power to modify their choice, that the creators of Rome II did not say anything on this point on purpose, in order to debar the parties from modifying their choice, although they knew (or ought to have known) the solution of the Rome Convention on contractual obligations.

The Hague Protocol remains silent too, with regard to the particular designation of the law applicable for the purpose of a particular proceeding provided in art 7 para 1, according to which '[…] the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation'. Nothing is said about modification or revocation of such a designation of the applicable law. Nevertheless, to refuse such possibilities seems more compatible with the aim of art 7 para 1.

(ii) Usually the modification of a choice-of-law agreement shall be effective only for the future, at least in the meaning that it should not adversely affect the rights of third parties deriving from the law previously applicable. This is provided for in Rome I Reg,[62] and in the Proposals

[58] Art 8 para 1.

[59] See text to n 53.

[60] Vrellis (n 43) 110.

[61] In the Explanatory Report on the Protocol (n 44) para 124, the changeableness of the choice by the parties is considered as obvious: 'The law chosen by the parties is intended to govern the maintenance obligations between the parties from the time of the choice and until such time, if applicable, as they choose to cancel or modify it'.

[62] See art 3 para 2 *in fine*.

on matrimonial property regimes[63] and registered partnerships,[64] even when the spouses / partners openly agree to make this change of applicable law retrospective.

Rome II Reg on the other hand, having being silent on the issue of the modification of a choice-of-law agreements, simply states that the choice itself 'shall not prejudice the rights of third parties'.[65] Equally silent on this point remain the Divorce and the Succession Reg (although they both allow the possibility of modifying a former choice of applicable law),[66] as well as the Hague Protocol.

bc) The validity of the professio iuris

(i) Substantive validity

The law chosen by the parties governs the existence and substantive validity of the choice; the right of a person to rely upon the law of the country in which he has his habitual residence, in order to establish that he did not consent, is, however, reserved.[67] This was already provided by the Rome Convention on contractual obligations and reiterated in Rome I Reg,[68] in the Divorce Reg,[69] in the Proposals on matrimonial property regimes[70] and on registered partnerships,[71] as well as (obviously without the reserve) in the Succession Reg.[72] On the contrary, Rome II Regulation and the Hague Protocol do not include any specific rule on this point; consequently one might argue that national conflict-of-laws rules govern the issue at hand. In the Explanatory Report on the Protocol (n 44), para 152 states, however, that

> […] these issues [existence and validity of the agreement, effect of a possible defect of consent] will have to be settled according to the law applicable to the designation agreement made between the parties, but that law is not expressly determined by the Protocol. The preferred solution for dealing with this deficiency is to consider that these issues will be governed by the law designated by the parties. This approach, consisting of subjecting the validity of the *optio legis* to the law that would apply if the agreement between the parties were valid, is very common in international instruments recognizing party autonomy, in particular as regards the existence and validity of consent. Its main advantage is to ensure that these issues are determined in a uniform manner in the various Contracting States to the Protocol.

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63 See art 16 paras 2-3.

64 See art 15-03 paras 2-3.

65 See art 14 para 1 *in fine*.

66 See text to n 53 and text to n 55-57.

67 See text in III.2.*b) bb)* (iii).

68 See art 3 para 5 and art 10 para 1.

69 See art 6 para 1.

70 See art 19a para 1.

71 See art 15-05 para 1.

72 See art 22 para 3. 'A choice of law under the Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law' (recital no 40).

(ii) Formal validity

Two main approaches of this problem appear in the Regulations.

(ii-a) Regarding the formal validity of a choice-of-law agreement, Rome I Reg,[73] followed by Rome II,[74] states that the choice shall be made expressly or demonstrated clearly/with reasonable certainty by the terms of the contract or the circumstances of the case. That the choice of law shall be made *expressly* in a declaration is required by the Succession Reg[75] and by The Hague Protocol[76] as well. However, this general requirement is followed in Rome I (not in Rome II) and in the Succession Reg by conflict-of-laws rules.

