



**PERSONALIZED SOLUTION  
IN EUROPEAN FAMILY AND  
SUCCESSION LAW**

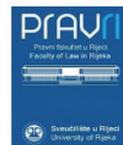
**GUIDELINES FOR PRACTITIONERS  
IN CROSS-BORDER FAMILY PROPERTY  
AND SUCCESSION LAW**

**(A collection of model acts accompanied  
by comments and guidelines for their drafting)**

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This project was funded by the European Union's  
Justice Programme (2014-2020)

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This e-book has been published within the EU Justice Project  
“Personalized Solutions in European Family and Succession Law (PSEFS)”  
No. 800821-JUST-AG-2017/JUST-JCOO-AG-2017.

This e-book is available in Croatian, Spanish, Slovenian, English and Italian  
and has been published as an adapted version for the visually impaired.

More information can be found on the project website [www.euro-family.eu](http://www.euro-family.eu).

Publication year: 2020

ISBN complete work: 978-84-1377-031-4

ISBN: 978-84-1377-033-8

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## FOREWORD

For the last twenty years, I have had the honour of contributing as a national expert in the creation of the European Justice Area, participating in the negotiations of the majority of its instruments, including the three that this fundamental project addresses from an applied perspective.

For this reason, I am immensely grateful for the invitation I have received from Prof. María José Cazorla González to contribute to the project by means of an introduction to *Guidelines for practitioners in cross-border Family property and Succession Law*, an excellent work carried out by Prof. Cazorla González, from the University of Almeria; Assist. Prof. Dougan and Assoc. Prof. Kramberger Škerl from the University of Ljubljana and Prof. Kunda and Assist. Prof. Vrbljanac from the University of Rijeka, entitled *Guidelines for practitioners in cross-border family property and succession law*, which will undoubtedly facilitate the understanding and application of three of the most complex and important European Regulations, from the patrimonial perspective, for the life of European families.

1. The legal basis of Article 65 of the Amsterdam Treaty - has been superseded - following the effort made in the Tampere Council and subsequent Scoreboards-, the Article 81 of the TFEU, consolidated after the Lisbon Treaty, expressly includes the compatibility of the Rules applicable in the Member States regarding conflicts of law and jurisdiction, although family law measures with cross-border implications shall be established by the Council, in accordance with a special legislative procedure, requiring unanimity and prior consultation of the European Parliament.

2. The European Union moves forward, step by step, but firmly, in the creation of its own and unique Family and Succession Law. In doing so, it encourages and improves international mobility, furthering the freedom of movement of workers, which is at the heart of the single market.

The Court of Justice is not indifferent to this development, as demonstrated by the judgment of the Grand Chamber of June 5, 2018 (C-673/16) on the extension of the concept of spouse in same-sex families.

3. From the perspective of legal technique, all instruments related to Family Law are Regulations, which allow their direct and uniform application in the Member States and do not require further national implementation.

Their European field of application has been shaped by each new Regulation.

4. The first one, which referred to parental responsibility and marital jurisdiction and after a few months of application, in which its deficiencies were revealed, gave rise to the first milestone: Regulation (EC) 2201/2003 of the Council, of November 27, 2003, concerning jurisdiction, recognition and enforcement of judicial decisions in matrimonial matters and matters of parental responsibility.

Currently, Regulation (EU) 2019/1111 of June 25 (Brussels II Recast) that will apply from August 1, 2022, expanding its scope to international child abduction in line with the application of the Hague Convention of 1980, whose interrelation with the Member States in order to access third countries gave rise to the Opinion of the Court of Justice (Grand Chamber) 1/2013, of October 14, 2014.

5. Council Regulation (EC) 4/2009 of December 18, 2008, on jurisdiction, applicable law, recognition and enforcement of resolutions and cooperation in matters of maintenance obligations was the second step in the creation of this area.

6. Both instruments allow an international expression, in the participation of the Member States and later of the European Union as REIO (Regional Economic Integration Organizations) in the Hague Conference.

Specifically, Brussels II bis (and at the time, its Recast) should be linked to the Convention of October 19, 1996 on Competition, Applicable Law, Recognition, Enforcement and Cooperation in matters of Parental Responsibility. and of Child Protection Measures on the protection of minors, of which all member states are parties.

Also, the Regulation on Maintenance Obligations, must be seen in relation with the Convention of November 23, 2007 on the international recovery of child support and other forms of family maintenance and its Protocol on applicable law, of the same date, of which the European Union is party in addition to all its Member States (in the case of the Protocol, all member States except for Denmark)

7. Moving forward from there was a complex issue.

The already mentioned challenge that poses the legal basis that requires unanimity of the Member States caused not only the special position of Denmark, the United Kingdom (until its departure) and Ireland, but also the use of the procedure of enhanced cooperation set in art. 20 TEU and 326-334 TFEU, that is, a procedure that allows, with a minimum of nine Member States, to establish advanced integration or cooperation in an area of European structures without the participation of the other States.

8. This variable geometry enabled the application of Council Regulation (EU) 1259/2010 of December 20, 2010, which establishes enhanced cooperation in the field of law applicable to divorce and judicial separation. (Rome III) and of the *Couples Regulations* 2016/1103 and 2016/1104, of June 24, whose participants do not completely overlap.

9. Regulation (EU) 650/2012, of July 4, however, was conceived on a legal basis that was closer to property law than to family law.

Almost four years of negotiations and some important concessions were necessary, as in the case of the *Couples Regulations*, in order to get an opt-in from the United Kingdom, which finally didn't take place.

This Regulation is one of the most complex of those approved in the field of civil law.

For this reason, the practical analysis carried out by this work is especially valuable, because it ensures that such knowledge is extended to legal practitioners and citizens.

10. The latest milestone was approved by the twin *Regulations (Regulation (EU) 2016/1103 and (EU) 2016/1104)*, with the solutions to which apply today in twenty Member States.

Like in all European Regulations in the field of Civil Justice that provide for conflict rules, the law of a third state can be designated, as it is universal in nature.

This book I am to introduce puts the accent accurately on their most relevant elements.

Among them, it is especially remarkable the regulation to safeguard third parties against the change of the applicable law, made difficult by the lack of unification of the institution of the institution of a Civil Registry in the European Union.

11. The last notable instrument in the field of Family Law, of an apparent ancillary character, but of great practical importance, is Regulation (EU) 2016/1191 of the European Parliament and of the Council, of July 6, 2016, in Application since February 16, 2019, which facilitates the free movement of citizens by simplifying the requirements of submission of certain public documents in the European Union, within the increasingly relevant IMI (Internal Market Information) system.

This instrument exempts certain public documents from legalization or apostille, among which are of special relevance in the instruments that we are discussing the documents relative to defunctions; marriage, including the capacity to marry and the marital status; divorce, legal separation and marriage annulment; the registered partnership including the capacity to register as a member of a registered partnership and the membership in a registered partnership; the cancellation of the registration of a registered partnership, judicial separation or the annulment of a registered partnership.

## 12. What will be the next steps?

At this time, under the German rotating Presidency of the European Union in the second semester of 2020, that will be marked by the health, moral and economic crisis of the Covid-19 pandemic, one can only foresee a horizon of consolidation, together with the coordination with the activity of the Conference of the Hague, especially relevant in the field of family law, and which poses new challenges in the fields of Institutional and Public International Law.

In this context, the Presidency highlights as lines of work the advancement of the international protection of vulnerable adults, now partially included in the 2000 Hague Convention - of which only nine Member States are part of the current twelve, together with the United Kingdom, Monaco and Switzerland.

Likewise, the Presidency has shown interest in the analysis and possible regulation of digital wills.

The advancement of the interconnection of Testamentary Registries and European succession certificates is also, for the European Union, a pending action within the e-Justice context.

Having briefly analysed the context in which the European Family and Succession Law is situated, the work that the reader will be able to enjoy below is of primary interest and importance, and provides a great added value to the informative work that the Commission is already carrying out, but aims specifically to working professionals.

Framed in the PSEFS project (<https://www.euro-family.eu>), that is supported by the European Commission, it is called to be an essential tool in the application of European Family Law.

I congratulate and encourage you in this work.

ANA FERNANDEZ-TRESGUERRES

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Number Academic of Spanish Royal Academy of Law.*



# INTRODUCTION

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The European family today is diverse, and proof of this is the different models and their evolution in recent decades, with family relationships being based not only on those constituted by marriage but also on those formed by couples living together in a stable manner.

Against this background, we find countries in Europe where the marriage only is between people of different sexes is allowed, such as Italy, Romania, Slovakia, Greece and Lithuania, so there is currently no regulation for people of the same sex who wish to get married, in the above-mentioned States.

Others Member States regulate registered unions only between people of the same sexes are regulated, such as Croatia or Slovenia; and others where people of the same or different sexes are encouraged to marry can get married, if they can do so instead of joining as a partnership such as Denmark, Finland and Germany.

Thirteen EU countries in 2020: Germany, Malta, the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, Luxembourg, Finland, Ireland, Austria (from 2019) and the United Kingdom (included Ireland Nord from 2019) have approved same-sex marriage, fully granting the same rights to the same-sex family as to the same-sex family. But, Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia do not recognize either marriage or de facto unions formed by persons of the same sex.

