



Carruthers, J. M. (2020) Article 28 Effects in respect of third parties. In: Viarengo, I. and Franzina, P. (eds.) *Preview Hardback The EU Regulations on the Property Regimes of International Couples: A Commentary*. Series: Elgar commentaries in private international law series. Edward Elgar Publishing, pp. 271-283. ISBN 9781788115087.

This is the author's final accepted version.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/220669/>

Deposited on: 15 July 2020

Enlighten – Research publications by members of the University of Glasgow
<http://eprints.gla.ac.uk>

<fresh page><cn>ARTICLE 28
<ct>EFFECTS IN RESPECT OF THIRD PARTIES
<au>Janeen M. Carruthers

ARTICLE 28: EFFECTS IN RESPECT OF THIRD PARTIES

1. Notwithstanding point (f) of Article 27, the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

(a) that law is the law of:

- (i) the State whose law is applicable to the transaction between a spouse and the third party;
- (ii) the State where the contracting spouse and the third party have their habitual residence; or,
- (iii) in cases involving immoveable property, the State in which the property is situated;

or

(b) either spouse had complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of:

- (i) the State whose law is applicable to the transaction between a spouse and the third party;
- (ii) the State where the contracting spouse and the third party have their habitual residence; or
- (iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the third party shall be governed:

- (a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or
- (b) in cases involving immoveable 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.

ARTICLE 28: EFFECTS IN RESPECT OF THIRD PARTIES

1. Notwithstanding point (f) of Article 27, the law applicable to the property consequences of a registered partnership between the partners may not be invoked by a partner against a third party in a dispute between the third party and either or both of the partners unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the property consequences of the registered partnership, if:

(a) that law is the law of:

- (i) the State whose law is applicable to the transaction between a partner and the third party,
- (ii) the State where the contracting partner and the third party have their habitual residence or,
- (iii) in cases involving immoveable property, the State in which the property is situated;

or

(b) either partner had complied with the applicable requirements for disclosure or registration of the property consequences of the registered partnership specified by the law of:

- (i) the State whose law is applicable to the transaction between a partner and the third party,
- (ii) the State where the contracting partner and the third party have their habitual residence, or
- (iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the property consequences of a registered partnership cannot be invoked by a partner against a third party by virtue of paragraph 1, the property consequences of the registered partnership in respect of the third party shall be governed:

- (a) by the law of the State whose law is applicable to the transaction between a partner and the third party; or
- (b) in cases involving immoveable 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.

<T/S: please set mini ToC over 2 columns>

A. INTRODUCTORY REMARKS	28.01
B. BACKGROUND	28.02
C. THE RULE ON 'EFFECTS IN RESPECT OF THIRD PARTIES'	28.12

<a>A. INTRODUCTORY REMARKS

<prn>**28.01** Article 28 constitutes an important exception to, or modification of, the rule of general application of the designated *lex causae*, that is, the law applicable to the matrimonial or partnership property regime pursuant to the Property Regimes Regulations. Like Article 27, Article 28 applies irrespective of the manner by which the applicable law is ascertained, that is to say, regardless of whether the law designated as applicable by the Regulations has been identified through operation of Article 22 (choice of the applicable law) or by means of Article 26 (applicable law in the absence of choice by the parties)

<a>B. BACKGROUND

<prn>**28.02** A third party wishing to acquire property from a 'selling spouse' or 'selling partner' needs to know that the putative vendor is free to dispose of the property in question, unencumbered by any prior interest of a spouse or partner. Similarly, a third-party creditor, such as a mortgage provider, who lends money to a borrowing spouse or partner and takes security over an asset purportedly belonging to that party, needs reassurance that its interest is not secondary to, or adversely affected by, any interest

of the borrower's spouse or partner. If, by the law applicable to the matrimonial or partnership property regime, either member of the couple is able to contest the validity of a loan or gift, or otherwise throw doubt upon the other's contractual dealing with a third party, there could be a conflict between the matrimonial or partnership property rights of the spouse or partner and the contractual or property rights of the third party stemming, for example, from Regulation 593/2008¹ or other governing law such as the *lex situs*.

