

# **CONFLICT OF LAWS IN MATTERS CONCERNING MATRIMONIAL PROPERTY –PERSPECTIVES FROM EUROPEAN UNION’S ROME IV REGULATION PROPOSAL AND CHINESE AND TAIWANESE NEW CODES OF PRIVATE INTERNATIONAL LAW\***

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## **Abstract**

The Europeanization of family law matters attracts attentions of the entire world. It is not just because the European Union has just successfully harmonized the jurisdiction and recognition and enforcement problems both in civil, commercial and matrimonial regimes by the Brussels Regulations I and II, and has set conflict of laws rules in contractual and non-contractual obligations by the Rome Regulations I and II, but also because the varied possibilities of marriages, registered partners and cohabitation contracts in the European Union has increased the difficulties for the harmonization of conflict-of-law rules in family law and has created vivid possibilities for the probable norms, such as just showed in the recent Council Regulation No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome Regulation III).

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Following this trends for harmonization, in 2006 the European Commission published a Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. Moreover, in March 2011, a Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Rome Regulation IV Proposal) was just announced.

As indicated in the Proposal of Rome Regulation IV, the basic rule for determining the jurisdiction for matrimonial matters would follow the principles of determination of jurisdiction for divorce, legal separations or marriage annulment proceedings (art.4); for the event of the death of one of the spouse, the court of a Member State for succession would have jurisdiction. Besides, for the conflict-of-law rules, it follows the principle of party autonomy (art.16) for the matrimonial property; finally, for the recognition of decision would be allowed under some exceptions (art.27).

This new proposal would facilitate the harmonization of conflict-of-law rules in European family laws, and also set some references for other countries. For example, both in 2011, China and Taiwan has just promulgated their new Codes of Private International Law (CPIL). Basically, both in China and in Taiwan, there's no rule for the determination of jurisdiction in these Codes. For the applicable law to matrimonial property, both follow the principle of party autonomy, too. But in China, the choice of applicable law is limited among the law of habitual residence, *lex patriae* or the *lex loci* of the main property (art.24 of the CCPIL); in Taiwan, it will also be limited between *lex patriae* of *lex domicilii* (art.48 of the TCPIL) The reasons for these delicate differences in choice-of-law rule among the EU, China and Taiwan would be worthy of further analyses.

So based on the European Union's Proposal of Rome Regulation IV, Chinese CPIL and Taiwanese CPIL, this article would try to establish some cross-county comparative perspectives for the further harmonization in the global conflict of laws in matrimonial property.

**Keywords:** *Private International Law, Jurisdiction, Applicable Law, Recognition and Enforcement, Matrimonial Property*

## Introduction

The Europeanization of family law matters attracts attentions of the entire world. It is not just because the European Union has just successfully harmonized the jurisdiction and recognition and enforcement problems both in civil, commercial and matrimonial regimes by the Brussels Regulations I<sup>1</sup> and II<sup>2</sup>, and has set conflict of laws rules in contractual and non-contractual obligations<sup>3</sup> by the Rome Regulations I<sup>4</sup> and II<sup>5</sup>, but also because the varied possibilities of marriages, registered partners and cohabitation contracts in the European Union has increased the difficulties for the harmonization of conflict-of-law rules in family law and has created vivid possibilities for the probable norms, such as just showed in the recent Council Regulation No 1259/2010 of 20 December

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<sup>1</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>2</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, please note that a Brussels II *bis* Regulation revised the Brussels II Regulation: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

<sup>3</sup> See generally, MICHAEL BOGDAN, *CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW* (2006) ; PETER STONE, *EU PRIVATE INTERNATIONAL LAW: HARMONIZATION OF LAWS* (2006); JANET A. PONTIER & EDWIGE BURG, *EU PRINCIPLES ON JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: ACCORDING TO THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE* (2004); KATHARINA BOELE-WOELKI & CRISTINA GONZÁLEZ BEILFUSS (ED.), *BRUSSELS II BIS: ITS IMPACT AND APPLICATION IN THE MEMBER STATES* (2007); FRANCO FERRARI & STEFAN LEIBLE (ED.), *ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE* (2009); JOHN AHERN \* WILLIAM BINCHY (ED.), *THE ROME II REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS: A NEW INTERNATIONAL LITIGATION REGIME* (2009); ANDREW DICKINSON, *THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS* (2008); The newest development of these European private international laws could be accessed in the website of the European Union “Judicial co-operation in civil matters”: [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/index\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/index_en.htm) (2012/5/31 last visited)

<sup>4</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

<sup>5</sup> 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

2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome Regulation III)<sup>6</sup>.