To this situation, we must add the increase in the mobility of citizens, who do not always reside in the country where they were born or are nationals, the most immediate consequence of which is the increasing number of transnational marriages, with the added difficulties of a marriage crisis. The private law applicable to the economic and matrimonial effects of separation, annulment, divorce and inheritance law varies depending on the state and the possible agreements reached by the parties, and three Regulations must be analyzed to determine the competent court and the applicable law.

The three EU Regulations on which we will rely in order to provide answers to and support for some of the questions that arise in the area of matrimonial property regimes and the property effects of registered partnerships are as follows:

- Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions concerning matrimonial property regimes
- Council Regulation (EU) 2016/1104 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matters relating to the property effects of mergers.
- Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 concerning jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance

and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession.

The application of these regulations, which are still unknown to many, causes difficulties because of the complexity of a subject that was traditionally linked to the national law of each country and that now goes beyond national borders in an area of freedom, security and justice in the Community, which guarantees the free movement of persons.

Our objective is to facilitate the understanding and application of the regulations, and to this end, models and forms have been included that are preceded by a description that deals with different situations, such as when a couple has joined in marriage or registered as such in a country other than the one in which they reside when the time comes for them to break up, when both or one of them reside in a country of which they are not nationals or are partnered with a foreign person, or when a marriage is between foreigners who reside in a country other than that of their origin.

These situations mean that people sometimes do not know which court in the country has jurisdiction in the field of applicable law, the level of recognition and enforcement of judgments on matrimonial property regimes and the property effects that will arise because it is confusing that, under the regulations, the court of one state may be able to apply the law of another country.

Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden are the countries currently participating in enhanced cooperation. The remaining countries can join when they see fit (Estonia did on 11 February 2018 expressed its intention to join, but as of June 2020 it has not materialized that will).

To gradually establish this area, the Union has been adopting measures for cooperation in civil matters with cross-border repercussions in order to improve the good functioning of the internal market, including the three abovementioned regulations, which are the focus of this book. The book is intended to be a tool to support people who want to be informed about the property effects resulting from marriage or from the death of one of them and to provide professionals with a useful and flexible tool to help them determine which is the competent court, which law is applicable to the specific case, when such acts have cross-border repercussions and the results of the applicable law according to the country when they prepare claims, resolve conflicts, or draft premarital agreements.

Since the JUSTICE PSEFS project<sup>1</sup>, we have been aware of the difficulties and doubts that arise when making claims in terms of agreement on the economic regime when nationality or residence is not common, when the applicable law is not chosen, or when we encounter countries with nonreinforced cooperation<sup>2</sup>. Therefore, we have developed this guide in the form of questions with answers, adding examples that compare the different countries of the Union. We know this is far from a detailed analysis, but the examples represent the casuistry with which European cross-border families and professionals who guarantee the application of the current legal framework must operate. The book ends with some generic and adaptable models to use in filling out a claim or choosing a court and the applicable law when cross-border elements exist.

The forms and the prior practical information presented in the form of a questionnaire in this book have been translated into five languages, English, Spanish, Italian, Croatian and Slovenian. The intention is to facilitate access to and understanding of them by European citizens and professionals by systematically clarifying the information on the law that applies, the existence and regulation of the matrimonial property regime in each EU country for both nationals and spouses of different nationalities, what is laid down in

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1 Ruggieri, L., Kunda, I, and Winkler, S. (Eds): "Family Property and Succession in EU Member States National Reports on the Collected Data". Sveučilište u Rijeci, Pravni fakultet. Croatia. 2019. ISBN 978-953-8034-25-1.

2 Cazorla González, MJ.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio tras la entrada en vigor del Reglamento UE 2016/1104". Revista Internacional de Doctrina y Jurisprudencia, nº 21 Diciembre de 2019, pp.87-104.

the European civil code whether national law stipulates the property regime for registered and unregistered partners, what are the consequences after the death of one of the parties and what is the competent judicial authority to which we should turn when there is a conflict.



# CHAPTER 1

## DETERMINING WHAT COURT HAS JURISDICTION IN MATTERS RELATING TO MATRIMONIAL PROPERTY REGIMES

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### I. GUIDELINES ON JURISDICTION

We will start with how we can determine the court and which bodies have jurisdiction on the basis of Regulation (EU) 2016/1103 of 24 June establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matters relating to matrimonial property regimes, which has been fully applicable since 29 January 2019.

#### 1. Do notaries have jurisdiction to resolve conflicts and questions arising from the matrimonial property regime?

Yes, provided that they have been appointed by their state as courts within the meaning of Article 3 (2) of Regulation (EU) 2016/1103, as appropriate.

In particular, in Whereas 29 of the regulation, the term court is to be understood in a broad sense, including notaries as courts having jurisdiction in matters of matrimonial property regimes (Whereas 30 and 31), provided that they comply with Article 3 of the regulation and that in their respective states, they are able to exercise their jurisdiction. Thus, acts issued by notaries in this connection must be circulated in accordance with the provisions of the regulation relating to authentic acts.

It should be borne in mind that unless a dispute arises, in which case jurisdiction will lie with the competent court, notaries have been appointed in some Member States as courts within the meaning of Article 3(2) of the regulation and are therefore bound by these rules of jurisdiction, although they may continue to act freely in drawing up a marriage contract or a choice of law agreement. This is the case in Spain, Luxembourg and the Czech Republic<sup>3</sup>, among others.

In most countries, for example, Germany, Austria, Belgium, Bulgaria, Italy, Malta, the Netherlands, Portugal, and Slovenia, notaries are not bound by these rules of jurisdiction (unless they are appointed by their state in compliance with the provisions of 3 (2) and can therefore act freely in such cases as drawing up a marriage contract or a choice of law agreement. A similar situation is found in Greece, where a notary

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<sup>3</sup> Conclusions of Advocate General and Bot., delivered on 28 February 2019. *WB v Notariusz Przemysław Bac*. Reference for a preliminary ruling from the Court of Justice of the European Communities (Sąd Okręgowy w Gorzowie Wielkopolskim). Reference for a preliminary ruling - Judicial cooperation in civil matters - Regulation (EU) No 650/2012 - Article 3(1)(g) and (i) - Article 3(2) - Concept of 'court' - Circumstances in which the Member State has failed to notify notaries as non-judicial authorities exercising judicial functions on the same basis as courts. Case C-658/17. European Jurisprudence Identifier: ECLI:EU:C:2019:166. CELEX Code: 62017CC0.

has the power to conclude a cohabitation contract but not a marriage contract, or in Slovenia, where from 15 April 2019 they have had the ability to conclude a formal marriage contract (notarial act). However, notaries in the Netherlands are not considered courts within the meaning of this regulation.

## 2. Is it possible to conclude an agreement on the choice of court under Regulation (EU) 2016/1103?

Yes, this possibility is determined by Article 7 of Regulation (EU) 2016/1103, which allows exclusive jurisdiction to be conferred on the court of a Member State, provided that it participates in the enhanced cooperation, to resolve questions relating to matrimonial property regimes by formalized agreement (Article 7.2) in two different areas:

- where the agreement is made on the basis of one of the cases set out in Article 6 of the regulation, which describes situations linked to habitual residence or nationality, so that the parties can choose the court of a Member State whose law is applicable by virtue of Article 22 (agreement valid by choice) or Article 26(1)(a) or (b) (agreement valid in the absence of choice).
- where the agreement is made by choosing the courts of the Member State where the marriage took place.

## 3. Can the rules on jurisdiction contained in Regulation (EU) 2016/1103 prevent the concentration of the proceedings from being brought before the court of the same state?

Not for **proceedings brought in one of the states participating in enhanced cooperation**, because in these states are applicable the rules of **functional jurisdiction** by connection which are provided by Articles 4 and 5 of the Regulation.

The rules of functional jurisdiction by connection are applicable to two situations:

- for Regulation (EU) 2016/1103 on matrimonial property regimes, the rules of functional or connected jurisdiction are applicable, provided that the court has jurisdiction to rule on **divorce, legal separation or marriage annulment under the Brussels IIa Regulation**, unless the proceeding can be based only on specific grounds of jurisdiction, in which case the concentration of jurisdiction can be authorized only with the agreement of the spouses, and
- **on the death of one of the spouses**, the succession is settled in accordance with **Regulation (EU) 2012/650**. Whereas 33 of Regulation (EU) 2016/1103 refers to Regulation (EU) 2012/650 for the connection in matters of succession.

Whereas 34 of Regulation (EU) 2016/1103 includes the reference to jurisdiction in connection with proceedings pending under Council Regulation Brussels IIa 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility<sup>4</sup>. This regulation applies without distinction as to whether the marriage was concluded before or after 29 January 2019 in order to determine the rules of jurisdiction of each Member State in which proceedings for divorce, legal separation or marriage annulment may be initiated<sup>5</sup>.

Regarding the competence to determine the court in matters relating to divorce, legal separation and annulment, the provisions of **Article 3 of Regulation 2201/2003** will be followed. This article contains the

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<sup>4</sup> This Regulation has recently been reformed by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, and on international child abduction, which will enter into force in 2022.

<sup>5</sup> Gray, J. and Quinzá Redondo, P.: “Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession”. *Journal Family and Law*. November. 2013.

seven courts applicable to any nationality of the spouses, even if none of them is a national of a Member State of the EU, and the competence may be transferred to the courts of the Member State when that state is:

- the place of the spouses' habitual residence;
- the last place of habitual residence of the spouses, provided that one of them still resides there;
- the place of the defendant's habitual residence;
- in the case of a joint application, the place of habitual residence of one of the spouses;
- the place of the claimant's habitual residence if he or she has resided there for at least 1 year immediately prior to the filing of the application; or
- the place of the applicant's habitual residence if he or she has resided there for at least six months immediately prior to the lodging of the application and is a national of the Member State in question or, in the case of the United Kingdom and Ireland, is domiciled there.

