Centro de Estudios Europeos Luis Ortega Álvarez
Centro de excelencia Jean Monnet

UCLM

Cofinanciado por la Unión Europea

Pre-Print Series in EU LAW
3/25

ADMISSIBILITY OF IMPLICIT CHOICE OF LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES IN EUROPEAN REGULATION 2016/1103

AFONSO PATRÃO

Funded by the European Union. Views and opinions expressed are however those of the author only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.

ADMISSIBILITY OF IMPLICIT CHOICE OF LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES IN EUROPEAN REGULATION 2016/1103

Afonso Patrão
Faculty of Law of the University of Coimbra
University of Coimbra Institute for Legal Research (UCILeR)

ADMISSIBILITY OF IMPLICIT CHOICE OF LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES IN EUROPEAN REGULATION 2016/1103

AFONSO PATRÃO

Estudio realizado en el marco de la Cátedra Jean Monnet Integration through EU Fundamental Rights, financiada por la Unión Europea. Las opiniones y puntos de vista expresados solo comprometen al autor y no reflejan necesariamente los de la Unión Europea o los de la Agencia Ejecutiva Europea de Educación y Cultura (EACEA). Ni la Unión Europea, ni la EACEA pueden ser considerados responsables de ellos.

Summary

Unlike European Regulations in the field of succession, contractual obligations and non-contractual obligations, European private international law does not clearly address the problem of the admissibility of a tacit choice of law applicable to matrimonial property regimes. This article analyses the reasons supporting and opposing the possibility of giving effect to an implicit choice of law by the spouses. Subsequently, the author argues that EU Regulations 2016/1103 and 2016/1104 allow a tacit choice of the applicable law».

Keywords

Party Autonomy; Choice of Law; Matrimonial Property

INDEX

I. THE QUESTION

Unlike European Regulations in the field of succession, contractual obligations and non-contractual obligations, European private international law does not clearly address the problem of the admissibility of a tacit choice of law applicable to matrimonial property regimes[2]. As such, we may question whether a will implicitly indicated by spouses to submit their matrimonial property regime to a certain legal system can be taken into account when determining the applicable law[3].

Suppose that two Portuguese spouses living in France enter into a pre-nuptial agreement in Portugal and, in front of a Portuguese notary, elect the *"separation of property regime governed by articles 1735 et seq. of the Portuguese Civil Code"* and also agree that *"the property will be divided according to the general communion regime if the marriage is dissolved by death and there are common descendants, under the terms of article 1719 of the Portuguese Civil Code"*, without, however, including any clause expressly designating Portuguese law as the law applicable to their matrimonial property regime. After their marriage, they set up their first marital residence in France.

Under European rules on the conflict of laws (Regulation 2016/1103), it is true that the spouses had the right to choose Portuguese law as applicable to their matrimonial property regime, being the law of the state of nationality of at least one of the spouses (art. 22 of EU Regulation 2016/1103)[4]; and this would be the legal order they would seemingly rely on, given the express reference to rules of that law and the use of legal figures from the *lex patriae* legal system.

However, by not making an express designation of the applicable law, the question arises as to whether these elements should be given weight (i.e. recognising here a tacit choice by them of the applicable law) or whether, on the contrary, a subsidiary connecting factor should operate, with their matrimonial property regime being subject to the law of the state of the first common habitual residence after the conclusion of the marriage (art. 26 of EU Regulation 2016/1103).

The question is not one of whether *a hypothetical choice* of applicable law - the law that the couple would have chosen if they had considered it - is admissible. It seems clear that the Regulation requires an *informed and certain* choice of law; a *real* choice of a particular jurisdiction[5] and not a hypothetical choice[6]. Rather, the question is whether,

when it is clear and unequivocal from the prenuptial agreement (or other agreement) that the parties were counting on the application of a certain applicable law that could have been chosen, this should be considered[7]. Or again, whether, as in the Regulations on the law applicable to succession, contractual obligations and non-contractual obligations, relevance can be given to a supposed choice of law that unequivocally results from an agreement that fulfils the substantive and formal requirements for the agreement to designate the applicable law (arts. 22, 23 and 24 of Regulation EU 2016/1103) [8].