According to Rome I Reg, the formal validity 'of the consent of the parties as to the choice of the applicable law' is governed in principle[77] by the law applicable to the substance of their contract or the law of the country where it is concluded; in the case of an agreement concluded between persons being at the time of conclusion in different countries, by the law governing its substance or the law of either of the countries where either of the parties or their agent is present at the time of conclusion; or by the law of the country where either of the parties had his habitual residence at that time.[78]

The Succession Reg, in turn, after having stated that 'the choice shall be made expressly in a declaration', adds that such a declaration shall be made 'in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition'.[79] In order to check the formal validity of the choice of law on the succession, one has to apply the law which governs the formal validity of dispositions of property upon death, established in art 27 of the Succession Reg, i.e., the *lex loci actus* or the *lex patriae* or the *lex domicilii* or the law of the habitual residence of the testator, either at the time when the declaration of the choice was made or at the time of death or, where immovable property is concerned, of the State in which that property is located.[80]

(ii-b) The informed choice of the parties is a basic principle of the Regulations.[81] In order to facilitate such an informed choice and ensure legal certainty, as well as better access to justice, a material rule is established in some matters: the contract has to be 'expressed in writing, dated

[73] See art 3 para 1.

[74] See art 14 para1 *in fine*.

[75] See art 22 para 2.

[76] See art 7, regarding only a particular proceeding in a given State; above II 2 *b) i (i-c)*.

[77] But regarding e.g. consumer contracts, see art 11 para 4.

[78] See art 3 para 5 and art 11 paras 1-3.

[79] See art 22 para 2; cf. art 5 para 2 of *The Hague Succession Convention*. 'A choice of law should be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law' (recital no 39).

[80] Regarding the formal validity of any modification or revocation of the choice of law in succession, see art 22 para 4 and art 27 para 2 of the Succession Reg; cf. art 2 of *the Hague Convention* of *5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions* (entered into force 5 January 1964).

[81] See for example, recital no 18 of the Divorce Reg: 'The informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable

and signed by both parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing'. This is the case in the Proposals on matrimonial property regimes[82] and registered partnerships,[83] in the Divorce Regulation[84] and in the Hague Protocol (although with not exactly the same wording).[85] The requirement to make the contract in writing means, in my view, that an implicit choice of the applicable law by the parties is not acceptable, since the protection of the parties needs a clear knowledge by them of the consequences of their choice.[86]

While the Hague Protocol is limited to the above material rule, other instruments combine it with some private-international-law rules: The Divorce Reg,[87] and the Proposals on matrimonial property regimes[88] and on registered partnerships[89] establish the following rules: *(a)* If the law of the Member State in which the parties have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply. *(b)* If the parties are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those States. *(c)* If only one of the parties is habitual resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

III Are there Restrictions to Party Autonomy?

The basic distinction between Regulations where patrimonial elements are preponderant, the power of the parties being very extensive on one hand, and those where important personal or family elements overshadow patrimonial elements, the power of the parties being more or less restricted with regard to the pool of laws out of which the choice may be done on the other, is already mentioned [in II 1 and II 2 *a)*]. Besides that, several other restrictions to party autonomy are provided for in both categories.

law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses […].'

82 See art 19 para 1.

83 See art 15-04 para 1.

84 See art 7 para 1.

85 According to art 8 para 2 of the Protocol, 'such agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.'

86 Regarding the Hague Protocol see, however, M. Andrae, 'Zum Beitritt der Europäischen Gemeinschaft zum Haager Protocoll über das Unterhaltskollisionsrecht' [2010] GPR 196ff, 201.

87 See art 7 paras 2-4.

88 See art 19 paras 2-4.

89 See art 15-04 paras 2-4.

1 General Restrictions

One general restriction regarding the function of the conflict-of-laws rules in general, party autonomy included, is due to the *ordre public* clause,[90] or the *overriding mandatory rules (règles d'application immediate* according to the well-known terminology of Ph. Francescakis), referred to by almost all instruments, albeit with some variations.[91] Both may in fact counteract the choice of law made by the parties.

2 Specific Restrictions

Some Regulations provide various other more specific but very interesting restrictions to party autonomy: Some of them aim at limiting the abuse of freedom; other at protecting third parties or even one party, either because the latter is vulnerable or due to the circumstances or because of the gravity of the act at hand.

a) Restrictions to the abuse of a very large party autonomy

Rome I and Rome II Reg, in order to prevent the *abuse* of the very large party autonomy established by them, provide *two* limitations to that autonomy, using almost the same wording. Both have the same justification and goal: they reject the abuse of that autonomy. At the same time, they have a not fully identical but a similar effect: they transform the nature of the choice, each of them in a somewhat different way. In the place of what is called in German practice *international privatrechtliche Verweisung,* i.e. a designation of a law as applicable to the contract, they establish a *materiellrechtliche Verweisung,* i.e. a contractual clause.