Finally, the courts of a Community country will have jurisdiction where both spouses are nationals of the same country or, in the case of the United Kingdom and Ireland, where they have a common domicile.

**All these criteria are objective, alternative and flexible** since the aim is to enable the parties to choose the simplest court of jurisdiction, such as the one where they have their habitual residence, without excluding the possibility that they may prefer to apply to the courts of their home state, either because of a question of language or because of a better knowledge of the rules and the judicial system<sup>6</sup>.

All these rules relate solely to international jurisdiction<sup>7</sup>: the court or authority in a Member State with jurisdiction in a particular case is determined by national procedural provisions. However, it should be noticed that the rules of international jurisdiction that exist under the law of the Member State are not applicable *a priori*. So, the court or authority will be determined depending on whether one of the spouses is habitually resident in that Member State or is a national of that Member State or if, in the case of Ireland and the United Kingdom, he or she is domiciled there (Article 6 of Regulation (EC) 2201/2003).

In addition, and exceptionally, national rules on international jurisdiction come into play if no court in any Member State has jurisdiction in the case by virtue of the rule of residual jurisdiction in Article 7 of the Brussels IIa Regulation, which was clearly established by the European Court of Justice (ECJ) in the Sundelind/López case (Case C-68/07)<sup>8</sup>.

#### 4. For the matrimonial property regime, for marriages celebrated before 29 January 2019, which is the competent court?

The competent court is the one resulting from the internal **procedural and civil rules of each state unless the matrimonial property regime has been voluntarily submitted** to the court in accordance with Article 22 of the regulation<sup>9</sup>.

<sup>6</sup> Reference for a preliminary ruling: Court of the cassation - France. Case C-168/08. European Court Reports 2009 I-06871. European Court Reports: ECLI:EU:C:2009:152. Opinion of Advocate General Kokott delivered on 12 March 2009. Judicial cooperation in civil matters - Regulation (EC) 2201/2003 - Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility - Article 3(1) - Jurisdiction in divorce matters - Relevant connecting factors - Habitual residence - Nationality - Spouses residing in France who are both French and Hungarian nationals. Vid. Pérez Vallejo, A.M.: "Notas sobre la aplicación del Reglamento (UE) 2016/1103 a los pactos prematrimoniales en previsión de la ruptura matrimonial". Revista Internacional de Doctrina y Jurisprudencia. No 21. December. 2019.

<sup>7</sup> Case 412/98, Group Josi paras 47 and 61: An instrument providing for harmonized rules on international jurisdiction in case where the defendant is domiciled in an MS is applicable even if the claimant is domiciled in a third country.

<sup>8</sup> [https://www.era-comm.eu/EU\\_Civil\\_Justice\\_Training\\_Modules/kiosk/courses/Family\\_Law\\_Module\\_1\\_ES/Module%201/jurisdiction.html](https://www.era-comm.eu/EU_Civil_Justice_Training_Modules/kiosk/courses/Family_Law_Module_1_ES/Module%201/jurisdiction.html)

<sup>9</sup> Giobbi, M.: *The law applicable to matrimonial property regimes after the Regulation (EU) No. 2016/1103. The impact upon the Italian law*, 6th SWS International Scientific Conference on Arts and Humanities 2019 Conference Proceedings, volume 6, issue 1, pp. 213-218.

First, when determining which court has jurisdiction in matters relating to matrimonial property regimes, a distinction must be made between whether the marriage was concluded before or after 29 January 2019, as this is the date on which Regulation 2016/1103 entered into force, and whether there was an agreement to submit the case to a court on that date.

Prior to 29 January 2019, the jurisdiction of the courts was determined by the rules of procedural jurisdiction within each Member State in international cases, although the parties may have voluntarily agreed to submit to the courts of the Member State whose law was applicable in accordance with Article 22 or Article 26(1)(2) of each of the regulations.

In this area, we must bear in mind that in disputes arising from the classification or transfer of assets, liability for debts and other issues referred to in Article 27 of each regulation, there are also variables to be considered when determining the competent jurisdiction. For example, Luxembourg's domestic law regulates that disputes in matters of matrimonial property regimes are independent of the location of the immovable property, but in Croatia, Latvia, Malta and Slovenia, domestic law determines that their courts have jurisdiction over disputes arising from immovable property in the territory, regardless of residence.

Moreover, under the principle of free choice of court, a choice is facilitated that takes into account the situation and interests of each marriage in a personalized manner, but it is necessary to know when such an agreement can be made.

## 5. How is the jurisdiction of the court determined under (EU) Regulation 2016/1103?

The regulation applied as of 29 January 2019. Therefore, the claims, judgments or other acts delivered on that day, at a later date or by voluntary submission of the parties are determined by the rules contained in Regulation (EU) 2016/1103 for matters affecting the matrimonial property regimes which are dealt with by different courts according to the circumstances described above.

A. - Where the legal relationship is terminated by the death of one of the spouses, the court with jurisdiction over the succession will have jurisdiction (Article 4 in both regulations).

**1st CONNECTION FORUMS:** Art. 4 of Regulation (EU) 650/2012

B. - In cases of divorce or separation, as the case may be, jurisdiction shall lie with the court having jurisdiction to settle the dispute of the marriage.

Divorce, legal separation or marriage annulment pursuant to Article 5 of Regulation (EC) 2201/2003, with agreement in certain cases.

C. - In other cases, it makes a difference whether there is agreement:

\* Tacit or express submission: It is express when the spouses agree on the jurisdiction corresponding to a Member State of applicable law (Article. 6) or to the place where the marriage was celebrated (Art. 7), although such agreement must be in writing, dated and signed by the parties. It is tacit when an application and defense are made to the same court without opposition (Article 4 or Article 5(1) (Article 8)

### **2nd FORUMS OF TACIT OR EXPRESS SUBMISSION:**

Tacit: Art. 4 or Art. 5.1 and Art. 8 of Council Regulation (EU) 2016/1103

Expresses: Art. 6 and 7 of Council Regulation (EU) 2016/1103

\* In the absence of an agreement, the application shall be brought before the courts of the Member State concerned to resolve any question relating to its matrimonial property regime, except in the case of the death of one of the spouses or of a matrimonial dispute in the following order<sup>10</sup>:

1. **If the spouses are resident in a state at the time when the application is lodged**, the nationality of the parties or where the marriage took place does not matter because what matters is the common habitual residence at that time.
2. **When both spouses marriage do not reside in the same State**, because one of them lives in another country, the application shall be filed where both have established their common residence, provided that one of them still resides there.
3. **Where the members of the marriage are each resident in different states**, there are two situations, the first taking precedence over the second; the basis for this is cases where the spouses have not had a common habitual residence for a long time:
  - \* First: In the country where the defendant is habitually resident.
  - \* Subsidiary: In the country where the claimant is habitually resident, provided that he or she has resided in that country for at least one year before the lodging of the application
4. **When the spouses agree jointly**. If they consider filing a lawsuit, then they will choose at their own discretion the country where either of them habitually resides, knowing that the agreement has the force of law and that if the relationship should subsequently become complicated, there will be no possibility of modifying the agreement.
5. **Where the claimant has resided for at least six months in the country of which he or she is a national**. In this case, he or she may file the claim or application in the country of which he or she is a national.
6. **If the spouses are both nationals of the same state**, they may submit their application to settle the matrimonial property regime without any requirement of residence in their country.

**3rd FORUM IN OTHER CASES:**  
Art. 6 Council Regulation (EU) 2016/1103

Note that the requirements of residence or domicile are variables that may cause some distortion, either because there are circumstances that are undetermined, as with the definition of the two terms, or because the time to determine residence will vary depending on the country, although in case C-523/07<sup>11</sup>, the ECJ determined that habitual residence corresponds to the place where the person has some integration into a social and family environment. From this point on, the national court will have to determine this matter on the basis of the specific circumstances. Therefore, we find differences in the determination of habitual residence in the legislation of the Member States:

- When we consider the indeterminacy of the term residence/domicile: while in Portugal or Poland, the domicile is where the habitual residence is, in Ireland, there is a domicile of origin equivalent to the concept of habitual residence and a domicile of choice that is identified with the place where there is a permanent or indefinite intention to reside, and in Italy, where the domicile is the place

<sup>10</sup> Case C-281/02, *Owusu*, paras 25-6 and 41-3: Such an instrument is applicable even where both parties are domiciled in the same MS; the court of the MS in question may not decline jurisdiction in favour of the court of a third country, even where all other elements of the case are connected only with that country.

<sup>11</sup> Judgment of the Court (Third Chamber) of 2 April 2009 (reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland)) — proceedings brought by A (Case C-523/07) - Korkein hallinto-oikeus (Finland)] — A. <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:62007CA0523&from=EN>

where the professional activity and interests of the person. This place doesn't coincide with the place of the residence, because this is in the place in which the person has his/her habitual abode.

- The time of residence varies depending on the country, ranging from the 40 days prior to the filing of the application in Scotland to the three months of prior residence required in Cyprus or the 12 months required in Belgium or Malta. However, we also find the temporary indeterminacy of the last residence or domicile as it happens in Greece, England or Wales, where it is enough to have a domicile in the territory.