Following this trends for harmonization, in 2006 the European Commission published a “Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition”<sup>7</sup>. Moreover, in March 2011, a “Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes”<sup>8</sup> (hereinafter “*Rome IV proposal*”) was just announced.

As indicated in the Rome IV proposal, the basic rule for determining the jurisdiction for matrimonial matters would follow the principles of determination of jurisdiction for divorce, legal separations or marriage annulment proceedings (art.4); for the event of the death of one of the spouse, the court of a Member State for succession would have jurisdiction. Besides, for the conflict-of law rules, it follows the principle of party autonomy (art.16) for the matrimonial property; finally, for the recognition of decision would be allowed under some exceptions (art.27).

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<sup>6</sup> See generally, Katharina Boele-Woelki, *To Be, or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union*, 39 VICT. U. WELLINGTON L. REV. 779 (2009); Yao-Ming Hsu, *The Applicable Law in Divorce in New Chinese and Taiwanese Codes of Private International Law: a Comparison with European Rome III Regulation*, 35 YUE-DAN CIVIL AND COMMERCIAL LAW 89 (2012), in Chinese: 許耀明, 兩岸新國際私法典中關於離婚準據法之規定與省思——兼論歐盟羅馬規則, 月旦民商法雜誌, 第35期, 2012年3月, 頁89-109。

<sup>7</sup> Brussels, 17 July 2006, Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, MEMO/06/288, COM(2006) 400 final, available at: [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2006&nu\\_doc=400](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2006&nu_doc=400) (2012/5/31 last visited)

<sup>8</sup> Brussels, 16.3.2011, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF> (2012/5/31 last visited). In fact, sometimes this proposal is called “Rome IVa”, because there’s at the same time a proposal of “Rome IVb”, which is titled “Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships”, COM (2011) 127, available at: [http://ec.europa.eu/justice/policies/civil/docs/com\\_2011\\_127\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/com_2011_127_en.pdf) (2012/6/1 last visited). In this Paper, we just discussed the “Rome IVa” for convenience and actually the “Rome IVb” is almost equivalent to the former.

This new proposal would facilitate the harmonization of conflict-of-law rules in European family laws, and also set some references for other countries. For example, both in 2011, China and Taiwan has just promulgated their new Codes of Private International Law (CPIL). Basically, both in China and in Taiwan, there’s no rule for the determination of jurisdiction in these Codes. For the applicable law to matrimonial property, both follow the principle of party autonomy, too. But in China, the choice of applicable law is limited among the law of habitual residence, *lex partiae* or the *lex loci* of the main property (art.24 of the CCPIL); in Taiwan, it will also be limited between *lex partiae* of *lex domicilii* (art.48 of the TCPIL) The reasons for these delicate differences in choice-of-law rule among the EU, China and Taiwan would be worthy of further analyses.

So based on the European Union’s Rome IV Proposal, Chinese CPIL and Taiwanese CPIL, this article would try to establish some cross-county comparative perspectives for the further harmonization in the global conflict of laws in matrimonial property. Consequently, the following paragraphs will be arranged in order of general introduction of Rome IV Proposal and the comparison of European, Chinese and Taiwanese norms in such a matrimonial property regime. A concise conclusion would be added at last.

## **Rome IV Proposal: a brief**

### **Backgrounds**

Since the promulgation of Brussels II Regulation, the Europeanization of family law launched. Besides the jurisdictional rules, the EU has tried to harmonize the applicable law regime in family laws<sup>9</sup>. The first attempt is finalized in Maintenance Regulation<sup>10</sup> in 2009, which combined the jurisdiction and applicable law rules, and later a Rome III Regulation emerges in 2010 in the area of the law applicable to divorce and legal separation. However, according to the civil law tradition, a marriage is both a status and property contract. An European Regulation relating to Divorce is not simply enough, but a Regula-

<sup>9</sup> Maire Ni Shuilleabhain, *Ten years of European family law: retrospective reflections from a common law perspective*, 59 (4) I.C.L.Q. 1021, 1023 (2010); Rome IV Regulation Proposal, *ibid.*, para.1.1.