First limitation: Where all other elements relevant to the situation at the time of the choice (according to Rome I),[92] or at the time when the event having given rise to the damage occurred (according to Rome II)[93] are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of the *jus cogens* of that other country. In such a case, the content of the *chosen law* is submitted to *conformity control with the* jus cogens *of that other country, the law of which, moreover, is designated as applicable in the absence of any choice.*

Second limitation: Where all other elements relevant to the situation at the time of the choice (according to Rome I),[94] or at the time when the event having given rise to the damage occurred (according to Rome II)[95] are located in one or more Member States, the parties' choice of applicable law, other than that of a Member State, shall not prejudice the application of the com-

[90] Rome I art 21; Rome II art 26; Divorce Reg art 12; Succession Reg art 35; Proposals on matrimonial property regimes art 23 and on registered partnerships art 18; The Hague Protocol art 13.

[91] Rome I art 9; Rome II art 16; Succession Reg art 30; Proposals on matrimonial property regimes art 22 and on registered partnerships art 17.

[92] See art 3 para 3.

[93] See art 14 para 2.

[94] See art 3 para 4.

[95] See art 14 para 3.

munitarian *jus cogens*, as implemented in the Member State of the *forum*. In that case, the content of the *chosen law* is under conformity control with the Community *jus cogens,* as implemented in the Member State of the *forum (even though the* lex fori *is not the applicable law).*[96]

b) Restrictions aiming at the protection of parties

Regarding *the protection of parties,* some distinctions are necessary:

ba) Restrictions aiming at the protection of third parties

The rights of *third* parties set a limit to the choice-of-law agreement, according to Rome II Reg, where it is explicitly stated that the choice of law by the parties 'shall not prejudice the rights of third parties'.[97]

The same orientation is to be found, but in a different way, in the Proposal on matrimonial property regimes: while it states that the law applicable to that regime shall determine (inter alia) the effects of the regime on a legal relationship between a spouse and third parties, it nevertheless goes on by stating that 'the law that governs the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law'.[98] This rule is reiterated in the Proposal on registered partnerships regarding the property consequences on a legal relationship between a partner and third parties.[99]

bb) Restrictions aiming at the protection of one party

This kind of restriction to party autonomy is due to the particularly delicate situation of the creditor or to the gravity of the specific act or to the circumstances of the case.

(i) The vulnerability of the creditor

An illustrative example is offered by The Hague Protocol. According to it, the chosen law 'shall not apply to maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest'.[100]

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[96] Calliess in Gralf-Peter Calliess (ed), *Rome Regulations: Commentary on the European Rules on the Conflict of Laws* (Wolters Kluwer Law & Business 2011, The Netherlands) 85, in art 3 Rome I mn 57, correctly remarks: 'This seems to be convenient for the judge but leads to unpredictable results in case of minimum harmonization Directives which are transposed quite differently throughout the Member States.'

[97] See art 14 para1 *in fine.*

[98] See art 20aa letter *(f),* art 20 b para 1; cf. art 9 of *The Hague Matrimonial Property Regimes Convention:*
'[…] the law of a Contracting State may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party where either that spouse or the third party has his habitual residence in its territory, unless (1) any requirements of publicity or registration specified by that law have been complied with, or (2) the legal relations between that spouse and the third party arose at a time when the third party either knew or should have known of the law applicable to the matrimonial property regime.'

[99] See art 15 a letter *(f),* art 15 b para 1.

[100] See art 8 para 3, which reiterates the definition of a vulnerable adult already established in art 1 para 1 of *the Hague Convention of 13 January 2000 on the international protection of adults* (entered into force 1 January 2009).

(ii) The gravity of the specific act

In maintenance obligations again, according to The Hague Protocol, 'the question of whether the creditor can renounce his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation' of the applicable law.[101] Both for the sake of legal certainty and avoidance of undue use of the party autonomy, the law of the State of the habitual residence of the creditor at the time of the choice-of-law agreement is exclusively applicable, even though it would not have been applicable in the absence of choice (for example, in the event of a change of the creditor's habitual residence)[102].