<prn>28.03 A third party in this context may, but will not necessarily, be a commercial creditor or actor; a friend or family member who agrees to lend money to one member of the couple to enable ~~him or her~~ either or both of them to secure a property would constitute a third party. Such an individual is not likely to find it an easy task to ascertain the applicable law governing the matrimonial or partnership property regime. A third party may find it very difficult, and sometimes impossible, to identify the legal system governing the couple's matrimonial or partnership property regime,² and it is highly possible that a third party will contract with one or both spouse(s) or partner(s) on the basis of a law other than that which is applicable to the matrimonial or partnership property regime.

<prn>28.04 Accordingly, a third party may incur additional costs and delay, being required to seek legal advice before entering into a legal relationship with one or both of the couple, and, in certain cases, reservations about the adverse impact of these considerations may lead a third party to decide against contracting with the couple or either of them.

<prn>28.05 The effects of a matrimonial or partnership property regime upon the rights of third parties vary from legal system to legal system. In some systems, a marital or partnership property agreement or other regime will have no binding effect upon a third party unless there is full disclosure by the other transacting party as to his or her marital or personal status by means of registration and the third party consents in full knowledge of that status. In other systems, however, the third party's rights may be prejudiced by virtue of the existence of the matrimonial or partnership property regime. In some legal systems, in order to be binding on a third party and effective, a matrimonial or partnership property agreement (or subsequent variation thereof) must be notarially executed and recorded in a public register.³ Even in the absence of a special matrimonial or partnership property register, protection of third parties may be afforded by registration, for example, in land registers. In other legal systems, a matrimonial or partnership property regime may be recorded on the record of marriage or formal marriage certificate; 'Third parties may then consult the record of

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

² See concerns outlined in UK Ministry of Justice Impact Assessment on Proposed European Community Regulations on Matrimonial Property Regimes and the Property Consequences of Registered Partnerships (15.4.2011) paras 3.31 *et seq*. See also position stated in, 'Matrimonial Property Regime and the Property Consequences of Registered Partnerships – How should the UK approach the Commission's proposals in these areas?' (15.4.11, CP 8/2011) para 41: '[w]hile corporate entities such as banks might be more able to establish the existence of the relevant applicable law, ordinary individuals entering into a legal relationship with the couple would be more at risk of not understanding the implications'.

³ See, e.g., Dieter Martiny, 'The Effects of Marital Property Agreements in Respect of Third Parties' in Alain-Laurent Verbeke, Jens M. Scherpe, Charlotte Declerck, Tobias Helms and Patrick Senaev (eds), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* (Intersentia 2012) 908.

marriage, obtain information from it and subsequently ask to be presented the marital agreement [sic], which generally remains with the notary.⁴ Registration requirements such as these may put the third party on notice and thereby bind the third party in the same way as the parties themselves are bound by the matrimonial or partnership property regime. Some legal systems may permit the third party to seek a guarantee or other form of protection against the prior or competing claim of the transacting party's spouse or partner.

<prn>28.06 While certain legal systems may provide a degree of protection for a third party insofar as national law may provide that the third party ought to have been notified in some way of the existence of the matrimonial or partnership property regime, or ought to have known of the existence of such a regime and expressly consented to it before being bound by its effects, this is by no means a universal protection. It would not have been feasible (by reason of uncertainty – in advance of transacting – as to identity of the applicable law, especially in cases where the applicable law is to be determined, per Article 26, in the absence of choice by parties) to have introduced in the Property Regulations a provision requiring disclosure to third parties of the law applicable to a couple's matrimonial or partnership property regime, or to create a system of mandatory, central registration of the matrimonial or partnership property regime to which a couple is subject.⁵ But to avoid a situation where a third party was uncertain about the law governing his or her legal relationship with the spouse(s) or partner(s), it was necessary to amend the draft regulations to bolster the protection afforded to third parties. Harmonised conflict of laws rules are essential in view of national differences.

<prn>28.07 The 2011 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes⁶ contained a freestanding chapter, Chapter V, entitled 'Effects in respect of third parties', with only one article, namely, Article 35.⁷ Article 35(1) provided that the effects of a matrimonial property regime on a legal relationship between a spouse and a third party were to be governed by the law applicable to matrimonial property regimes [sic], subject to exceptions (draft Article 35(2) and 35(3)), which form the basis for the current exceptions narrated in Article 28(2). The proposed system of third party protection, however, was not as strong or as clear as required, and draft Article 35 was somewhat convoluted and inflexible in its terms.

