

# Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law

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## Abstract

After describing the framework of the European Union's law sources on family matters, this article addresses the private international law (applicable law, jurisdiction, and recognition of decisions) discipline of property regimes between spouses and between partners of a registered partnership, at the outset, in view of the new (EU) Regulation Nos 2016/1103 and 2016/1104 and, secondarily, in view of the Italian conflict of law system (Law No 218/1995).

## Introduction

The beginning of the process of European harmonization of the rules of private international law in the field of family dates back to 20 years ago, when the Council recommended to the Member States the ratification of the Brussels Convention of 28 May 1998 on jurisdiction, recognition, and enforcement of judgements in matrimonial matters.

### *Rules of private international law in the field of family*

That convention never entered into force, but—thanks to the amendments introduced to the EC

Treaty by the Amsterdam Treaty of 2 October 1997—became European law by way of Regulation (EC) No 1347/2000 (the so-called Brussels II Regulation) into which it was fully and literally carried across.

In turn, the aforementioned regulation was replaced by Regulation (EC) No 2201/2003 (the so-called Brussels IIa Regulation), which deals with, among other things, establishing jurisdiction in matters of divorce, legal separation and marriage annulment (Article 1, Paragraph 1a).

This regulation is complemented by Regulation (EU) No 1259/2010 concerning the applicable law to divorce and legal separation (but not the applicable law to marriage annulment which, therefore, continues to be governed by the relevant conflict of laws rules of each Member State).

To these sources must be added Regulation (EC) No 4/2009, which:

- directly governs jurisdiction, recognition and enforcement of decisions in matters relating to maintenance obligations;
- refers to the Hague Protocol of 23 November 2007 for the designation of the applicable law to these obligations.

However, given that, in most cases, the question of maintenance arises between spouses at the time of

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separation or dissolution of marriage, Regulation (EC) No 4/2009 and the Hague Protocol contain two clauses aimed at coordination with the aforementioned Regulation Nos 2201/2003 and 1259/2010. Specifically:

- first, Article 3(c) of Regulation (EC) No 4/2009 establishes that, if the matter relating to maintenance is ancillary to a proceeding concerning the status of a person, jurisdiction shall lie with the court of the Member State which, according to its own law (including rules of European derivation), has jurisdiction to entertain that proceeding (unless the jurisdiction is based solely on the nationality of one of the parties);
- secondly, Article 5 of the Protocol also grants either one of the spouses the right to obtain the application, instead of the law designated by Article 3, of the law of the country that has the closer connection with the marriage, in particular, the law of the State of the last common habitual residence of the spouses (coinciding with that applicable to separation or divorce under Article 8(a) and (b) of Regulation (EU) no. 1259/2010).

To the mosaic illustrated so far, two tesserae have recently been added, being Regulations (EU) Nos 2016/1103 and 2016/1104 which cover, respectively, jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of property regimes of registered partnerships.

*Regulations (EU) Nos 2016/1103 and 2016/1104 jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of property regimes of registered partnerships*

As it will be seen shortly, these regulations also contain a clause for coordinating with Regulation (EC) No 2201/2003 and a coordination clause with Regulation (EU) No 650/2012 on successions upon death.

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In fact, questions concerning property can arise not only when a marriage is dissolved by the will of the spouses but also when the dissolution derives by death of one of them.

Reciprocally, the definition of the estate of a person who was married at the time of death is influenced by the property regime in force during the marriage. For this reason, numerous provisions of Regulation (EU) No 650/2012 require, in particular on the part of the authority in charge of issuing a European Certificate of Succession, that the property regime of the deceased at the time of death be taken into account.

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The puzzle that emerges from this rapid examination is further complicated by the fact that European harmonization is not spatially uniform.

Of the instruments mentioned above, only Regulation (EC) No 4/2009 is applicable to all Member States (with the clarification that the UK and Denmark are not parties to the Hague Protocol to which reference is made for the determination of the applicable law); Regulation (EC) No 2201/2003 does not bind the latter Member State; the others apply only to the Member States that participated in the enhanced cooperation process by the way they were adopted (currently fewer than 20).