<sup>10</sup> 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

tion concerning the effects of matrimonial regime is deeply needed. These ambitious further harmonization possibilities of European family law are well witnessed in the “Stockholm Programme” for 2010-2014<sup>11</sup>.

For the matrimonial regime, spouses are free to choose their dispositions for managing their respective property before or after the marriage and their joint properties after the marriage by a pre-nuptial contract or during the marriage at any time, for the possible distribution after the dissolution of marriage<sup>12</sup>. Because of the cross-border mobility rooted in the freedoms of persons in the European Union, private international law issues happen in cross-border marriages<sup>13</sup>. For the harmonization of substantial matrimonial regimes differing in EU member states, the European Commission published a Green Paper on conflict of laws in matters concerning matrimonial property regimes in 2006. Later in 2011, a Rome IV proposal was also announced. The legal basis for this proposal is Article 81(3) of the Treaty on the Functioning of the European Union, which confers on the Council the power to adopt measures concerning family law having cross-border implications after consulting the European Parliament<sup>14</sup>. Below are some key definition and application scope.

First of all, according to the art.2 (a) of this proposal, “matrimonial property regime” is defined as “a set of rules concerning the property relationships of spouses, between the spouses and in respect of third parties”. And a “marriage contract” means “any agreement by which spouses organise their property relationships between themselves and in relation to third parties”. (art.2 (b)) Besides, some legal relationships are clearly excluded from

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<sup>11</sup> The Stockholm Programme – An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4.5.2010]. The Stockholm Programme sets out the European Union’s (EU) priorities for the area of justice, freedom and security for the period 2010-14. Building on the achievements of its predecessors the Tampere and Hague programmes, it aims to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens. See generally on the EU website: [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/jl0034\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/jl0034_en.htm) (2012/6/1 last visited)

<sup>12</sup> Anne Sanders, *Private autonomy and marital property agreements*, 59 (3) I.C.L.Q. 571, 574 (2010)

<sup>13</sup> Sjef J. H. M. van Erp, *Matrimonial property regimes and patrimonial aspects of other forms of union: what problems and proposed solutions? (Proposal for Rome IV Regulation)*, p.6. available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1734702](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734702) (2012/5/31 last visited)

<sup>14</sup> Rome IV Regulation Proposal, *ibid.*, para.3.1.

this proposal, for example, the capacity of spouses, maintenance obligations, gifts between spouses, the succession rights of a surviving spouse, companies set up between spouses, the nature of rights *in rem* relating to a property and the disclosure of such rights, according to the art.1(3).

### Jurisdictional Clauses

According to this proposal, the basic principle for deciding jurisdiction is party autonomy<sup>15</sup>. The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, **where the spouses so agree**, to rule on matters of the matrimonial property regime arising in connection with the application (art.4.1). Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and dated and signed by both parties (art.4.2). Both parties may also agree that the courts of the Member State whose law they have chosen as the law applicable to their matrimonial property shall also have jurisdiction to rule on matters of their matrimonial property regime (art.5.2).

If there’s no agreement between the spouses, the jurisdiction is complementarily decided by the following sequences (art.5.1): common habitual residence, last common habitual residence, defendant’s habitual residence, or at last, the nationality of both spouses.

Besides, some compulsory jurisdiction is exceptionally regulated. The courts of a Member state having jurisdiction on the succession of a spouse shall also have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the application (art.3).

Moreover, for the “subsidiary jurisdiction”, “the courts of a Member State shall have jurisdiction in so far as property or properties of one or both spouses are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the property or properties in question” (art.6).

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<sup>15</sup> Richard Frimston, *European Union proposed Regulation Rome IV and existing private international law: marriage and registered partnerships and their effect on property rights*, 2011(4) PRIVATE CLIENT BUSINESS 172, 176 (2011)

For preventing the dilemma of denial of justice in case of negative conflict of jurisdictions, the principle of *forum necessitatis* is called and “the courts of a Member State may, exceptionally and if the case has a sufficient connection with that Member State, rule on a matrimonial property regime case if proceedings would be impossible or cannot reasonably be brought or conducted in a third State” (art.7). Furthermore, for resolving the positive conflict of jurisdictions, the principle of *lis pendens* is also proclaimed in art.12 of this proposal: “where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised **shall** of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established” (art.12.1). And for the related actions, “where related actions are pending before courts of different Member States, any court other than the court first seised **may** stay its proceedings” (art.13.1).