<prn>28.08 The Explanatory Memorandum accompanying the 2011 Proposal explained the rationale for the proposed provision, namely, 'to reconcile legal certainty for the spouses with the protection of third parties against the application of a rule

⁴ Ibid., 912.

⁵ See UK Ministry of Justice, Impact Assessment on Proposed European Community Regulations on Matrimonial Property Regimes and the Property Consequences of Registered Partnerships (fn 2) para 3.32.

⁶ European Commission, '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.

⁷ Cf, Art 31 of the European Commission, '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 final and 'Proposal for a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' COM(2011) 126.

they could not have known or foreseen'.⁸ It was decided that, in relation to transactions between a spouse and a third party residing in their territory, that is having a common habitual residence, Member States should be able to prevent the spouse from relying on the rules of the matrimonial property regime unless it had been disclosed to the third party, or the third party ought to have been aware of it.

<prn>28.09 The European Commission highlighted⁹ that it is very often the case that inadequate information is available to third parties with respect to the existence of private matrimonial property contracts or statutory regimes. Many legal systems have no register of marriage contracts, and only a small number of Member States have any central register of marriage contracts. As a result, it may not be possible for a third-party creditor or other party transacting with one or both spouses to conduct satisfactory enquiries into the competence or legitimacy of a purported transaction by either or both spouse(s).

<prn>28.10 If application of the law governing a matrimonial property regime should cast doubt on the validity of a debt, gift, or other contractual dealing between one or both spouse(s) and a third party, there would be a conflict between the 'matrimonial property' rights of the spouse(s) and the 'contractual' or 'property' rights of the third party stemming from Regulation 593/2008 or other governing law, such as the *lex situs*. Consider, for example, a situation where a French woman and her Spanish husband elect to choose as the law applicable to their matrimonial property regime French law, being the law of the State of their then common habitual residence. The Spanish husband, meanwhile, transacts with a Spanish creditor, without his wife's knowledge, in a manner which contravenes the provisions of the French matrimonial property regime. According to Article 27(f), the legal relationship between the husband and his Spanish creditor would be governed by French law. The creditor, however, viewing his contract with the husband as a commercial contract, may have expected to have applied to his commercial relationship with the husband the provisions of the Rome I Regulation, and would be surprised to learn that the application of the Rome I Regulation may depend upon the operation of the particularities of Regulation 2016/1103. The Spanish creditor may not even know the marital status of the person with whom he has transacted.

<prn>28.11 The Explanatory Memorandum accompanying the 2016 Matrimonial Property proposal explained in relation to proposed Articles 27 and 28 that:

<quotation>In order to protect the rights of third parties, the [proposal for a Regulation] provides that a spouse cannot invoke the applicable law against a third party in a dispute unless the third party knew or should have known the law applicable to the property regime. The [proposal for a Regulation] specifies the cases in which it would be considered that the third party knew or should have

⁸ European Commission, 'Explanatory Memorandum to the 2011 Commission 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, para 5.5.

⁹ European Commission, 'Commission Staff Working Document: Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Bringing legal clarity to property rights for international couples COM(2011) 327 final, para 5.4.

known the applicable law that governs the matrimonial property regime.¹⁰

C. THE RULE ON 'EFFECTS IN RESPECT OF THIRD PARTIES'

28.12 Article 28 is a negative choice-of-law rule insofar as it provides that, in any dispute between a third party and one or both spouses or partners, a spouse or partner may not invoke against the third party the law applicable to the matrimonial or partnership property regime unless certain conditions are satisfied.¹¹ The underlying assumption is that the law applicable to the matrimonial or partnership property regime will favour the spouses or partners over the third party, and that the interests of the third party have to be safeguarded.

28.13 In effect, Article 28 creates an exception to, or modification of, the general rule that the *lex causae* is the law applicable to the matrimonial or partnership property regime pursuant to the Property Regulations, and thereby protects certainty in relation to transactions and the legitimate expectations of third parties.

28.14 Article 28 is intended to place a check on regulation by the law applicable to the matrimonial or partnership property regime of the contractual or property rights of a spouse or partner in his or her dealings with a third party, in such a way as to give the third party a certain degree of protection, albeit in clearly defined circumstances. Article 28 addresses the matter of applicable law from the perspective of the third party and, thanks to the intervention of the European Parliament,¹² affords clearer protection of third parties than did Article 35 of the original (2011) European Commission Proposal. Article 28 is designed to reconcile legal certainty for the couple with the protection of third parties against the application of a rule that they could not have known or readily foreseen.