To this may be added that the application of Regulations Nos 2201/2003 and 1259/2010 to same-sex marriages or partnerships is left to the discretion of the Member States: from the Italian point of view, for example, these unions are considered to be subject to the European instruments just mentioned, except for jurisdiction concerning the dissolution, annulment, and nullity of civil unions, whose existence

must be assessed on the basis of national legislation (Article 32-*quater* of Law No 218/1995).

Before getting to the heart of the subject, a final observation of a general nature seems opportune.

In all the aforementioned Regulations, priority is given to the connecting factor, not of citizenship (which in the past was widely used in family matters both in national systems and in international sources) but to that of the habitual residence, as already used in the most modern conventions developed by the Hague Conference.

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Since European lawmakers have never provided a definition of this connecting factor, we must use instead the case-law of the Court of Justice of the European Union, according to which

the place of habitual residence is that in which the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests,

with the further clarification that, 'for the purposes of determining habitual residence, all the factual circumstances which constitute such a residence must be taken into account' (see ECJ case c-452/93 of 15 September 1994, *Magdalena Fernandez v Commission*).

It is possible to deduce that residence in a given State can be said to be habitual when the person (or, as the case may be, the couple) has a link with that State that can be defined as genuine and stable, that is to say he, she or they are integrated with the social and cultural environment of the country.

To this end, it is necessary to take into account not only elements of an objective nature (such as the duration, the nature and characteristics of the residence) but also the psychological attitude of the person in question and, in particular, their intention to fix that State, in a stable way, as the main centre of their life and business interests.

## European law

It is now time to go into details of the new European regulations concerning the matrimonial property regimes of spouses and partners in a registered partnership.

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The two regulations in question have the same structure and, for most of the questions, they provide the same solution and justification, to the point that, in doctrine, they have been called *jumeaux* (twins).

This allows us to concentrate mainly on the former, pointing out only the differences with respect to the latter.

The examination must begin with the rules on applicable law.

According to Article 26, paragraph 1, Regulation (EU) No 2016/1103, the law applicable to matrimonial property regimes is in this order:

- i. the law of the State of the spouses' first common habitual residence after the conclusion of the marriage; or failing that
- ii. the law of the State of the spouses' common nationality at the time of the conclusion of the marriage (as long as the spouses do not have more than one common citizenship); or failing that
- iii. the law of the State with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

In the *Impact Assessment* accompanying the proposal for a Council regulation, the European Commission expressed the wishes that conflict rules in matters of matrimonial property regimes were based 'on the principle of immutability of the property regime'; according to such principle, 'the legal framework of the property regime of the spouses will remain unchanged during the marriage'.

This desire is not fully satisfied by the rule under examination.

In fact, of the three above-mentioned connecting factors, only the two latter ones are fixed at the time of conclusion of the marriage.

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Therefore, in the event that the future spouses do not have common habitual residence at that time—except in the case the same spouses have, before marriage, made a choice of law (that they are entitled to with the same conditions and same limitations better specified for spouses later on)—the applicable law to their matrimonial property regime designated by points (ii) or (iii) of Article 26, paragraph 1, will change as soon as the spouses establish their first common habitual residence (no matter when: whether this occurs immediately after the celebration of marriage or even years later).

By way of exception, pursuant to Article 26, paragraph 3, section 1, the application of the latter law can be overridden by the judge in favour of the law of the State of the subsequent common habitual residence, provided that:

- i. the duration of this latest common habitual residence was significantly longer than that established after the marriage; and
- ii. both spouses had relied on this law in arranging or planning their property relations.

Since one of the conditions on which the decision to activate the alternative law rests in the fact that the spouses had relied on it for the settlement of their property relations, it seems reasonable that the same law should apply since the celebration of the marriage; however, this retroactivity can be prevented by the opposition of one of the spouses: in such case, the alternative law applies only from the moment in which the spouses established the new common habitual residence (see Article 26, paragraph 3, section 2).

Furthermore, it must be held that the exception in question applies only with reference to the proceeding in which it is invoked; outside the courtroom, the applicable law remains that designated by Article 26, paragraph 1a).