This is not a *new* problem in European private international law. In fact, in EU Regulation 1259/2010, on the law applicable to divorce and legal separation, the admissibility of a tacit choice of applicable law remains unresolved[9]. However, the
solution to the question debated in the context of matrimonial property regimes cannot be found in the solutions given for the divorce regulation; as no ruling on the issue by the Court of Justice of the European Union exists, there is no consensus on the admissibility of a tacit choice of law applicable to divorce[10], which is why there are those either in favour of its admissibility[11] or in favour of its rejection[12].
But even if a solution were to be found in the context of the law applicable to divorce, the truth is that divorce and matrimonial property regimes do not overlap. In the scope of matrimonial property regimes, the admissibility of tacit choice arises when the spouses or partners plan their economic relationship relating to their marriage, modelling their behaviour on a lasting basis by reference to a certain legal system. The preparation of the marital relationship is often based on a document in which the spouses agree on aspects of different areas (maintenance, inheritance and property), respecting the formal requirements of a given legal system. This is why it can often happen that such an agreement fulfils the formal requirements laid down in Article 23 of Regulation EU 2016/1103 and assumes the application of a certain applicable law that the spouses are able to choose (of the nationality or residence of either of them), its clauses being drafted to refer to a certain jurisdiction *without having expressly stated the intention of its applicability*[13].
The situation is not the same in the context of the designation of the law governing the grounds and requirements for divorce: here it is a question of choosing the legal order that will serve in a *legal procedure* (and not in lasting legal relationships), prior planning for which is rarer and does not guide the spouses' behaviour throughout the duration of

the marriage. Furthermore, because the Divorce Regulation only applies to divorces granted by a court or other public authority under its control[14], the intervention of a judicial or quasi-judicial body always ensures that the choice is *informed*[15], which makes the problem of tacit designation irrelevant.

II. ARGUMENTS AGAINST THE POSSIBILITY OF IMPLICIT CHOICE OF LAW IN MATRIMONIAL ADMISSIBILITY

Four important arguments weigh against the possibility of an implicit choice of law applicable to the matrimonial property regimes.

On the one hand, it can be argued that the need for legal certainty demands that any notion of an implicit will of the parties be deemed irrelevant. Admitting any such implicit will would necessarily involve a certain amount of doubt and could even be the focus of a new controversy: the question of whether or not the evidence revealed is evidence of a tacit choice of applicable law. In fact, it could be argued that no evidence usually used to infer an *electio iuris* is infallible, implying the risk of the parties themselves being surprised by a choice they had no intention of making[16]. Uncertainty

and debate on the determination of the applicable law was precisely what the lawmaker wanted to avoid by allowing parties autonomy on the choice of law, especially given the fact that this *uncertain choice* by the spouses also implies a risk of litigation with third parties - to whom the applicable law is enforceable (Article 27(f)) - and who would be even more surprised with the applicable law. To accept this discussion on whether there is an implicit choice of law would undermine the very objectives that led to the institution of this connecting factor[17].

Secondly, it must be borne in mind that the solutions contained in the Regulation on Matrimonial Property Regimes are inspired, in many parts, by the European Succession Regulation (EU Regulation 650/2012). However, on this specific point, European lawmakers have moved away from the wording used — which explicitly states the possibility of tacit designation of the applicable law. Since the Regulation on matrimonial property regimes is more recent, the omission of the relevance of the implicitly chosen

law cannot be said to be an oversight; on the contrary, it must be understood as an unequivocal political decision not to recognise it[18].

Thirdly, it may be noted that the prescription of strict rules on the formal requirements for the choice of law agreement — Article 23, requiring a written document, dated and signed by both spouses, unless one of the spouses resides in a Member State that imposes greater solemnity — seems to indicate an expressly revealed decision as to applicable law[19].

Finally, it can be argued that, if no relevance is given to an implicit designation of the applicable law — which would lead to the application of *the law of the State of the spouses' first common habitual residence after the conclusion of the marriage*, under Article 26(1)(a) of the Regulation) — the escape clause[20] of Article 26(3) would deal sufficiently with any expectations of the spouses on the application of a different applicable law. In fact, the escape clause makes it possible to replace the law of the State of the spouses' first common habitual residence after the conclusion of the marriage with the law of the State *both spouses had relied on in arranging or planning their property relations*. Thus, it can be argued that this escape clause makes it unnecessary to accept the notion of tacit choice of applicable law: the law implicitly selected by the spouses when planning their property relations will be relevant in the circumstances required by Article 26(3)[21].