All European countries have in common that they take residence/domicile and nationality as the closest connecting elements to regulate in their rules of international private law and/or civil law, in determining the competent international body that must resolve conflicts and questions arising from the property effects in marriages, in matrimonial disputes with members of different nationalities and in their division of property by divorce, annulment, separation or death.

**4<sup>th</sup> FORUM NECESSITATIS:** Art. 11 of the regulation. It determines that before the impossibility or difficulty of initiating a procedure in a Third state with which the case is closely connected, it can be competent to choose the court of other State with sufficient connection.

The alternative jurisdiction is of an exceptional nature and applies without undue delay: when the court has jurisdiction under one of the forums set out in Articles 4 to 8 but understands that in its private international law, the marriage in question is not recognized for the purposes of the matrimonial property regime proceedings, it may decline jurisdiction. In cases of nonrecognition (under Articles 4 or 6) where the parties agree to confer jurisdiction on the courts of any other Member State in accordance with Article 7, jurisdiction to rule on matrimonial property regimes shall lie with the courts of that Member State. In all other cases, jurisdiction to rule on matrimonial property regimes shall lie with the courts of any other Member State by virtue of Article 6 or 8 or with the courts of the Member State in which the marriage takes place.

Nothing in the preceding paragraph shall apply when the parties have obtained a judgment of divorce, legal separation or marriage annulment that is likely to be recognized in the Member State of the forum.

**Alternative jurisdiction:** on grounds of lack of competence of the court (Article 9 Council Regulations): the court is not competent.

Regarding subsidiary jurisdiction, we will enter into it when no court of a Member State has jurisdiction under Articles 4 to 8 or when all have declined jurisdiction under Article 9 and none has jurisdiction under Article 9(2). The courts of a Member State shall then have jurisdiction insofar as immovable property belonging to one or both spouses is situated within the territory of that Member State, in which case the court seized shall have jurisdiction only over the immovable property in question.

**Subsidiary jurisdiction:** on the basis of the location of property (Art. 10 Council Regulation)

## 6. The jurisdiction of the competent court, where it is regulated in each EU State?

In a case involving more than one EU country, people need to know which court should hear their case.

<b>AUSTRIA</b>	<b>BELGIUM</b>	<b>BULGARIA</b>
§ 114a Act on Jurisdiction (JN)	Art. 5 and 42 of Law of 16 July 2004 holding the Code of private international law	Art. 7 of the CPIL and § 105 Code of Civil Procedure The family court has jurisdiction in all family-related disputes - Article 572 bis of the Judicial Code 2007.
<b>CROATIA</b>	<b>CYPRUS</b>	<b>CZECHIA</b>
Art. 56 and 59 Private International Law Act (ZMPP)	Section 11 (3) of Law 23/1990, as amended by Law 63 (I)/2006 and Section 14 of the Family Courts Law 23/1990	Section 6, 49 and 67 Law. Czech private international law is Act No. 91/2012 Coll. on Private International Law
<b>DENMARK</b>	<b>ESTONIA</b>	<b>FINLAND</b>
Sections 4 and 5 of Act on Division of Matrimonial Property, and Section 74 Danish Administration of Estates Act	§ 9 and 102 according to the Estonian Code of Civil Procedure.	§ 127 Marriage Act.
<b>FRANCE</b>	<b>GERMANY</b>	<b>GREECE</b>
Art. 1070 of the Code of Civil Procedure and Art. 14 and 15 Civil Code	§ 105 and 262 FamFG Law on the Procedure in Family Matters and in Matters of Voluntary Jurisdiction	Art. 3 and 22, 39, 611 and 612 Code of Civil Procedure
<b>HUNGARY</b>	<b>IRELAND</b>	<b>ITALY</b>
Art. 102 and 103 of Act XXVIII of 2017 on International Private Law	Section 31(5) Judicial Separation and Family Law Reform Act 1989 and section 38(3) Family Law (Divorce) Act 1996)	Art. 3 and 32 Law No. 218 of 31/05/1995)
<b>LATVIA</b>	<b>LITHUANIA</b>	<b>LUXEMBOURG</b>
Art. 26.1 Code of Civil Procedure	Art. 784 Code of Civil Procedure	Article 27-46 New Civil Procedure Code (Law of 18 July 2018) and Art. 1018 Law of 27 June 2018 instituting the family court.
<b>MALTA</b>	<b>NETHERLANDS</b>	<b>POLAND</b>
Code of Organization and Civil Procedure 16 December 2003. Book First §36: Competence of the Civil Court. Added by:1.2018.2. amended by:XVI.2019.3.	Book 10 of the Dutch Civil Code	Art. 1103 and 1106 of the Code of Civil Procedure.
<b>PORTUGAL</b>	<b>ROMANIA</b>	<b>SLOVAKIA</b>
Art. 82 Civil Code and Art. 75 Code of Civil Procedure	Art. 170 and 173.1 Romanian Law on Private International Law No. 105/1992	§ 88 Občianskeho súdneho poriadku (OSP) – Code of Civil Procedure
<b>SLOVENIA</b>	<b>SPAIN</b>	<b>SWEDEN</b>
Art. 48 and 67 of the Private International Law and Procedure Act	<b>For all Autonomous Communities</b> Art. 9.2 and 107.2 Civil Code and Art. 50-60 LEC and 36 LEC. – Civil Procedure Law	§ 2 and 18 of the Act (1990:272
<b>UK*</b>		
<b>England/Wales</b> Sections 21 ff and 25 Matrimonial Causes Act 1973 <b>Scotland</b> Section 39 Family Law (Scotland) Act 2006) <b>Ireland Nord</b> The Matrimonial Causes Order 1978 and § 1.4 (2) the Family Proceedings Rules 1996: county Court Rules 1981		

*Note: Table prepared by the author.*

\*Although the United Kingdom is not currently a member country, marital relationships do exist, and in support of these families, we decided to include it in the table.

## II. MODEL CLAUSES

- ☞ CHOICE OF COURT AGREEMENT BETWEEN SPOUSES OR FUTURE SPOUSES
- ☞ CHOICE OF COURT AGREEMENT IN MATRIMONIAL PROPERTY REGIMES IN CONNECTION TO DIVORCE, LEGAL SEPARATION OR MARRIAGE ANNULMENT (ART. 5.1 OF COUNCIL REGULATION 2016/1103)

## III. GUIDELINES ON LAW APPLICABLE IN MATTERS OF MATRIMONIAL PROPERTY REGIMES

The jurisdiction rules set out above differ from the conflict rules. The Rome III<sup>12</sup> Regulation will therefore apply where there are connections under the law applicable to the legal grounds for divorce or separation or where there is a connection with conflicts of matrimonial property regimes.

Until Regulations (EU) 2016/1103, 2016/1104 and 2012/650 entered into force, the applicable law was the law of the forum in accordance with the rules of international law in each of the states. It is not the aim here to provide a detailed analysis of whether it is appropriate to provide the legal bases of the legal economic system of each country, whether there is freedom of choice or whether there is a possibility of changing the forum. However, among the many questions that the regulations cited make clear, there is one, in our view, that should be highlighted: the autonomy of the parties to choose the applicable law.

We believe that although Regulation (EU) 2016/1103 does not modify the substantive law of the states, since its function is to strengthen cooperation on jurisdiction, applicable law, and recognition and enforcement of judgments with property effects in matrimonial property regimes, it is necessary to know the substantive law of each state involved, not only to resolve conflicts when the time comes but also as information prior to the exercise of the right of option that the parties have to choose the applicable law in many states or not to do so because of the place where the marriage was contracted or the place of residence. In this sense, we understand that the law is more useful from the temporary and economic point of view if the spouses are informed and advised about it prior to the moment in which the problem of the crisis of marriage, the couple, or the death of one of them already exists.

**The differences between one applicable law and another in each state of the European Union are decisive in the legal liquidation of the economic regime**, since distribution in a community property regime is not the same as when the liquidation of assets takes place under the regime of separation of assets or by deferred or limited community property<sup>13</sup>.

Furthermore, the legal regime applicable in each country with respect to marriages is different, since some states recognize and regulate marriages of the same and different sexes, while others do not recognize those contracted between persons of the same sex.

### 1. Does Regulation (EU) 2016/1103 apply in full to all Member States from its entry into force?

No, the territorial competence of the regulation is fully applicable only in the 18 countries participating in enhanced cooperation<sup>14</sup>, although the *erga omnes* application effects through Article 20 can be extended

<sup>12</sup> Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation on the law applicable to divorce and legal separation (Rome III Regulation), which binds 17 Member States of the European Union, including Spain,

<sup>13</sup> Palao Moreno, G.: “La determinación de la ley aplicable en los reglamentos en materia de régimen económico matrimonial y efectos patrimoniales de las uniones registradas 2016/1103 y 2016/1104”. *Revista española de derecho internacional*, ISSN 0034-9380, Vol. 71, N° 1, 2019.

<sup>14</sup> Belgium, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Spain, Finland and Sweden) Only if a court in one of these States can determine its international jurisdiction, can it also use the rules on applicable law contained in the Regulation.

when the universal application is established: “the law determined to be applicable under this Regulation shall apply, even if it is not the law of a Member State”. Article 62 adds that the regulation does not affect existing conventions, except those between Member States, or take precedence over them. In the case of Palao Moreno<sup>15</sup>, this refers mainly to the 1978 Hague Convention, which continues to apply in France, the Netherlands and Luxembourg, and the conventions on this subject signed by the Scandinavian countries.