Pursuant to Article 22, paragraph 1, the application of the law indicated by Article 26 can also be overridden via *optio legis*; more precisely, the spouses can choose as the law regulating their property relations:

- i. the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or
- ii. the law of the State of nationality of either spouse or future spouse at the time the agreement is concluded.

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Other laws cannot be chosen. In particular, in accordance with the principle of the unity of the applicable law—expressed by Article 21, laying down that the ‘law applicable to a matrimonial property regime shall apply to all assets falling under that regime, regardless of where the assets are located’—the law of the place where the assets are located cannot be chosen.

According to the subsequent Article 22, paragraph 2, if the choice of law causes a change in the applicable law to a matrimonial property regime, the retroactive application of the chosen law is excluded, unless spouses agree otherwise.

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The agreement on the choice of the applicable law shall be expressed in writing, dated and signed by both spouses. However, if at the time of choice the

spouses are habitually resident in one of the Member States, the additional formal requirements for matrimonial property agreements imposed by the law of the Member State where both spouses are habitually resident at the time of the conclusion of the agreement (Article 23, paragraph 2) or where one of the spouses is habitually resident at the same time (paragraph 3), even when the other spouse resides in a third State (paragraph 4), shall apply.

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These additional formal requirements are very significant, since matrimonial agreements are required to have the legal form of a notarial deed according to the internal law of most of the Member States bounded by the regulation. Consequently, if the habitual residence of one of the spouses is in a Member State, failure to comply with these additional formal requirements causes nullity of *professio iuris*; whereas the written agreement is a necessary and sufficient requirement if both spouses are habitually resident in a State unbound by the regulation.

Pursuant to Article 27(f), the applicable law to the property regime regulates the effects of the regime itself ‘on a legal relationship between a spouse and third parties’.

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However, in the context of a dispute with a third party, the spouses can enforce the applicable law to

the property regime only if they prove that ‘the third party knew or, in the exercise of due diligence, should have known of that law’ (Article 28, paragraph 1).

Paragraph 2 sets two *iuris et de iure* presumptions of knowledge of the applicable law to the property regime for the third party.

According to the first, such knowledge is acquired if the applicable law to the property regime coincides either with the law:

- i. of the State whose law is applicable to the transaction between a spouse and the third party (identified under the pertinent rules of private international law), or
- ii. of the State where the contracting spouse and the third party have their habitual residence, or
- iii. in cases involving immovable property, the State in which the property is situated.

For the second, knowledge of the applicable law to the property regime is presumed if one of the spouses has ‘complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified’ by one of the just mentioned laws.

There is no doubt that this latter presumption operates not only in the case where the spouses have a real obligation to register officially but also in the case where the law leaves such spouses the option and they comply in the specific case (as in the hypothesis of foreign spouses who have contracted marriage abroad and are resident in Italy, who, pursuant to Article 19, section 1, first sentence of Presidential Decree No 396/2000, may—but are not obliged to—request the transcription of their marriage certificate into the registry of marriages in the Municipality where they reside).

Where it is not possible to demonstrate what is required by Article 28, paragraph 1, as well as in the event that none of the presumptions indicated in paragraph 2 of the same provision apply, ‘the effects of the matrimonial property regime in respect of the third party shall be governed’:

- i. by the law of the State whose law is applicable to the transaction between a spouse and the third party (here too identified by way of the relevant rules of private international law); or
- ii. in cases involving immovable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.

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This is the goal, in particular, of Article 7 of the Regulation, stating that the parties may expressly agree in writing that the jurisdiction shall lie with the courts of the Member State whose law is applicable:

- i. on the basis of a choice of law pursuant to Article 22; or
- ii. pursuant to points (a) or (b) of Article 26 (1) (which, as you will remember, refer to the law of the State of the spouses' first common habitual residence and to the law of the State of the spouses' common nationality).

The same Article 7 adds that the choice of court agreement can confer jurisdiction to the courts of the Member State of the conclusion of the marriage (in such case, however, this does not generally lead to a coincidence between *forum* and *ius*, considering that such law has not been declared applicable by any provision of this regulation).

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Moreover, subsequent Article 8 states that there may be a tacit prorogation of jurisdiction if a defendant enters an appearance before the courts of the Member State whose law is applicable without disputing the jurisdiction.