III. THE NON-DECISIVE NATURE OF THE ARGUMENTS AGAINST THE ADMISSIBILITY OF TACIT CHOICE OF LAW.

Although the arguments are impressive, none of them are decisive.

As for the argument of *legal certainty and security*, this seems to favour the possibility of an implicit (but unequivocal) will of the parties. In fact, in situations such as the one analysed in paragraph I — in which the spouses point to legal rules of the law of a State that could have been chosen and use legal figures specific to a certain judicial system in an agreement with the necessary form for the choice of law (art. 23 of the Regulation) — the spouses have a serious expectation of such implicitly chosen law being the one governing their matrimonial regime. Not admitting a tacit choice of law would submit the property regime to a different applicable law from the one the spouses expected,

jeopardising their trust[22]. The certainty and stability that follows from allowing party autonomy is that spouses who are convinced that a certain law does indeed apply to their property regime (even when they have not expressly designated it as such) and who have therefore adapted their behaviour to the legal system on which they are relying[23]. As far as relations with third parties are concerned, it should be remembered that the Regulation establishes a system of non-opposability of the law applicable to the matrimonial property regime when it is not reasonably cognisable (article 28), so it will not matter to them whether the choice of law was express or tacit.

Secondly, regarding the differentiation between the wording used in the matrimonial property regimes Regulation and in the succession Regulation, the distinction between them is not decisive. In fact, it is not undeniable that the European Succession Regulation was the origin of the rules on party autonomy laid down in the Matrimonial Property Regimes Regulation. In fact, in the Succession Regulation, *choice* is not the main connecting factor (rather it is the habitual residence of the deceased at the time of death) and the *professio iuris* acts as a substitute for the objectively determined law[24]. In contrast, in the Matrimonial Property Regimes Regulation, the will of the parties is the *primary* connecting factor — as it is in the case of the European Regulation on the law applicable to divorce. This means that the inspiration for the rules on the choice of law is to be found in Articles 5 to 7 of EU Regulation 1259/2010 - whose similarity to the rules in Articles 22 to 24 of EU Regulation 2016/1103 is undeniable - and which, as seen above, do not expressly decide on the issue of tacit choice of law.

Thirdly, it does not seem that the stipulation for formal requirements for an agreement on the choice of applicable law allows us to come to any conclusion as to the viability of tacit designation. In fact, the formal requirements laid down in Article 23 of the Regulation are aimed at providing for the document of the agreement in which the choice of law is contained; there is nothing to prevent an agreement between the spouses in which they tacitly agree on the application of a certain law from being contained in a written document, implicitly establishing *professio iuris* - namely, referring to the property regime of a certain applicable law, with reference to its legal rules[25]. On the contrary, if tacit designation is allowed, the formal requirements of the agreement — especially when it involves the participation of a notary — will only reinforce the certainty that the law implicitly designated matches the genuine will of the spouses[26].

Finally, the escape clause of Article 26(3) does not support an implicit choice of law and this is not its *ratio legis*. In fact, it only works if the applicable law was the law of the State of the spouses' first common habitual residence after the conclusion of the marriage and no other (*e. g.*, the law of the State of the spouses' common nationality at the time of the conclusion of the marriage); and it does not lead to the application of any law that can be chosen but, on the contrary, only to the *law of the State of the last common habitual residence when this has lasted significantly longer than the first*

residence. Therefore, the escape clause acts in favour of a legal system that *may not even have been eligible as a choice* at the time the spouses tacitly referred to it in their agreement on matrimonial economic relations (laws of the habitual residence or nationality of either of them *at the time the agreement was concluded* were eligible for choice (Article 22(1)).

This means that the escape clause does not protect a tacit choice of applicable law. Instead, it appears to be merely a mechanism to combat the disadvantages of the system of *crystallisation of the applicable law*[27] established by the Regulation: since it does not provide for the *automatic updating* of the applicable law in the case of subsequent changes of habitual residence, it may happen that the first common habitual residence of the spouses is not, with hindsight, the jurisdiction with the closest connection to that marriage[28]. In this case, exceptionally, prominence may be given to the law of the State of the *last common habitual residence*, allowing a deviation from the rule of Article 26(1)(a)[29].