28.15 Article 28(1) provides that, notwithstanding Article 27(f) (by which the designated *lex causae* will govern the effects of the matrimonial or partnership property regime on a legal relationship between a spouse or partner and third parties), the law applicable to the matrimonial or partnership property regime between the couple may *not* be invoked by either of them against a third party, in a dispute between the third party and either or both of the spouse(s) or partner(s), *unless* the third party knew of that law (for example because a declaration as to the law which is applicable to their matrimonial or partnership property regime was made by the spouse(s) or partner(s) or, in the exercise of due diligence, should have known of that law.

28.16 Article 28(1) does not prescribe a *tempus inspiciendum*, and so the question is unanswered in the Property Regulations as to the time at which the third party's knowledge or imputed knowledge of the existence and identity of the

¹⁰ European Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' COM(2016) 106 final, para 5.3

¹¹ The relationship between Arts 27(f) and 28 of Regulation 2016/1103 can be compared to that between Arts 7 ('Applicable law') and 8 ('Third parties' rights *in rem*') of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings [2015] OJ 2 141/19.

¹² See Parliament, Committee on Legal Affairs (Rapporteur: Alexandra Thein), 'Final Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' COM(2011) 0126. The Final Report contained proposed amendments 101–103 to amend Art 35 ('effects in respect of third parties'). The article title preferred by the European Parliament Committee was 'protection of third parties'.

designated *lex causae* is to be tested. As a matter of logic, it can be inferred that the time at which the third party's knowledge of the law applicable to the matrimonial or partnership property regime is to be tested is the time at which he or she entered into the transaction in question with the spouse(s) or partner(s) or undertook the obligations in question.

<prn>28.17 Additionally, a question can be asked regarding the nature and extent of knowledge required of the third party in order to satisfy Article 28(1).¹³ Is knowledge of the existence and identity of the designated *lex causae* sufficient to satisfy the test, or is knowledge as to the actual content of the matrimonial or partnership property regime imposed by that law expected? If the designated *lex causae* has a mandatory system of public registration, it may be that knowledge of the actual content of the matrimonial or partnership property regime will be imputed to the third party. Since Article 28 has been drafted with the objective of protecting third parties in their dealings with one or both spouse(s) or partner(s), it is arguably the case that the test of establishing knowledge, actual or imputed, is not to be lightly satisfied. One commentator has indicated, with regard to German private international law, that <quotation>Knowledge means that the party at least knew of the facts that should lead to the conclusion that the legal situation was different than under domestic law. However, the mere fact that the spouse is a foreigner combined with an awareness of this fact is not sufficient.¹⁴</quotation>

<prn>28.18 Article 28 does not specify the legal system according to which due diligence is to be tested, and it is probable that the term is to be interpreted autonomously. The provision is reminiscent of the rule in Article 13 (Incapacity) of Regulation 593/2008, according to which:

<quotation>In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.¹⁵</quotation>

The provision on good faith, as noted in the Giuliano and Lagarde Report,¹⁶ seeks to balance the competing interests of a party who, in good faith, believed himself to be contracting with a person of full capacity, and the counterparty who is under a disability by another law.

<prn>28.19 Only where knowledge – actual or imputed – of the law applicable to the matrimonial or partnership property regime can be attributed to the third party is a spouse or partner entitled to rely on that law in any dispute between the third party and either or both of the couple.

¹³ Notably, Art 28 refers to knowledge of the law applicable to the matrimonial or partnership property regime, and not to knowledge of the mere fact of existence of a matrimonial or partnership property agreement.

¹⁴ Martiny (fn 3) 920 *et seq.*

¹⁵ The prudence/diligence required of a third party is a 'deemed knowledge' drafting device, which is found not only in Art 13 of Regulation 593/2008, but also in Art 10 of Regulation 2201/2003, concerning the continuing jurisdiction of the Member State court of the habitual residence of the child immediately before wrongful removal or retention. The same device is to be found in Art 9 of the Convention of 14 March 1978 on the law applicable to matrimonial property regimes, <http://hcch.net>, accessed 3 February 2020.

¹⁶ Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde [1980] OJ 1 282/1, 34.