At last, the jurisdiction of substance matter do not hinder the necessary jurisdiction for provisional and protective measures: “provisional, including protective, measures provided for by the law of a Member State may be requested from the courts of that State, even where, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter” (art.14).

### **Applicable Law**

In principle, the Rome IV proposal follows the principle of party autonomy for choice of applicable law, but **in a limited way** (the parties could not choose any law they prefer). According to the art.16 of this proposal, “the spouses or future spouses may choose the law applicable to their matrimonial property regime, as long as it is one of the following laws: (a) the law of the State of the habitual common residence of the spouses or future spouses, or (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made.” This chosen applicable could be altered in any time later. “The spouses may, at any time during the marriage, make their matrimonial property regime subject to a law other than the one hitherto applicable.(art.18.1)” “Unless the spouses desire otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the fu-



ture (art.18.2)”. For the unity of the applicable law chosen, it’s not allowed for choosing a way of “*dépeçage*” (one of the properties applies one law, the other part of the properties applies another law) and it “shall apply to all the couple’s property” (art.15). It’s noteworthy that a universalism is displayed in this proposal: “any law determined in accordance with the provisions of this Chapter shall apply *even if it is not the law of a Member State*.(art.21)”

As for the formalities for this choice, “the choice of applicable law shall be made in the way specified for the marriage contract, either by the law of the State chosen or by the law of the State in which the document is drawn up. (art.19.1)” Besides, “the choice must at least be made expressly in a document dated and signed by both spouses (art.19.2).”

When no choice is made between the spouses, art. 17 establishes the sequences for the application of laws: first the “law of the State of the spouses’ first common habitual residence after their marriage”, second “the law of the State of the spouses’ common nationality at the time of their marriage” and at last “the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated”.

For the application of the applicable chosen or assumed, some complementary rules are set. First, mandatory rules are without exception applied, according to art. 22, “the provisions of this Regulation shall be without prejudice to the application of imperative provisions the upholding of which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the matrimonial property regime under this Regulation.”

Second, public policy is guarded, because “the application of a rule of the law determined by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.”(art.23). Nevertheless, such a public policy exclusion remains in substantial way and “shall not apply to the rules on jurisdiction set out in Articles 3 to 8 (art.28.2)”.

Third, because the applicable law of matrimonial property is more likely assimilated to the one for contract, the *renvoi* is excluded by the art.24: “where this Regulation provides for the application of the law of a State, it

means the rules of substantive law in force in that State other than its rules of private international law.”

Finally, for the territorial conflicts of laws, “any reference to the law of that State shall be construed, for the purposes of determining the law applicable under this Regulation, as a reference to the law in force in the relevant territorial unit”.(art.25.1).

### **Recognition and Enforcement**

Since the jurisdictional rule is harmonized by this Rome IV regulation proposal, the recognition and enforcement of decisions are generally automatic. According to the art.26.1 of this proposal, “a decision given in a Member State shall be recognised in the other Member States without any special procedure being required.” Besides, not only “the jurisdiction of the court of the Member State of origin may not be reviewed (art.28.1), but also that “under no circumstances may a foreign decision be reviewed as to its substance” (art.29). Moreover, it’s curious that in this proposal, the recognition is not necessarily set for a final decision without any ordinary opportunity for appeal. “A court of a Member State in which recognition is sought of a decision given in another Member State *may* stay the proceedings if an ordinary appeal against the decision has been lodged.” (art.30)

However, some exceptional conditions are allowed for the discretionary power of each Member state for non-recognition. Based on the art. 27, the reserve of public policy, default of appearance of a party and conflict of relevant decisions all constitute reasons for the non-recognition. The art.27 says that “a decision shall not be recognised if: (a) such recognition is manifestly contrary to public policy in the Member State addressed; (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him or her to do so; (c) it is irreconcilable with a decision given in a matter between the same parties in the Member State addressed; (d) it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State addressed”.