It would seem that the parties may choose the applicable law of any Member State under Article 20 and by the principle of free choice regulated in Article 22 in each regulation, including the law of a nonparticipating Member State. In this case, the limitations set out in Article 22 of Regulation (EU) 2016/1103 on the law of the participating or nonparticipating state must be taken into account.

In Whereas 11 of each of the respective regulations, Belgium, Bulgaria, the Czech Republic, Greece, Germany, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden expressed their wish to establish enhanced cooperation among themselves (during the work, Cyprus expressed a wish to participate in enhanced cooperation) in the field of the economic systems of international couples, in particular jurisdiction, applicable law, and recognition and enforcement of decisions in matters of matrimonial property regimes, and requested that the Commission submit a proposal to the Council to this end.

## **2. Can the spouses choose the applicable law under Regulation (EU) 2016/1103 if the marriage took place before 29 January 2019?**

Yes, but they must agree to do so in accordance with the provisions of Article 22 of the regulation, thereby modifying the applicable law in force up to that time, in order to resolve possible conflicts of law with the express manifestation of the will of both parties and without retroactive effect, unless otherwise expressly provided by them.

Therefore, the effects referred to the temporary application (retroactivity) of the change of applicable law will have only future effects, preventing any retroactive changes of the applicable law that could negatively affect the rights of third parties derived from said law.

The regulation therefore applies to marriages concluded under the regulation (from 29 January 2019 on) and when agreed upon by the parties, who may opt for the regulation to apply to them when determining the law applicable to matrimonial property effects in cross-border relations since its entry into force.

This approximation of the regulation of uniformity of the law applicable to the economic regime in cross-border situations within the European Union is a novelty, since until that time, national regulations applied. However, we must be aware of the difficulties arising from the substantive and conflictual diversity that will arise from the regulations of each state because the existing asymmetries in this area are evident, and we have tried to highlight them in the tables that appear later showing the legal economic regime applicable to marriages and the freedom the parties have in choosing or modifying it.

## **3. Based on the principle of free choice of applicable law, what are the possible scenarios?**

According to Article 22 of Regulation (EU) 2016/1103, the free choice of applicable law is reduced to a maximum of six different state systems if the parties have dual nationality and four if they have only

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<sup>15</sup> Iglesias Buigues, J.L. and Palao Moreno, G.: “Régimen económico matrimonial y efectos patrimoniales de las uniones registradas en la Unión Europea”. Ed. Tirant lo Blanch. 2019. Mota, H.: “Regímenes matrimoniales y sucesión después de la disolución por muerte de un matrimonio transfronterizo: un caso de estudio”. Núm. 21 (2019). Revista Internacional de Doctrina y Jurisprudencia. Mota, H., “La armonización de la ley aplicable a los regímenes matrimoniales en la Unión Europea. The long and winding road.”, in \*Mónica Guzmán Zapater/Carlos Esplugues Mota (Dirs.) Persona y familia en el nuevo modelo español de derecho internacional privado, Valencia, Tirant lo Blanch, 2017 (a).

one each. One option for each nationality and place of habitual residence is different from the other. The options may be reduced for same-sex marriages in twelve EU Member States that do not provide for their regulation: Bulgaria, the Czech Republic, Cyprus, Slovenia, Slovakia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Croatia and Romania.

On the basis of the possible options and building on the work that has been done under the PSEFS project, the three possible scenarios that could affect marriages in determining the applicable law should address whether there is enhanced cooperation: where both parties are nationals of the countries referred to in Whereas 11 above; if only one of the partners or consorts is a national of a state that is part of the enhanced cooperation, and the other is not; and where neither of the parties is a national of a state that is subject to enhanced cooperation, in which case we will take into account the Rome III Regulation and the rules of the applicable state.

This apparently simple approach contains asymmetries in the material and geographical scope of the application of both regulations, which will have to be clarified in accordance with the specific case.

INFORMATION: This is an interactive map where selecting two countries and two situations to choose from (marriage or registered partnership) provides general information on the applicable law. For an exact determination of the applicable law in each individual case, numerous circumstances must be considered because the criterion of nationality does not suffice for the determination of the applicable law in every case. In case of legal questions, we advise you to seek professional advice. The taxonomy enables the search for the different typologies of mixed marriages and transnational families with people from different countries.

 LINK: <https://www.euro-family.eu/eu-database>

#### 4. Can spouses or future spouses change the law applicable to the matrimonial property regime by mutual agreement? Are there any requirements for the material validity of the agreements?

Yes, Article 22 of Council Regulation (EU) 2016/1103 regulates **the free choice of the law applicable to the matrimonial property regime**, although it is restricted to two options (residence and nationality), and its effects can be increased under material competition with the unity of the law applicable to the matrimonial property regime (Article 21 of the regulation).

The choice of applicable law under Art. 22 of Council Regulation (EU) 2016/1103 is based first on the law of the state where the spouses or future spouses, or one of them, have **their habitual residence at the time the agreement is concluded** and, failing that, on the law of the **state of nationality of either spouse or future spouse at the time the agreement is concluded**.

The following articles add requirements for the **formal validity** of choice of law and of marriage contracts, together with the **material validity** of the agreements. Here, it should be borne in mind that the assessment of whether consent has been given is a matter for the law of the country where the person has his or her habitual residence at the time that the court is dealing with the case and that it is not reasonable to determine the effect of his or her conduct in accordance with the law specified in paragraph 1, as provided for in Article 24 of the regulation governing the existence and material validity of a choice of law agreement.

Unless otherwise agreed upon by the spouses, any change in the law applicable to the matrimonial property regime made during the marriage shall have effect only in the future. However, a retroactive change of the applicable law pursuant to paragraph 2, if agreed upon, by the spouses shall not adversely affect the rights of third parties arising from that law.

## 5. Does Regulation (EU) 2016/1103 set out any requirements for a valid choice of law agreement?

Yes, the regulation establishes requirements of material validity, as mentioned in the previous question, and of formal validity, to which the requirements established in the **law of the country of residence must be added for its formalization**, as we will see below.

The formalization requirements for the election agreement to be concluded **in a separate document or included as a clause in an agreement on the economic matrimonial regime** are specified in Article 23.1 of Regulation (EU) 2016/1103, which determines that the agreement must be expressed in writing (including asserting the agreement by means of electronic communications) and dated and signed by both parties. It then adds three formal requirements that vary according to the specific situation that might arise:

- Where the agreement is concluded in a Member State where **both spouses have their habitual residence**, and that state lays down additional formal requirements for marriage settlements, those requirements will apply.
- Where the agreement is concluded with **each spouse having his or her habitual residence in a different Member State**, and with different formal requirements for marriage settlements, the agreement will be formally valid if it satisfies the requirements of one of the two laws.
- Where on the date of conclusion of the agreement, **only one of the spouses has his or her habitual residence in a Member State** and the law of that state lays down additional formal requirements for marriage settlements, those requirements shall apply.

No additional requirement may be imposed when the spouses or future spouses are not resident in any of the participating countries.

Finally, it should be added that most Member States regulate freedom of contract in their national laws, not only as regards the applicable law but also as regards the choice of economic system or agreement on the nature of the property. However, there are some differences as regards the formalization and time of completion of the agreement. Thus, Austria, Croatia, Germany, Spain, France, Greece, Finland, Italy, Lithuania, Latvia, Luxembourg, Poland, Malta and the Netherlands, among other states, admit agreements at any time, provided that they are duly formalized before a notary and registered so that they are effective against third parties from that moment on.

## 6. What are the effects of the applicable law agreement, and what is the scope of the applicable law?

Council Regulation (EU) 2016/1103 **does not expressly provide for specific effects** but generally **links the applicable law to the matrimonial property regime and its effects**.

On the other hand, it does establish the scope of application, in a positive sense, under the agreement of the law applicable to the economic matrimonial property regime regulated in Article 27, and in a negative sense, in Whereas 20 and 21 on the areas of exclusion where it should not be applied.

As far as **the possible areas of application are concerned**, they are regulated as follows:

- a) the classification of the property of one or both spouses into different categories during the period of validity and after the marriage;
- b) the transfer of property from one category to another;
- c) the liability of one spouse for the obligations and debts of the other spouse;
- d) the powers, rights and obligations of either or both spouses with respect to the estate;

- e) the dissolution of the matrimonial property regime and the distribution, division or liquidation of the estate;
- f) the property effects of the matrimonial property regime on the legal relationship between one of the spouses and a third party; and
- g) the material validity of the marriage settlements.

On the basis of this list, it should be remembered that under the unity of the law applicable to matrimonial property regimes **under Articles 22 or 26, the regulation applies to all property included in those regimes, regardless of where it is situated**, and thus its scope of application may be increased.

In a negative or exclusive sense, **Council Regulation (EU) 2016/1103 should not apply**, as set out in Whereas 20, to questions relating to the general legal capacity of the spouses (not including the powers, rights and obligations set out in Article 27(d)) or to preliminary questions such as the existence, validity or recognition of marriage, which remain governed by the national laws of the Member States, including their rules of private international law (Whereas 21 of the Council Regulation).