Where no choice of court has been made, the jurisdiction shall lie with the courts of the Member State:

- i. in whose territory the spouses are habitually resident at the time the court is seised; or, failing that
- ii. in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or, failing that,
- iii. in whose territory the respondent is habitually resident at the time the court is seised; or failing that,
- iv. of the spouses' common nationality at the time the court is seised.

These grounds of jurisdiction operate in the above-mentioned order, as meaning that the existence of the former excludes the viability of the subsequent criteria.

The grounds of jurisdiction indicated so far may be derogated when there is an issue in matters of matrimonial property regimes in connection with:

- i. a succession case; and
- ii. an application for divorce, legal separation or marriage annulment.

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In this case, the regulation states that the jurisdiction lies on the court seised to rule on the main issue under Regulation (EU) No 650/2012 or, respectively, under Regulation (EC) No 2201/2003.

Derogation is certainly suitable since it prevents duplication of proceedings on issues closely linked to each other.

If we take a close look, this implies that rules on jurisdiction set out in Regulation (EU) No 2016/1103 have a residual nature, considering the fact that, at least in general, issues regarding the property of assets acquired by the spouses or by one of them during marriage arise at the time of the legal separation or of the dissolution of marriage upon divorce or death.

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*Rules on jurisdiction set out in Regulation (EU) No 2016/1103 have a residual nature*

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Therefore, the regulation under examination will mainly apply to disputes between spouses (or one of them) and third parties, such as those relating to:

- i. the responsibility of one spouse for liabilities and debts of the other spouse;
- ii. the powers, rights and obligations of either or both spouses with regard to property; and
- iii. the effects of the matrimonial property regime on a legal relationship between a spouse and third parties;

which points (c), (d) and (f) of Article 27 refer to and which are regulated according to the above-mentioned Article 28.

In this respect, it is worth mentioning a recent case brought before the Italian Supreme Court, which rejected the request by a third party to enforce a preliminary contract for the sale of property bought under the community of property regime. The Court has deemed this contract to be null and void as it was only signed by one of the spouses (Court of Cassation, II Civil Chamber, 6 April 2018, No 8525).

The issue of the circulation of decisions in the European Judicial Space is tackled by Regulation (EU) No 2016/1103 in a classical way, in line with the blueprint of Regulation (EC) No 44/2001, which is in turn already replicated by the Regulation on

successions and the Regulation governing matrimonial matters.

More specifically, it is established that a decision given in a Member State be recognized in the other Member States without any special procedure being required.

The judicial authority only steps in when the recognition is challenged or when the party wants the decision (or the authentic instrument) to be enforced. In this case, the authority issues the *exequatur* after assessing the absence of grounds of non-recognition set forth by Article 37 of the Regulation.

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Furthermore, the Regulation reiterates in the field of matrimonial property regimes the significant step forward made by the Regulation on successions, as it extends the simplified recognition regime—which up until now was only applicable to judicial decisions—to the evidentiary effects of the authentic instruments established in a Member State by civil law notaries.

This ensures the transnational circulation of the agreements entered into by spouses concerning their property relations, given that, in most Member States, such agreements have to take the form of notarial deeds.

What has been said so far also applies to the property consequences of registered partnerships, with the only (not unimportant) difference that Regulation (EU) No 2016/1104 designates, as the law governing the matter, that of the State under whose law the registered partnership was created.

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The connecting factor of the *locus celebrationis* is also used by the same Regulation:

- i. in the matter of *professio iuris*, in the sense that, in addition to the same laws made available to spouses under Article 22 of Regulation (EU) No 2016/1103, the partners may choose, as the law regulating their property relations, the *lex loci celebrationis* (Article 22, paragraph 1 (c) of Regulation (EU) No 2016/1104);
- ii. in matters of jurisdiction, in the sense that, in the absence of the grounds of jurisdiction already described earlier for spouses, jurisdiction shall lie with the courts of the Member State under whose law the registered partnership was created (Article 6e) of Regulation (EU) No 2016/1104).

## Italian law

The twin regulations will replace the corresponding national rules of private international law only for families constituted after 29 January 2019. So, national conflict of laws systems will continue to be used for a long time to come.