For the enforcement of decisions concerning to matrimonial property, this proposal simply refers to the enforcement procedure in Regulation Brussels I, in words describing that “decisions given in a Member State where they are enforceable shall be enforced in the other Member States in accordance with Articles [38 to 56 and 58] of Regulation (EC) No 44/2001.” According to this reference, in general, “a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there” (art.38.1 of Regulation Brussels I). “The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought. (art.40.1 of Regulation Brussels I) and “the judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35.” (art.41 of Regulation Brussels I, art.34 and 35 of this Regulation set the conditions of non-recognition).

### **Effects in Respect of Third Parties and Relations with Existing International Conventions**

Since the applicable law for matrimonial property not only deals with the property relationship between the spouses, but also relates to the third party. In this proposal, it is proposed that “the effects of the matrimonial property regime on a legal relationship between a spouse and a third party are governed by the law applicable to matrimonial property regimes under the terms of this Regulation”.(art. 35.1). For the protection of *bona fide* third party, it is also stressed that “the law of a Member State may provide that the law applicable to the matrimonial property regime may not be relied on by a spouse in dealings with a third party if one or other has their habitual residence in the territory of that Member State and the conditions of disclosure or registration provided for in the law of that State are not satisfied, unless the third party was aware of or ought to have been aware of the law applicable to the matrimonial property regime”.(art.35.2) A similar protection for third party is laid down for the immovable property (art.35.3), since the conditions of disclosure or registration are deposited for the public.

As for the relations with existing international conventions, in this proposal art.36.1 prescribed that “this Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member

States are party at the time of adoption of this Regulation and which relate to the subjects covered by this Regulation, without prejudice to the obligations of the Member States under Article 351 of the Treaty.” What is more interesting is that this proposal insists the supremacy of European Union Regulation, even to the international conventions between Members states. In art.36.2, it is set that “this Regulation shall, between Member States, take precedence over conventions which relate to subjects governed by this Regulation and to which the Member States are party”. It echoed the French case law<sup>16</sup>, in which the French Périgueux District Court considered that the freedom of movement of persons rooted in the European Union Treaties would take precedence over the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

## Comments

Overall, we could conclude that the Rome IV proposal did move forward for the harmonization of European private international law in family law matters. For the direct jurisdiction, it sets the rules of limited party autonomy, by which the spouses could choose among the courts that has the jurisdiction of their litigation about divorce, judicial separation or marriage annulment for the settlement of their disputes concerning matrimonial property regime. The parties may also agree that the courts of the Member State whose law they have chosen as the law applicable to their matrimonial property shall also have jurisdiction to rule on matters of their matrimonial property regime. If such an agreement is not found, the courts in the Members states of their common habitual residence, last common habitual residence, defendant’s habitual residence, or at last, nationality of both spouses will exercise the jurisdiction. By these common grounds for the distribution of jurisdiction, the recognition and enforcement of decisions concerning the matrimonial property is in principle allowed in other Member states. Beside, the parties are also free to choose the applicable law for the matrimonial property, under the condition of some real connections to the chosen law. The law of the State of the habitual common residence, or the law of the State of habitual residence of one of the or the law of the State of which one of the spouses or future spouses is a national could be chosen, even it is not the law of a Member state. This approach did not only harmonize the application of family law relating to matrimonial property re-

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<sup>16</sup> Tribunal de grande instance Périgueux 17 March 1992, in *Dalloz* 1992, 315.

gime among the Member states, but also promotes a harmonized interpretation of third state’s laws and regulations concerning to the matrimonial property in the European Union.

In perspective of *lex personae*, we clearly realize that in this proposal, except to the principle of party autonomy, the law of the habitual residence is preferred and the *lex patriae* plays a subsidiary role, no matter in the decision of jurisdiction or the choice of applicable law. On the one hand, for the integration of internal market, the notion of state and nationality are gradually meaningless, and on the other hand, the notion of habitual residence promoted in the Hague Conference of Private International Law does find a way for conciliation of conflicts of *lex patriae* and *lex domicilii* in *lex personae* matters, especially substantially on resolving the confusing technical problem of *renvoi*. Nevertheless, does this proposal of Rome IV propose some lessons for other countries?