(iii) The circumstances of the case

The protection of one of the parties is often safeguarded in the following way: in order to establish that he did not consent to the choice of law agreement, a party may rely upon the law of the country in which he has his habitual residence, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the chosen law.[103] However, especially in maintenance obligations, 'unless at the time of the designation [of the applicable law] the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead *to manifestly unfair or unreasonable consequences* for any of the parties.'[104]

IV Concluding Remarks: Goals and Achievements

1 Regulations Rationale

This report cannot be concluded without a fundamental general remark regarding the legal basis, or rather the legal and moral justification of the rules on applicable law adopted by the Regulations discussed.

In all of them one finds the same boring wording of fixed ideas: 'The objective of maintaining and developing an area of freedom, security and justice.'[105] A magniloquent language,

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[101] Art 8 para 4. This restriction to the party autonomy is applicable not only where the creditor renounces his right to maintenance and this renouncement is accompanied by the choice of a law permitting the renouncement, but also where the parties have chosen a law not providing maintenance at all (in other words, where the choice of law implicitly includes a renunciation of the right to maintenance). See Explanatory Report on the Protocol (n 44) para 150; Vrellis (n 43) 111 n 37.

[102] Vrellis (n 43) 111-112, with comments against the different position of Andrea Bonomi, 'The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations' (2008) 10 YPIL 333-357, 356-357.

[103] See Rome I Reg art 3 para 5 and art 10 para 2; Divorce Reg art 6 para 2; Proposals on matrimonial property regimes art 19 a para 2, and on registered partnerships art 15-05 para 2.

[104] Art 8 para 5 of the Hague Protocol. This restriction does not constitute an escape clause [as it is usually qualified; see, for example, Explanatory Report on the Protocol (n 44) para 151; Bonomi (n 102) 357], but rather a limit to party autonomy for reasons of substantive justice known in material domestic law as well. The element of *proximity,* of the manifestly closer connection which justifies and *legalises* an escape clause does not exist here. See Vrellis (n 43) 112 n 39.

[105] Recital no 1 of all Regulations mentioned in the text at hand.

unfortunately without much real content! As a matter of fact, *first,* the area referred to is one of legalism rather than of justice; *second,* it is well known that freedom is reduced where the number of rules of law increases, since there is an internal rivalry between law and freedom; in the European legal order there exist too many rules, so that the freedom of human beings becomes excessively limited, despite the usual pretentions to the contrary; *finally,* security has not much to do with the law applicable to divorce or to succession etc., unless under *security* is meant legal certainty and predictability of the applicable law; in any event, from a general point of view, security at any cost may be proved detrimental, to a less or higher degree, to other important values, interests or principles.

The above-mentioned allegedly fundamental objective but one not achievable by the Regulations is accompanied by the true Community concern underneath, which is: to adopt measures appropriate *for the proper functioning of the internal market.* This is, indeed, the genuine objective of the Regulations. The Regulations adopt 'measures relating to judicial cooperation in civil matters with a cross-border impact *to the extent necessary for the proper functioning of the internal market*' [emphasis added].[106] This 'proper functioning of the internal market', as one can read in the recital no 6 of Rome I and Rome II Regulations, 'creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'. However, all these are objectives of private international law in general, beyond the expectations of any internal market. Predictability and certainty are goals in every legal system, as well as an international harmony of solutions through the harmonisation of conflict-of-laws rules: these have long constituted a *desideratum* of private international law at a global level. As a matter of fact this is the adventure in which The Hague Conference on Private International Law has been involved since the end of the 19th century. To insist on the functioning of the internal market runs, in my view, the risk of focusing on the market itself and neglecting the real needs of human beings and the demands of justice.

Recital no 7 of the Succession Reg clarifies even further the goal of the EU Regulations. It states: 'The proper functioning of the internal market should be facilitated by *removing the obstacles to the free movement of persons* who currently face difficulties in asserting their rights in the context of a succession having cross-border implications' [emphasis added].

The orientation towards the internal market, envisaged by these Regulations in areas where personal and family factors play the main role as contrasted to patrimonial ones, expresses the exclusively materialistic (and therefore inevitably erroneous) background of the Union. It is a great pity that a Union of States with long and high level cultural traditions is not able to surpass such an elementary level of legislative policy and go in search of higher values in regulating private law relations.