## 7. How does the choice of law agreement affect the rights of third parties?

Within the limit of retroactive effectiveness, i.e., **the agreement does not affect the parties to an extent that is detrimental to previous agreements with third parties**. In legal relations between a spouse and a third party concerning the property effects of the matrimonial property regime (Article 27 f), the law applicable to the matrimonial property regime between the spouses cannot be invoked by one of them against a third party in a dispute between the third party and either or both spouses unless the third party knew or, acting with due diligence, should have known of that law. In other words, it must be ensured that the agreement is in accordance with good faith.

To this end, Article 28 of the regulation considers that the third party knows the law applicable to the matrimonial property regime<sup>16</sup> if

- a) that law is
  - i) the law of the state applicable to the transaction between one of the spouses and the third party;
  - ii) the law of the state where the contracting spouse and the third party have their habitual residences; or
  - iii) in the case of immovable property, the law of the state in which the property is situated
 or when
- b) either spouse has complied with the requirements for disclosure or registration of the matrimonial property regime specified by
  - i) the law of the state applicable to the transaction between one of the spouses and the third party;
  - ii) the law of the state where the contracting spouse and the third party have their habitual residences; or
  - iii) in the case of immovable property, the law of the state in which the property is located.

The law applicable to the matrimonial property regime **may not be relied on by one of the spouses against a third party** pursuant to paragraph 1, the effects of the matrimonial property regime against that third party being regulated

<sup>16</sup> MOTA, Helena, “La protección de terceros en el Reglamento (UE) 2016/1103” (Protection of Third Parties in the Regulation (UE) 2016/1103), in *Anuario Español De Derecho Internacional Privado*, vol. XVIII, 2018.

- a) by the law of the state applicable to the transaction between one of the spouses and the third party or
- b) in the case of immovable property or registered property or rights, by the law of the state in which the immovable property is located or in which the property or rights are registered.

#### **8. Is any court in the Member States bound by the applicable choice of law agreement under Regulation (EU) 2016/1103?**

No, only the Member States participating in enhanced cooperation will have to establish their international jurisdiction in accordance with the rules of Regulation (EU) 2016/1103. This means that in nonparticipating states, international jurisdiction will lie with their respective courts, and consequently, the application of Regulation (EU) 2016/1103 is not guaranteed as far as the effects of an applicable choice of law agreement under the application of its rules. However, if the agreement were to meet the requirements of the rules of private international law of the state, which has international jurisdiction, it would continue to produce valid effects.

#### **9. What is the law applicable to the matrimonial property regime in the absence of a choice by the parties?**

That which derives from Article 26 of Council Regulation (EU) 2016/1103, which deals, first, with the common residence after the celebration of the marriage; failing that, with the common nationality (this provision does not apply if at the time of the celebration of the marriage, the spouses have more than one common nationality); and finally, with the common place with the closest connection at the time of the celebration of the marriage.

Exceptionally, at the request of either spouse, the judicial authority having jurisdiction to rule on matrimonial property regimes may decide that the law of a state other than the state whose law is applicable by virtue of the spouses' common residence shall apply if the applicant proves that<sup>17</sup>:

- the spouses had their last common habitual residence in that other state for a significantly longer period than in the designated state, and
- both spouses relied on the law of that other state to organize or plan their property relations.

The law of that other state shall apply only from the time of the conclusion of the marriage unless one of the spouses disagrees. In the latter case, the law of that other state takes effect from the time of the establishment of the last common habitual residence in that state, and its application does not adversely affect the rights of third parties under the law applicable by virtue of paragraph 1 a).

This paragraph shall not apply where the spouses have entered into a marriage contract prior to the establishment of their last common habitual residence in that other state.

#### **10. In the absence of a choice agreement, do all countries have an established matrimonial property regime?**

No, although the countries participating in the enhanced cooperation have one, as do some of those not participating in it. Most, but not all, countries have a matrimonial property regime applicable in the absence of an agreement. In this respect, the United Kingdom does not determine the economic regime

<sup>17</sup> Pogorelčnik Vogrinc, N.: *Applicable Law in Matrimonial Property Regime*. Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 40, 2019, br. 3, 1075-1100. RADEMACHER, I.: *Changing the past: retroactive choice of law and the protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships*, Madrid, Cuadernos de Derecho Transnacional, vol. 10, 1/2018, pp. 7-18.

in England and Wales as such, but in Scotland, it does, since in the absence of agreement, separation of property applies.

For the economic regime applicable in the absence of agreement, the table below shows the legal wealth existing in Europe: in the absence of agreement, 18 countries establish community of goods as the applicable legal regime; 5 countries establish separate goods; 1 country establishes community of accumulated earnings, which is similar to separation; 2 states defer community; and another 2 are plurilegislative, regulating according to the territory community or separation of goods or without determining an economic regime as such. These are Spain and the United Kingdom (although the latter is no longer a Member State, the personal and family relations of its citizens are the reason for its inclusion).

In Spain, the existing diversity means that the regulation of the economic matrimonial regime occurs in 7 different civil regulations, depending on the territory. Thus, in addition to the **Spanish Civil Code**, there are six regions with their own civil legislation, which means that most of the territory has the legal **regime of a community of property**. The exceptions are the Autonomous Communities of **Catalonia** and the **Balearic Islands**, which govern the separation of property; **Navarre**, where the system of conquests is similar to that of a community of property but with some differences, such as the order of priority for the payment of credits; and **Community of Valencia**, where Law 10/2007 of 31 May 2016 established the separation of property as the legal economic system in the absence of an agreement. However, this law was declared unconstitutional, which led to the legal regime of separation of property in the absence of agreement being applied only to marriages celebrated from July 1, 2008 to June 1, 2016. For those celebrated outside the above dates (before 11/07/2008 and after 1/07/20016), the applicable legal regime is that of community of property.

## 11. What is the statutory matrimonial property regime in each state?

<b>AUSTRIA</b>	<b>BÉLGIUM</b>	<b>BULGARIA</b>
Separation of property: § 1233 and 1237 of the ABGB	Community of property: Art. 1405 Civil Code	Community of property: Art. 18.2 FC
<b>CROATIA</b>	<b>CYPRUS</b>	<b>CZEQUIA</b>
Community of property: Art. 34-39 of the Family Act	Separation of property: Art. 13 de la Ley 232/91	Community of property: Art. 709, 710 and 3040 Act No. 89/2012 Coll
<b>DENMARK</b>	<b>ESTONIA</b>	<b>FINLAND</b>
Deferred community of property: Act No. 56 Danish Act on the Legal Effects of Marriage	Community of property: PKS § 25-39 Family Law Act	Deferred community of property Section 34 Marriage Law Act
<b>FRANCE</b>	<b>GERMANY</b>	<b>GREECE</b>
Community of property: Art. 1400-1491 Civil Code	Community of accrued gains: § 1363 par. 2 BGB German Civil Code	Separation of property/participation in acquisitions system: Art. 1397-1402 HCC
<b>HUNGARY</b>	<b>IRELAND</b>	<b>ITALY</b>
Community of property: Art. 4:34 (2) and 4:35 (1) Civil Code	Separation of property with possibility of entitlement to a share in the property of the other spouse: Section 16(5) Family Law Act 1995 and Section 20(5) Family Law (Divorce) Act 1996	Community of property: Arts. 159 and 177 Civil Code
<b>LATVIA</b>	<b>LITHUANIA</b>	<b>LUXEMBOURG</b>

Community of property: Arts. 89-113 Civil Law	Community of property: Art. 89 et seq. Civil Code	Community of property: Art. 1400-1535 Civil Code
<b>MALTA</b>	<b>NETHERLANDS</b>	<b>POLAND</b>
Community of property: Art. 1316 Civil Code	- Community of property for marriages before January 1, 2018 Art. 1:94 Civil Code. - A limited community of property for marriages after January 1, 2018: Art. 1:94 Civil Code	Community of property: Art. 31 Para. 1 of the Family and Guardianship Code
<b>PORTUGAL</b>	<b>ROMANIA</b>	<b>SLOVAKIA</b>
Community of property: Art. 1721 Civil Code	Community of property: Arts 339-359 Civil Code	Community of property – undivided co-ownership of spouse Arts. 143–150 Civil Code
<b>SLOVENIA</b>	<b>SPAIN</b>	
Sociedad de Gananciales /Comunidad de Bienes – DZ, § 66 and 67 Family Code	<p>PLURILEGISLATIVE STATE. Depending on the territory:</p> <p><b>Andalusia, Canary Islands, Cantabria, La Rioja, Castilla-La Mancha, Castilla and León, Valenciana, Extremadura, Madrid, Murcia, Asturias</b></p> <p>Community of property: Arts. 1344 et seq. Spanish Civil Code</p> <p><b>Aragón</b></p> <p>Community of property: Legislative Decree 1/2011 of 22 March. Art. 193</p> <p><b>Baleares Island</b></p> <p>Separation of property: Legislative Decree 79/1990 of 6 September. Art. 3</p> <p><b>Catalonia</b></p> <p>Separation of property: Chapters I (Second Section) and II of Title III of Law 25/2010, of 29 July, of the second book of the Civil Code. Arts. 232.1-232.1.2</p> <p><b>Galicia</b></p> <p>Community of property: Law 2/2006 of 14 June, Civil Code of Galicia. TÍTULO IX</p> <p><b>Navarra</b></p> <p>Conquest regime: Similar community of property – Law 82 Compilation of 1973, modified by the Law of 1987</p> <p><b>País Vasco</b></p> <p>Community of property: Law 5/2015 of 25 June</p> <p><b>Valencian Community</b></p> <p>Separation of property: Law 10/2007 on economic matrimonial regime. This law was declared unconstitutional on 31 May 2016. It applied from 1 July 2008 until 1 June 2016</p> <p>Outside this time: community of property provided for in the Spanish Civil Code</p>	
<b>UK*</b>		<b>SWEDEN</b>
<p><b>England/Wales</b></p> <p>No matrimonial property regime as such. There is a division of property attend the circumstances of the cases.</p> <p><b>Scotland</b></p> <p>Separation of property: Art. 24 Scotland Family Law 1985</p> <p><b>Northern Ireland</b></p> <p>Section 25 of the Matrimonial Causes Act 1973 as amended see <i>Xydhias v Xydhias</i> [1999] 2 All ER 386, per Thorpe LJ at 394.</p>		Deferred community of property: Art. (1987:230) Marriage Code (ÄktB)

*Note: Table prepared by the author.*

\*Although the United Kingdom is not currently a member country, marital relationships do exist, and in support of these families, we decided to include it in the table.