In Italy, there has recently been a major change and reorganization of the rules of private international law in the field of marriage and registered partnership, consequent upon the adoption of a specific regulation of homosexual unions (see Law No 76/2016).

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First of all, in the absence of *professio iuris*, the applicable law to property relationships arising from marriage (including homosexual marriage, provided that it is contracted between foreigners) is the law of the common nationality of the spouses (see the combined provisions of Article 30, paragraph 1, first sentence, and Article 29, paragraph 1 of Law No 218/1995).

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However, pursuant to Article 13 of the same law (and unlike what happens for EU sources), heed must be paid to the *renvoi* that the private international law of the spouses' common national law could make:

- i. to Italian law or
- ii. to the law of a third State that would apply its own law.

In such cases, our law or the law of the third State will apply.

If the spouses do not possess a common national law, the property regime is regulated by the law of the State in which their matrimonial life is predominantly lived, this time with the exclusion of any *renvoi*.

Such connecting factor—which is meant to identify the legal system with the most relevant connection with the marriage—implies the (at times tricky) weighting of the factual circumstances that are relevant for the specific case (i.e. the actual—besides the official—residence of the spouses, their nationality, the place where the marriage was entered into and the place of birth of any children, the language spoken in family relations, etc).

Under Article 30, paragraph 1, second sentence of Law No 218/1995, spouses are entitled to choose the applicable law to their matrimonial property relations, which shall be the law of the State where at least one of the spouse has his/her nationality or residency. In this case, Article 13, paragraph 2(a) does not allow the *renvoi*.

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*Under Article 30, paragraph 1, second sentence of Law No 218/1995, spouses are entitled to choose the applicable law to their matrimonial property relations*

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The assessment of the formal and substantive validity of the choice of law is alternatively referred to



the chosen law or to the law of the State where the agreement was entered into (Article 30, paragraph 2), notwithstanding the minimum formal requirement of the written deed.

According to the first sentence of the third subparagraph of the same rule, third parties are bound by the matrimonial property regime regulated by a foreign law only if they have knowledge of such regime or have ignored it through fault of their own.

The burden of proof of knowledge of the matrimonial property regime, or lack of knowledge thereof, shall be on the spouses; in the absence of such proof, the Italian law shall apply.

Moreover, when rights in real property are at stake, 'third party are bound only if the forms of public notice prescribed by the law of the State where the property is located have been complied with' (Article 30, paragraph 3, second sentence). This gives rise to problems for foreigners who got married abroad and do not reside in the State. These foreign nationals are denied the possibility to enter the certificate of marriage in the register of civil status. Therefore, they are also denied publicity of the optional matrimonial property regimes (which is ensured by adding a margin note to the certificate of marriage indicating the matrimonial property agreement underpinning the optional regime). According to the notarial doctrine, publicity in land registers shall compensate for it.

Against this backdrop, one can imply an inherent variability of the law regulating matrimonial property regime; however, if the law changes, such variability shall not result in a fragmentation of the relevant legal framework, and said regime will remain subject to the applicable law at a specific time. If anything, changes in the law should be considered in light of the old and new provisions in order to ascertain any possible consequences.

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#### *Inherent variability of the law regulating matrimonial property regime*

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Therefore, the shift to a separation of property regime can be considered to be a cause of termination

of the previous regime of community of property, and it will entail the obligation to proceed with the liquidation of said patrimonial regime (see Articles 191ff of Civil Code).

Vice versa, in case of a shift from the separation to the community regime, property acquired separately when the old regime was still valid will remain personal property of each spouse, although it will become subject to the management rules dictated by the new regime (see Article 185 of Civil Code). In the latter case, spouses can decide that personal property also be subject to the community of property regime, although they must do so within the limits of the party autonomy under the new applicable law (see Article 210 of Civil Code).

The above-described rules are overridden with reference to same-sex marriages contracted abroad between Italians or between a foreigner and an Italian.

Specifically, pursuant to Article 32-*bis* of Law No 218/1995, the property regime resulting from such marriages are directly and fully regulated by the aforementioned Law No 76/2016 on civil unions, which subjects them by default to the community property regime (unless the parties have opted for the separate property regime).