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[106] Recital no 1 of Rome I and Rome II Reg; Divorce and the Succession Regulations and the Proposal on matrimonial property regimes as well adopt measures 'particularly when necessary for the proper functioning of the internal market' (recital no 1), or (in Maintenance Reg, recital no 1) 'in so far as necessary for the proper functioning of the internal market'.

2 Comparison with The Hague-Conference Conventions

Quite different at a global level is the mentality within The Hague Conference on Private International Law. For the Conference, facility and freedom of circulation are internationally established *simple facts, not goals to achieve.* This freedom creates problems and difficulties for persons. The goal of the law in general and private international law in particular is to wipe out or to diminish the difficulties and solve the problems for the sake of human beings, *safeguarding at the same time the interests and the foundation of international law and legal order.*

This is absolutely clear, when one has a look at the Hague analogous Conventions.[107] It is easy to ascertain from the Explanatory Report on The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations,[108] that the main concern in negotiating this Convention was not to facilitate divorce, but 'matters being as they are and since divorces exist and are even increasing in number, […] to limit the social consequences of th[e] *unfortunate* phenomenon [of divorce] by recognizing its existence' [emphasis added], and to harmonize the choice of law rules in order to satisfy 'the requirements of security and stability in family matters, […] *for the sake of private interests involved, even if this means some sacrifice of their freedom of action*' [emphasis added]; to show 'respect for rights acquired in foreign countries [which] is the very foundation of international law'.[109]

To the contrary, the Divorce Reg establishes party autonomy in the fields of divorce and legal separation in order not to limit the social consequences of the 'unfortunate phenomenon' of divorce etc., but achieve a specific objective: 'Increasing the mobility of citizens [which] calls for more flexibility and greater legal certainty'.[110]

3 Illustrative Examples

This fundamental divergence in terms of mentality between The Hague Conventions and the EU Regulations on the issue at hand has a concrete and specific impact on the content of the choice-of-law rules included in these texts. Two examples suffice to prove it.

a) Succession to the estates

In succession matters, the Hague Convention of 1989 art 5 para 1 offers to the testator the possibility of designating as applicable (among other laws) the law of his habitual residence at the time of the designation. Why, during the Sixteenth Session of the Conference Commission II did shift the viewpoint expressed previously by the Special Commission and decide to give the testator such an additional option? The Explanatory Report on this Convention[111] gives the answer:

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[107] See, for example, Explanatory Report on The Hague Succession Convention (by Donovan W.M. Waters), paras 12ff.

[108] Entered into force 24 August 1975.

[109] See Explanatory Report on The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations (by P. Bellet, B. Goldman) para 3.

[110] See recital no 15.

[111] See n 107 at para 61.

> […] the primary cause of this shift of opinion seems to have been the realization that, if the date of designation were permitted, the *de cujus* might plan his matrimonial property arrangements and his provisions for succession to his estate freely, knowing which law will apply to each and being able to have the same law apply to both. In the nature of things a designation of the law that will be the nationality law or the habitual residence law (particularly the latter) on his eventual date of death is not conducive to the best state planning for the *de cujus*. This is one reason why *inter vivos* dispositions, with perhaps the reservation of life interests to the disposer, are so very popular and increasingly used in lieu of will disposition in the common law jurisdictions […].

The Succession Reg on the other hand in art 22 para 1 allows the designation by the testator only of the law of his nationality at the time either of making the choice or of his death, without explaining the exclusion of choosing the law of the habitual residence at the time of choice.[112] Recital no 38 simply states that 'this Regulation should enable citizens to organize their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share'. One may wonder why the habitual residence at the time of designation would not be considered as *a connection between the deceased and the law chosen,* and why the designation of such a law as applicable would be suspected to conceal a fraudulent intention. Besides this, the testator can always choose as his last habitual residence an appropriate State whose law, as applicable in absence of choice, would frustrate *the legitimate expectations of persons entitled to a reserved share.* The persistence of the Europeans institutions in the free movement of persons has probably prevented them from granting the testator the option of designating as applicable the law of his habitual residence at the time of designation, while they allowed the designation of the law of the nationality at the same time: The possibility of having provided for succession to his estate in conformity with the law of his habitual residence at that time, would possibly complicate a testator's decision to subsequently change his habitual residence.