### **Comparative Perspectives in Matrimonial Regime**

On October 28 2010, the Chinese “Law of the Application of Law for Foreign-Related Civil Relations of the People’s Republic of China” (customarily named the “Chinese Code of Private International Law”, hereinafter “Chinese CPIL”) was passed and it is promulgated since April 1<sup>st</sup> 2011. Coincidentally, in the end of May 2010, the first amendment of Taiwanese “Law Concerning the Application of Law for Civil Matters Involving Foreign Element” (also customarily named the “Taiwanese Code of Private International Law”, hereinafter “Taiwanese CPIL”) since its original promulgation 57 years ago was also passed, and it is promulgated from the 26th May 2011 on.

Basically, these two codes take a legislative form only for conflict-of-law rules, and don’t encompass any clauses for the jurisdictional decisions. According to Chinese and Taiwanese scholars, the direct jurisdiction question would still be decided by analogical application of domestic civil procedure clauses. Besides, the recognition and enforcement of foreign judgments/decisions are still waiting for further legislation in China; but they are already existed in Taiwanese Code of Civil Procedure and Code of Civil Enforcement, in which foreign judgments/decisions are generally recognised with some exceptions similar to the clauses in Rome IV proposal. Consequently, below the comparative studies would be just done in the applicable law for matrimonial regime.

In general, as for the matrimonial regime, these two new codes share the basic principle of party autonomy with the Rome IV proposal. But, for the complimentary application in absence of such an agreement between spouses, they diverge in a significant way, in which then Chinese CPIL embraces principally the habitual residence as a connecting factor, later the law of nationality; and the Taiwanese CPIL still prefers the *lex patriae* approach, later the law of the domicile.

### Matrimonial Regime in Chinese CPIL

Article 24 of the Chinese CPIL stipulates that “as for the property relation between husband and wife, the parties concerned may choose the applicable laws at the habitual residence of one party, of the state of nationality of one party or at the locality of the main properties of one party by agreement. If the parties do not choose, the laws at the mutual habitual residence shall apply; if there is no mutual habitual residence, the laws of the mutual state of nationality shall apply.” Here is expressed a limited version of party autonomy, by limiting the choice of the parties among the law of habitual residence, the law of the state of nationality or the law of the locality of the main properties of one party.

As for the protection of *bona fide* third party, there’s no special rule in the Chinese CPIL.

### Matrimonial Regime in Taiwanese CPIL

In addition to the confirmation to gender equality, the party autonomy principle originated from articles 3 & 4 of the Hague “Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes”<sup>17</sup> is also transplanted into the art. 48 of the Taiwanese Code of PIL. The couple may designate the applicable law by agreement as the law of the state of nationality of one party or the law of the *lex domicilii* of one party. If there’s no agreement between the spouses or the agreement is void, the matrimonial property regime would be regulated by the law of the State of the common nationality of spouses, or the common *lex domicilii*, or the law which has the closet connection to the marriage. But, this article excludes its application

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<sup>17</sup> Available at the website of Hague Convention on Private International Law, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=87](http://www.hcch.net/index_en.php?act=conventions.text&cid=87) (2012/06/01 last visited).

scope from the immovable property of the couple, so that special provision shall be applied according to the law of locality.

But there is a distinctive provision in the New Taiwan PIL. Art.49 stipulates that “if the matrimonial property regimes shall apply foreign law, but the couple does a legal act with a good-faith third party, and in that act the property in Taiwan is the object, regarding to the effects of this matrimonial property regimes for the good-faith third party, the law of Taiwan shall apply”. Its legislation purpose is to protect the transaction security and transaction order in Taiwan. So, three conditions are set in the legislative recitals of this article: first, the applicable law is foreign law; second, some specific property is transacted within the territory of Taiwan; finally, the third person doesn’t know the content of the foreign law. The *lex rei sitae* is apparently used in this provision.

However, the questions emerge: on one hand, why should we protect the so-called good faith third party for whom the understanding the detail of transaction is basic and important? On the other hand, even though we decide to protect the third party, the last condition would be better in words of “the third person doesn’t know the transaction property shall apply foreign law”. It will be more proper for the balancing of both the interests of transaction security and the legal stability. Besides, in comparison to the Rome IV Regulation proposal, the disposition in the Taiwanese CPIL seems to be more forum-oriented in just regulating the third party protection for the property located in the forum; if the property is located in other territorial units, shouldn’t we consider the protection of *bona fide* third party?