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The same rule applies to property relationships arising from same-sex registered partnerships established abroad by partners who are both Italian citizens and both habitually resident in Italy (see Article 32-*quinquies* of Law No 218/1995).

In the event that the same-sex registered partnership does not have any of the links made by the aforementioned provision, Article 32-*ter*, paragraph 4 is applicable; this—like the European regulation—entrusts to the 'law of the State before

whose authorities the union was established' the regulation of the property relationship between the partners.

It should be noted, however, that the application of the *lex loci celebrationis* (which is certainly appropriate and consistent with the aim of ensuring cross-border production of the effects attributed to the union by the legal system of the State in which it was created and in whose registries it was consequently recorded) could be contradicted by the triggering of a *renvoi* as per Article 13 of Law No 218/1995, whose operation *in subiecta materia* has not been excluded by Italian lawmakers.

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*The application of the lex loci celebrationis could be contradicted by the triggering of a renvoi as per Article 13 of Law No 218/1995*

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The immutability of the connecting factor as per Article 32-ter, paragraph 4, first sentence, ensures certainty and predictability of the applicable law; however, it could also trigger the application of a law that, because of the changed factual features of the case, no longer meets the couple's expectations.

For this reason, it has been laid down in the provisions set forth in the following second and third sentences.

Similarly to what has been said with regard to European sources, the first provision provides that, upon request by one of the parties and as an alternative to the law of the State where the union was established, the judge can decide to 'apply the law of the State where the common life is predominantly lived'.

Being so laconic, the rule leaves several problems unsolved.

First of all, one must deem that the decision to apply the alternative law is left to the full discretion of the judge, even when the request is submitted jointly by both parties, as such a request cannot be deemed to be a choice of the applicable law; secondly, the application of the alternative law does not seem to stem from the mere recognition—inherent to the connecting factor—of its higher effectiveness as opposed to the law of the

State where the partnership was established. Indeed, it must be based on further elements, namely the fact that both partners relied on the application of such law or the consideration of the consequences of its application or lack of it, including *vis-à-vis* third parties; finally, any derogation that might be ordered can only be invoked to solve the problem at stake in a specific case, as in all other cases, the provisions of Article 32-ter, paragraph 4, first sentence, shall apply.

The last sentence allows people who have entered a civil union to choose the law that should regulate their property relations among the same laws provided for by Article 30, paragraph 1, second sentence, that is, the law of the State where at least one partner is a national or where at least one of them resides.

The jurisdiction of the Italian courts in matters of property regime between spouses or partners exists in very broad terms.

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Pursuant to Article 3, paragraph 1 of Law No 218/1995, it exists, first, when the defendant is domiciled or resident in Italy or has an agent authorized to appear in court for him/her in accordance with Article 77 of the Code of Civil Procedure.

In the absence of such grounds of jurisdiction, the criteria established for territorial competence are applied and, in particular, the domicile of the plaintiff, provided for by Article 18, paragraph 2 of the Code of Civil Procedure for the case of a defendant resident or domiciled abroad or whose abode is unknown (the applicability of this rule was confirmed, despite the uncertainties of the jurisprudence, by the Joint Sections of the Supreme Court in decision No 12056 of 27 November 1998).

Finally, recognition and enforcement in Italy of foreign decisions and authentic instruments is governed by Italian private international law in a manner similar to that provided for by EU regulations.

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In our legal system, too, recognition is automatic, that is, it does not require recourse to any proceeding (see Articles 64 and 68 of Law No 218/1995); the court's intervention is limited to cases of non-compliance or contestation of the recognition or when it is necessary to proceed with forced execution (see Article 67 of Law No 218/1995).

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*Recognition is automatic, the court's intervention is limited to cases of noncompliance or contestation of the recognition or when it is necessary to proceed with forced execution*

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In such cases, the Court of Appeals will have to verify the existence of the grounds of recognition indicated by the aforementioned Article 64, which roughly coincide with those provided for by European regulations except for the one at letter (d) of the provision in question, which asserts that the judgment is *res iudicata* where pronounced.