<prn>28.20 The Property Regimes Regulations specify in Article 28(2), on the basis of transactional, personal or territorial connection, the instances in which it shall be deemed that the third party knew or, in the exercise of due diligence (that is, acting with good faith), should have known, the identity of the applicable law that governs the matrimonial or partnership property regime. By Article 28(2)(a), the third party is deemed to know the law applicable to the matrimonial or partnership property regime if: (1) it coincides with the law applicable to the transaction between a spouse or partner and the third party, (2) it is the common habitual residence of the contracting spouse or partner and the third party (*not* the common habitual residence of the couple) or (3) in the case of immovable property, it is the state in which the property is situated.

<prn>28.21 No *tempus inspiciendum* is specified in Article 28(2), but for the purposes of paragraph (ii) the relevant time to assess the parties' habitual residence may be considered to be the time at which the third party entered into the transaction or undertook the obligation in question with one or both members of the couple.

<prn>28.22 The elaborately constructed Article 28 extends the 'deemed knowledge' device by providing in Article 28(2) specific circumstances in which the third party must be deemed to possess the knowledge of the identity of the law applicable to the matrimonial or partnership property regime.

<prn>28.23 It is important to note that by Article 1(2)(g) of the Property Regimes Regulations the nature of rights *in rem* relating to a property is excluded from the scope of ~~the~~ each instrument, as is by Article 1(2)(h),¹⁷ any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.¹⁸ Although these exclusions exist, nonetheless compliance with the disclosure or registration requirements of certain legal systems is highly significant for the purpose of Article 28, and specifically for the purpose of deeming knowledge on the part of the third party of the law applicable to the matrimonial or partnership property regime.

<prn>28.24 By Article 28(2)(b), a third party is deemed to know the law applicable to the matrimonial or partnership property regime if either one of the couple complied with the disclosure or registration requirements of the matrimonial or partnership property regime specified by the law of: (1) the State whose law is applicable to the transaction between a spouse or partner and the third party, (2) the common habitual residence of the contracting spouse or partner and the third party or (3) in cases involving immovable property, the State in which the property is situated.

<prn>28.25 Articles 28(2)(a)(iii) and (b)(iii) do not specify rights *in rem* in immovables,¹⁹ but it is probable, though not certain, that the provision is intended to be so restricted.

<prn>28.26 In a case where the third party did *not* know, and could not reasonably have known, the identity of the law applicable to the matrimonial or partnership property regime between the couple, Article 28(3) protects the third party by stipulating that the effects of the matrimonial or partnership property regime in respect of the third party shall be governed by (a) the law governing the transaction between the spouse or partner and the third party; or (b) in cases involving immovable

¹⁷ See Recitals 24–27 of Regulation 2016/1103.

¹⁸ See the analysis under Art 1 in this Commentary.

¹⁹ Nor does Art 28(3)(b).

property or registered assets or rights, the law of the state in which the property is situated or in which the assets or rights are registered.²⁰

<prn>28.27 The outcome in terms of applicable law is that, where the third party is deemed to have knowledge of the law applicable to the matrimonial or partnership property regime, the *lex causae* will be the law of the State whose law is applicable to the transaction between the spouse or partner and the third party, the law of the State of the common habitual residence of the contracting spouse or partner and the third party or the *lex situs* in cases involving immoveable property. Only the second of these laws is not applicable in cases where Article 28(3) is engaged, that is, where the third party did not have knowledge of the law applicable to the matrimonial or partnership property regime.

<prn>28.28 As a separate issue, the rights of third parties whose interests might be prejudiced by a change of the couple's matrimonial or partnership property regime are protected: where the couple expressly elects to make a change of applicable law retrospective, the Property Regimes Regulations provide that the effects of a change of matrimonial or partnership property regime are confined to the parties and shall not affect the rights of third parties. This is recognised explicitly in Article 22 (choice of the applicable law), in terms of which (Article 22(2)), unless the couple agrees otherwise, a change of the law applicable to the matrimonial or partnership property regime made during the marriage or registered partnership shall be effective *inter se* only prospectively, and (Article 22(3)), any spousally-agreed or partner-agreed retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law. Any change in applicable law must be without prejudice to the validity of previous transactions entered into under the prior applicable law and the rights of third parties.²¹

²⁰ Cf, Art 9 of the Convention of 14 March 1978 on the law applicable to matrimonial property regimes, in respect of which see Martiny (fn 3) 918.

²¹ Recital 46 of Regulation 2016/1103; Recital 45 of Regulation 2016/1104.