**12. What are the options that each country regulates so that spouses or future spouses can choose their matrimonial property regime in addition to the legal regime seen in the previous question?**

<b>AUSTRIA</b>	<b>BELGIUM</b>	<b>BULGARIA</b>
-Community of property: can be <i>inter vivos</i> or <i>mortis causa</i> §§ 1217 et seq. of the ABGB	- Separation of property: Articles 1466 et seq. of the Civil Code - Universal community of property – Articles 1454 et seq. of the Civil Code	- Statutory property (community): Art. 18 FC matrimonial regime - Statutory separate matrimonial regime: Art. 33 FC - Contractual regime (since 2009): Art. 38 FC
<b>CROATIA</b>	<b>CYPRUS</b>	<b>CZECHIA</b>
There is freedom of choice of matrimonial property regime: Marriage contract art. 40-42 of the Family Act	Marriage settlements in the sense of prenuptial agreements between the spouses are not valid, or at least not binding, under Cypriot law: Section 14 of Law 232/9	- Community of property: Arts. 709 et seq. Law no 89/2012 Coll. - Contractual one: separate property regime. Arts 729 et seqq. - One based on the court decision: Arts. 724 et 728.
<b>DENMARK</b>	<b>ESTONIA</b>	<b>FINLAND</b>
- Separation of assets: § 28 a) and b) and 30 Act on the Legal Effects of Marriage	- Community of accrued gains regime: PKS § 40–56 Family Law Act - Separate property regime: PKS § 57–58 Family Law Act	Spouses or future spouses are able to exclude from the scope of the marital right any property that either of them already owns or later acquires: Section 41 Marriage Law Act
<b>FRANCE</b>	<b>GERMANY</b>	<b>GREECE</b>
-Conventional community: Art. 1497 et seqq. Civil Code - Separation of property: Art. 1536 et seqq. Civil Code -Participation in acquisitions: Art. 1569 et seqq. Civil Code	- Separation of assets: § 1414 BGB - Full community of property: § 1415 et seq. BGB - The Franco-German matrimonial property regime of an optional community of accrued gains §§ 1519 et seq. BGB	- Community of property: Art. 1403 to 1415 Civil Code
<b>HUNGARY</b>	<b>IRELAND</b>	<b>ITALY</b>
-Marital property acquisition regime: Art. 4:34 (1) of Act V of 2013 of the Civil Code -Separation of property system, Art. 4:69-4:73 of the Civil Code  <b>NOTE:</b> However, in a matrimonial property contract, it is not mandatory to choose one of these systems.	The principle of community of property does not apply under Irish law and property. The spouses do not have a choice of matrimonial property regimes. All marital agreements are made in light of the governing provisions and cannot be regarded as absolutely binding upon the parties, as they remain subject to the approval of/amendment by the Irish courts – Section 16(5) Family Law Act 1995 and Section 20(5) Family Law (Divorce) Act 1996, and the impact of the separation/divorce order (section16(2)(a)-(l) Family Law Act 1995 and section 20(2)(a)-(l) Family Law (Divorce) Act 1996.	- Separation of assets: Articles 215 et seq. -Conventional community: Articles 210 et seq. Civil Code - The “fondo patrimoniale”, a fund made up of assets destined for the needs of the family: Art. 167 Civil Code
<b>LATVIA</b>	<b>LITHUANIA</b>	<b>LUXEMBOURG</b>
- Separation of assets: Art. 116 et seq. Civil Code - The conventional community: the spouses buy a property with common funds, and this property will be in common: Art. 89-110 Civil Code	- Statutory legal regime: Arts. 3.87 to 3.100 Civil Code - Contractual legal regime: Art. 3.101-3.115.	- Conventional community of property Arts. 1427-1526, Civil Code - Separate property regime: Art. 1536 to 1568, Civil Code -Participation in acquisitions: Art. 1569-1581, Civil Code.

<b>MALTA</b>	<b>NETHERLANDS</b>	<b>POLAND</b>
<ul style="list-style-type: none"> <li>- Community of property: Art. 1316</li> <li>- Community of residue under separate administration: Art. 1338-1345 Civil Code</li> </ul>	<p>Since 2012, the law no longer offers a choice of legal regimes: contractual freedom and can tailor their own regime</p>	<ul style="list-style-type: none"> <li>- Community of property regime: Art. 48 Civil Code</li> <li>- Contractual property regime (by extending or restricting statutory community): Art. 49 Civil Code</li> <li>- Separation of property regime: Art. 51 et seq. Civil Code</li> <li>- Separation of property regime with equalization of gains accrued: Art. 51 Civil Code</li> </ul>
<b>PORTUGAL</b>	<b>ROMANIA</b>	<b>SLOVAKIA</b>
<ul style="list-style-type: none"> <li>- General community of assets: Article 1717 Civil Code;</li> <li>- Separation of assets: Art. 1767</li> <li>- Freedom to establish antenuptial pacts allows the creation of agreement-based atypical property regimes</li> </ul>	<ul style="list-style-type: none"> <li>- Communion of assets: Articles 307-327 Civil Code</li> <li>- Separation of assets: Art. 360 et seqq. Civil Code</li> <li>- Conventional communion Arts. 366 et seqq. Civil Code</li> </ul>	<p>The agreements are limited by law, but it is possible</p> <ul style="list-style-type: none"> <li>- to extend or restrict the scope of undivided co-ownership determined</li> <li>- to change the rules of property administration</li> <li>- to postpone the establishment of undivided co-ownership until the moment when the marriage terminates</li> </ul>
<b>SLOVENIA</b>	<b>SPAIN – (plurilegislative state)</b>	
<p>The principle of free choice of the spouses is regulated so that they can freely choose the matrimonial property regime: Arts. 85 Family Code.</p> <ul style="list-style-type: none"> <li>- Community property – DZ § 66 Family Code</li> <li>- Separation of property DZ 77 § 2) Family Code</li> </ul>	<p><b>Andalusia, Canary Islands, Cantabria, La Rioja, Castilla-La Mancha, Castilla and León, Valenciana, Extremadura, Madrid, Murcia, Asturias and Valencia.</b></p> <p>Marriage contract – Art. 1315 Spanish Civil Code:</p> <ul style="list-style-type: none"> <li>- Community of property: Arts. 1316 et seqq. Spanish Civil Code</li> <li>- Separation of property: Art. 1435 et seqq. Spanish Civil Code</li> <li>- Participation system: Art. 1411 et seqq. Spanish Civil Code</li> </ul> <p><b>Aragón</b></p> <p>Community of property: Legislative Decree 1/2011 of 22 March, 203 et seq.</p> <p><b>Baleares Island</b></p> <p>Separation of property: Legislative Decree 79/1990 of 6 September, Art. 3</p> <p><b>Catalonia</b></p> <p>Participation Regime: Arts. 232.13-232.17 Second book of the Civil Code</p> <p>Community of property: Art. 232.30 et seq.</p> <p>Other regime: Association with purchases and improvements (in Tarragona) Art. 232-25 et seq; agermanament or half-for-half pact (in Tortosa) Art. 232-28; pact of agreement the half gain (in Valle de Arán): Art. 232-39</p> <p><b>Galicia</b></p> <p>Any stipulation regarding the family economic and inheritance regime: Art. 174 Law 2/2006 of 14 June, Civil Code of Galicia</p> <p><b>Navarra</b></p> <p>Universal community: Law 101 et seq. Navarra Compilation</p> <p>Separation of property: Law 103 et seq. Navarra Compilation</p> <p><b>País Vasco</b></p> <p>Separation of property: Spanish Civil Code</p> <p>Participation: Spanish Civil Code.</p>	
<b>SWEDEN</b>	<b>UK (plurilegislative state)*</b>	
<p>There is no alternative regime, but it is possible to change the nature of marital property or separate property (ÄktB Chapter 7)</p> <ul style="list-style-type: none"> <li>- concerning gifts between spouses (ÄktB Chapter 8 and Act (1936:83))</li> <li>- concerning division of property during marriage (ÄktB 9:1 and 9:2)</li> <li>- by agreement on the division of property at an imminent divorce (ÄktB 9:13).</li> </ul>	<p><b>England/Wales/Northern Ireland</b></p> <p>No matrimonial property regime as such</p> <p><b>Scotland</b></p> <p>A modified separate property system. The general rule is that marriage does not affect the ownership of property (section 24 Family Law (Scotland) Act 1985</p>	

*Note: Table prepared by the author.*

\*Although the United Kingdom is not currently a member country, marital relationships do exist, and in support of these families, we decided to include it in the table.