### **Convergence and Divergence**

We could summarize the regulations concerning the matrimonial regime in European Rome IV Regulation proposal, the Chinese CPIL and the Taiwanese CPIL in the following columns. For the connecting factors for applicable law, we could simply see the convergence between the Rome IV Regulation proposal and the Chinese CPIL; but, if there’s no agreement between the spouses, the Rome IV Regulation proposal adds the closest-linked law as complementary application, which is similar to the disposition in Taiwan. However, Taiwan still prefers *lex patriae*, and complemented by *lex domicilii*, which seems to be divergent to the European and Chinese dispositions and does not follow the international trend of habitual residence.

	<i>jurisdiction</i>	<i>Applicable Law (agreement)</i>	<i>Applicable Law (no agreement)</i>	<i>Recognition and Enforcement</i>
<b><i>Rome IV Regulation Proposal</i></b>	Limited party autonomy, aided by habitual residence or nationality	-habitual common residence -habitual residence of one party - <i>lex patriae</i> of one party	-common habitual residence -common <i>lex patriae</i> -closest-linked law	Generally recognised and enforceable in other Member States with some exceptions
<b><i>Chinese CPIL</i></b>	none	-habitual residence of one party - <i>lex patriae</i> of one party -locality of properties of one party	-mutual habitual residence -mutual <i>lex patriae</i>	none
<b><i>Taiwanese CPIL</i></b>	none	- <i>lex patriae</i> of one party - <i>lex domicilii</i> of one party	-common <i>lex patriae</i> -common <i>lex domicilii</i> -law of the closest connection to marriage	none (but in Code of Civil Procedure and Code of Civil Enforcement)



Besides, for the concrete application of applicable law, the Rome IV Regulation also regulates the exclusion effects of mandatory rules and public policy. Because in European private international law, there’s still no a real synthesis code for the general parts for these application, such rules seem to be necessary in each Regulation for its own purpose. That’s why in the Regulation proposal, the *renvoi* is also specially pointed out and is declared for its non-applicability.

However, since China and Taiwan have codes for conflict-of-laws rules, they postulate some clauses in their general part of the code for the effects of mandatory rules and public policy. In a more precise way, the art.2.1 of the Chinese CPIL stipulates that “the application of laws concerning foreign-related civil relations shall be determined in accordance with this Law. If there are otherwise special provisions in other laws on the application of laws concerning foreign-related civil relations, such provisions shall prevail.” It could be seemed as the exclusive effects in an interpretative way. Moreover, in its art.4, the Chinese CPIL regulates that “If there are mandatory provisions on foreign-related civil relations in the laws of the People’s Republic of China, these mandatory provisions shall directly apply.” Besides, according to its art.5, “if the application of foreign laws will damage the social public interests of the People’s Republic of China, the laws of the People’s Republic of China shall apply.”

In the other side, the Taiwanese CPIL do not directly regulate the effects mandatory rules, but by the clause for the evasion of law. In art.7 of the Taiwanese CPIL, it is posited that “if the parties of foreign civil matters evade the mandatory or prohibited rules of Republic of China, these rules should nevertheless be applied.” In addition, a public policy clause also exists, according to the art.8, “if the *result* of application of foreign law will violate the public policy of Republic of China, this foreign law shall be excluded.”

So, for the mandatory rule and public policy clauses, there seems to be convergent in all our discussed objects. However, for the *renvoi*, the Taiwanese CPIL still stipulates that “when according to this law, *lex patriae* of the parties should be applied, and if according to the *lex patriae* the foreign subject matter shall be determined by other laws, then the other law should be applied; according to the *lex patriae* of the parties or other laws, the law

of Republic of China shall be applied, shall the law of Republic of China be applied to the foreign-related matter.” The *renvoi* clause remains in the Taiwanese CPIL, because the principle legislative choice for *lex personae* is still for the *lex patriae*, and the *renvoi* dilemma is inevitable. In contrast, in the Chinese CPIL, we see no clauses for *renvoi*, because in the *lex personae* matters, it chose the habitual residence as connecting factors. For the simplification of application of law, the Rome IV Regulation proposal also excludes the possibility of *renvoi*.

## Conclusion

Comparative law studies always help us to enlarge our perspectives and are useful for cross-examination, especially in the private international law discipline. The Rome IV Regulation proposal marks a new trend in the harmonization of European private international law. By its comparison to the newest Chinese and Taiwanese CPIL, a border image displays. How far will the European private international go? Let’s wait and see for the references to others.