b) Matrimonial Property Regimes

The Proposal on matrimonial property regimes has taken a strict position, in favour of the unity of the applicable law. In art 15 it states that the law applicable to a matrimonial property regime after or without any choice by the spouses, 'shall apply to all assets falling under that regime, regardless their location'.[113] The Proposal arrived at such a strict principle of unity in matrimonial property regimes inspired by the idea 'to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market' and 'to avoid the fragmentation of the

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[112] It has to be recalled that, in the absence of choice, the law applicable to succession is the law of the habitual residence of the deceased *at the time of death* (art 21 para 1). Bonomi (n 46) 311, para 33, considers that exclusion as *particulièrement regrettable.*

[113] Cf. the Proposal on registered partnerships art 15-02.

matrimonial property regime [for reasons of legal certainty]'. It strangely excluded them from choosing the *lex rei sitae,* although this very law usually has the closest connection with those regimes. The EU Commission had recognised that 'immovable property has a special place in the property of couples, and one of the possible options would be to make it subject to the law of the country in which it is located *(lex situs),* thus allowing a measure of dismemberment of the law applicable to the matrimonial property regime'. It considered however that

> […] this solution is, […], fraught with difficulties, particularly when it comes to the liquidation of the matrimonial property, in that it would lead to an undesirable fragmentation of the unity of the matrimonial property (while the liabilities would remain in a single scheme), and to the application of different laws to different properties within the matrimonial property regime. The Regulation therefore provides that the law applicable to matrimonial property, whether chosen by the spouses or, in the absence of any such choice, determined under other provisions, will apply to all the couple's property, movable or immovable, irrespective of their location.[114]

The Hague Matrimonial Property Regimes Convention adopted the same starting point, stating in articles 3 and 6 that the law designated as applicable by the spouses (before or during marriage respectively) 'applies to the whole of their property'. However, the same articles proceed with an exception: 'Nonetheless, the spouses, whether or not they have designated a law […], may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide that any immovable which may subsequently be acquired shall be governed by the law of the place where such immovables are situated'. This is an important derogation from or even perhaps a distortion of the principle of the unity of the matrimonial property regime, which may create difficulties.[115] Nevertheless, in The Hague Conference the prevailing opinion was that *it is useful* 'to give to the spouses the option to harmonize their matrimonial property regime with the solutions of the *lex rei sitae* of the immovables', in choosing the law that, at least in case of an immovable, necessarily governs the ownership and other rights *in rem,* and 'will effectively be the only one applied'.[116]

Refusing this possibility, the Proposal: *(a)* deprives spouses of this useful option; *(b)* it ignores a well-known general principle of private international law advanced by W. Wengler,[117] i.e. the application to the point at hand of the *stronger law (l'ordre juridique le plus fort),* leading to conformity with the law of the State capable to impose in practice its own view regarding the applicable law (i.e. the *lex rei sitae* on immovables); *(c)* it deprives a court of a Member State from the possibility to apply the *lex fori* (its own law), notwithstanding that *(i)* this court has, for the ground alone of location of immovable property in that State, subsidiary jurisdiction

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[114] See Commission's Explanatory Memorandum, under art 15 [COM(2011) 126 final of 16.3.2011, 2011/0059 (CNS)]; cf. recital no 18b of the Proposal.

[115] Alfred E. von Overbeck, 'Explanatory Report' in *Conférence de La Haye de droit international privé, Actes et documents de la Treizième session, tome II : Régimes matrimoniaux* 329-377, 357-358, para 124.

[116] Ibid 359-360, paras 133-134, 137.

[117] Wilhelm Wengler, 'Les principes généraux du droit international privé et leurs conflits', (1952) 41 Rev. crit. DIP 595-622, 613-614.

according to art 6; *(ii)* this law would be anyhow applicable as *lex rei sitae* to rights in immovable property; and *(iii)* this law would be applicable to the matrimonial property regime regarding this very immovable, if the parties could designate it as applicable to the latter. For a court, it would be a good and convenient solution to apply its own law to both, the right in property in immovable and the matrimonial regime regarding that immovable.[118]

[118] Court's convenience is a relevant factor to the choice by the judge of the applicable (rule of) law; see *Restatement Second, Conflict of laws,* para 6 (2) *(g)*, referring to the 'ease in the determination and application of the law to be applied.' Its importance, however, has not to be exaggerated.