But even if this line of reasoning were not to be accepted, two arguments can be added to dismiss the idea that the existence of the escape clause (in favour of the law that the spouses invoked when planning their property relations) would rule out the admissibility of a tacit choice[30]. On the one hand, the fact that the escape clause only appears to be enacted *within the proceedings in which it has been invoked* — not altering the applicable law outside those proceedings — renders it incapable of producing the effects intended by the admissibility of the implicit choice. On the other hand, the fact that the escape clause cannot be invoked when there is a marriage contract prior to a change of residence[31] is evidence not only of its nature (as an instrument for correcting the primary connecting factor) but also rules out its use in the case I have illustrated.

This makes it very clear that the purpose and scope of the escape clause are not linked to protecting the will implicitly revealed by the spouses in the designation of the applicable law at the time of planning their property relationship regarding their marriage.

IV. SUPPORTING THE ADMISSIBILITY OF TACIT CHOICE OF LAW

If the arguments for the impossibility of tacit designation of the applicable law fail, there are reasons that, on the contrary, favour the viability of it, and which seem to be more decisive.

Firstly, it should be emphasised that Recital 46 of the Regulation requires an *express choice* for changing the applicable law during marriage[32]. Now, if lawmakers require an express determination in order to *change* the applicable law — because there are special reasons for legal certainty in this context — *a contrario* it follows that there is *no such requirement in the context of the initial designation* of the applicable law[33]. In fact, lawmakers' concerns to emphasise the need for an *express choice* when changing the applicable law imply that the same requirement does not exist in the context of this primary choice.

Secondly, it should be noted that the Commission's Proposal had the requirement for the choice of law agreement *to be express*[34], a solution which was criticised[35]. However, the final version of the Regulation removed the requirement for an *express* choice of law, unequivocally distancing it from the Commission's proposal. This
reveals lawmakers' intentions to overrule any restriction on the method of choice and to allow, instead, an *implicit* designation of the applicable law[36].

Thirdly, the viability of tacit agreement on the choice of law is usually accepted; in this context, its impossibility should be expressly established clearly. Since there is no rule in the Regulation on Matrimonial Regimes prohibiting implicit designation, there is no reason to reject it[37].

Finally, and above all, this seems to be the solution indicated by the rules on the interpretation of European regulations. In fact, the *autonomous interpretation* of the rules of European regulations takes into account the necessity of uniform application and the fulfilment of the goals of European law[38]. Since party autonomy is aimed at fostering the spouses' confidence in the matrimonial property regime they have planned[39], at allowing them to articulate the applicable law to related issues such as succession[40] (especially when agreements as to succession are included in the prenuptial agreement) and at

facilitating the management of their property by the spouses (Recital 45) by creating a flexible solution that takes into account their own interests - in a self-determination of matrimonial status that may even be supported by the European Convention on Human Rights and the EU Charter of Fundamental Rights. (Recital 45) by creating a flexible solution that takes account of their own interests[41] — in a self-determination of matrimonial status that may even be supported by the European Convention on Human Rights and the EU Charter of Fundamental Rights[42] — the refusal to take into account an implicitly expressed will to designate the applicable law is contradictory to that aim.

By tacitly designating the law that they intended to regulate their matrimonial regime, this will must be protected. Otherwise, the spouses' trust in the matrimonial statute will be violated — the very trust that party autonomy was intended to protect[43].

V. **CONCLUSION**

I believe that the best interpretation of EU Regulation 2016/1103 is to allow implicit designation, provided it is unequivocal, of the law applicable to the matrimonial property regime. In fact, this is the solution that best fulfils the objectives of establishing the freedom to choose the applicable law, namely respect for the will of the spouses (even if only tacitly revealed) and the protection of their trust.

Additionally, there are other signs that this was the intention of European lawmakers: the clear dissociation from the Commission's proposal (which limited the designation of the applicable law to an *express* choice); the requirement of an express agreement *only in cases of change of the applicable law*; and the lack of any rule precluding such a way of manifesting their will in the context of the *professio iuris*.

The admissibility of an implicit designation of the applicable law makes it possible to prevent spouses who have planned their matrimonial economic relations counting on the application of a certain law (which they could designate) from being surprised by the subjugation of their matrimonial status to a different legal order. Only in this way will the aim of *facilitating the management of the respective assets by the spouses* be realised as the matrix that underpins the provision for conflictual autonomy.