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#### IV. MODEL CLAUSES

- ☞ CHOICE OF LAW AGREEMENT BETWEEN THE SPOUSES O FUTURE SPOUSES BEFORE NOTARY/LAWYER
- ☞ CHOICE OF LAW AGREEMENT IN MARRIAGE AGREEMENT WITH AGREEMENT FOR MATRIMONIAL PROPERTY REGIME FOR SPOUSES OR FUTURE SPOUSES
- ☞ APPLICABLE LAW BASED ON HABITUAL RESIDENCE IN A MEMBER STATE AT THE TIME OF THE CONCLUSION OF THE MARRIAGE AGREEMENT
- ☞ CHOICE OF LAW APPLICABLE TO ADVERSARIAL LEGAL SEPARATION OR DIVORCE PROCEDURE (JURISDICTION TO RULE ON MATTERS OF MATRIMONIAL PROPERTY REGIMES ARISING IN CONNECTION WITH THAT APPLICATION: MARRIAGES CELEBRATED BEFORE 29 JANUARY 2019)
- ☞ CHOICE OF LAW APPLICABLE TO MARRIAGES ENTERED INTO BEFORE 29 JANUARY 2019
- ☞ CHOICE OF LAW APPLICABLE TO MATRIMONIAL PROPERTY IN CONTENTIOUS LEGAL SEPARATION OR DIVORCE

## CHAPTER 2

# MODEL CLAUSES FOR REGISTERED PARTNERSHIPS UNDER REGULATION (EU) 2016/1104

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### I. INTRODUCTION

On 24 June 2016, the Council of the European Union adopted *Regulation (EU) 2016/1104, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships* (hereinafter Regulation (EU) 2016/1104).<sup>18</sup>

The regulation applies to the property consequences of registered partnerships, namely, the set of rules concerning the property relations of the partners (between themselves and with third parties) that are the result of the registration of their partnership or its dissolution (Article 1 and Article 3(1)(b) of Regulation (EU) 2016/1104).

It should be noted that Regulation (EU) 2016/1104 applies only to property consequences of partnerships (either of opposite sex or same sex) that have been **registered**. Thus, it does not apply to property consequences of partnerships that have not been registered (de facto partnerships) or to property consequences of marriage.<sup>19</sup>

Its material scope also excludes questions regarding the existence, validity or recognition of a registered partnership and those regarding maintenance obligations, succession, social security, etc.

The application of Regulation (EU) 2016/1104 is further limited by the fact that it was adopted only within the enhanced cooperation among 18 Member States: Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden (hereinafter participating Member States). All other Member States continue to apply their national rules on private international law.

Regulation (EU) 2016/1104 applies to all three central questions of private international law. It includes rules on international (universal) jurisdiction, rules on applicable law and rules on recognition and enforcement of judgments from other participating Member States. Furthermore, it also enables registered partners to exercise free will by allowing them to conclude certain agreements regarding the property consequences of their relationship. Thus, registered partners may conclude (1) *choice of court agreements*, (2) *choice of law agreements* and/or (3) *partnership property agreements*.

With regard to their freedom of choice, registered partners should pay special attention to the temporal scope of application of Regulation (EU) 2016/1104. Its rules on jurisdiction are, namely, applicable only

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<sup>18</sup> OJ L 183, 8 July 2016, p. 30.

<sup>19</sup> See also: Dougan, F.: Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov. In: Galič, A., Kramberger Škerl, J. (eds.): *Liber Amicorum Dragica Wedam Lukić*. Pravna fakulteta. Ljubljana. 2019. P. 236–237.

to legal proceedings that were instituted **on or after 29 January 2019**. If a *choice of court agreement* was concluded before that date, its validity will be assessed under Regulation (EU) 2016/1104.

Furthermore, the rules on applicable law (including the rules on *choice of law agreements* and *partnership property agreements*) apply only to partners who registered their partnership or who specified the applicable law **on or after 29 January 2019**. Under this rule, 4 factual situations are possible:

- (1) the partnership was registered and the *choice of law agreement* was concluded **before 29 January 2019**: rules of national private international law need to be applied;
- (2) the partnership was registered **before 29 January 2019**, but the *choice of law agreement* was concluded on or **after 29 January 2019**: the courts need to take into account the *choice of law agreement*, which was validly concluded in accordance with Regulation (EU) 2016/1104. However, if the *choice of law agreement* is not valid, the courts need to apply national rules on applicable law to the property consequences of the registered partnership;
- (3) the partnership was registered on or **after 29 January 2019**, but the *choice of law agreement* was concluded **before 29 January 2019**: the courts need to apply Regulation (EU) 2016/1104 and take into account the *choice of law agreement*, which fulfills its requirements; or
- (4) the partnership was registered and the *choice of law agreement* was concluded on or **after 29 January 2019**: Regulation (EU) 2016/1104 applies.<sup>20</sup>

## II. GUIDELINES ON CHOICE OF COURT AGREEMENTS UNDER REGULATION (EU) 2016/1104

### 1. Is choice of court possible under Regulation (EU) 2016/1104?

Yes, Article 7 of Regulation (EU) 2016/1104 allows the parties to enter into an **agreement designating the courts of a Member State, which will have exclusive jurisdiction to rule on matters of the property consequences of their registered partnership**.

### 2. Can the parties choose the courts of any state?

No, the choice under the regulation is limited to only the 18 EU Member States that participate in the enhanced cooperation. For the *choice of court agreement* to be assessed under the rules of the regulation, only courts of the participating Member States may be chosen.

Additionally, Article 7 of Regulation (EU) 2016/1104 stipulates that parties may choose only the courts of the Member State

- (1) whose law is applicable pursuant to a valid *choice of law agreement* under Article 22 of Regulation (EU) 2016/1104 or
- (2) whose law is applicable pursuant to Article 26(1) of Regulation (EU) 2016/1104 (*Applicable law in the absence of choice by the parties*), i.e., the law of the state under whose law the registered partnership was created.<sup>21</sup>

<sup>20</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: Internationales Familienrecht. Nomos. Baden Baden. 2019, p. 286.

<sup>21</sup> It should be noted that, for unknown reasons, Article 7 provides for a third option, which is, however, identical to the second option, i.e. the law of the State in which the registered partnership was created. Article 26(1) of Regulation (EU) 2016/1104 points to the law of the State under whose law the registered partnership was created.

### 3. What happens if the parties choose the courts of a nonparticipating state?

In such cases, the effects of their choice will not be guaranteed by the regulation. However, such a choice might still be validly concluded in accordance with the national rules of private international law of that state and thus respected by the designated courts.

### 4. When can the parties conclude a choice of court agreement?

Such *choice of court agreement* may be concluded **before or after a dispute has arisen** or even **before the partnership was registered**.

The choice of court agreements concluded before the entry into force of the regulation on 29 January 2019 will be assessed under the regulation if the legal proceedings are instituted after that date.

The agreement can also be concluded “silently” at the beginning of the legal proceedings by the **defendant’s appearance** before a court where the plaintiff instituted the proceedings (Article 8), provided that this court could also have been chosen by an express choice of court agreement (Article 7).

### 5. Are there any requirements for the form of the choice of court agreement?

The *choice of court agreement* may be concluded in a **separate document** or included as a **clause in a partnership property agreement**.

Article 7 of Regulation (EU) 2016/1104 stipulates special requirements for formal validity. A *choice of court agreement* must be **expressed in writing** and **dated** and **signed by the parties**.

An agreement on the choice of court is also deemed to be expressed in writing when it is concluded through communication **by electronic means that provide a durable record of the agreement**. Even agreements concluded by electronic means must be dated and signed (either by hand or by a qualified electronic signature).<sup>22</sup>

Requirements for formal validity are governed exhaustively, so **no additional formal requirements may be imposed according to *lex fori***.<sup>23</sup>

Lastly, the court can also be chosen by way of **the appearance of the defendant (*prorogatio tacita, submissio*)** (Article 8). In practice, this entails that the plaintiff files a lawsuit before a noncompetent court, and the defendant responds without contesting the jurisdiction (after having been informed of that possibility). The jurisdiction can be based on the appearance of the defendant only if the court could have been chosen by the parties by an express *choice of court agreement*.

### 6. Will the courts always follow the parties’ choice?

No. In the case of (relatively frequent) connected proceedings, an otherwise validly concluded *choice of court agreement* might not take effect.

It should, however, be noted that special regulation from Article 4 and Article 5 applies only if such connected proceedings were instituted in one of the participating Member States. When connected proceedings concerning succession after the death of a partner or dissolution or annulment of partnership were instituted in other states, a *choice of court agreement* will not be ineffective: it will still bind the parties, as well as the courts of the participating Member States.

<sup>22</sup> Cf. regarding the Regulation (EU) 2016/1103: Bergquist, U., Damascelli, D. [et al.]: The EU Regulations on Matrimonial and Patrimonial Property. Oxford University Press. Oxford. 2019, pp. 65, 66.

<sup>23</sup> Ibid., p. 65.

### 6.1. *Death of one of the partners – the jurisdiction under the Succession Regulation prevails*

First, the choice of court agreement will not be followed by the courts in cases that are covered by Article 4 of Regulation (EU) 2016/1104 (*Jurisdiction in the event of the death of one of the partners*).

In such cases, coordination of jurisdiction in connected proceedings takes precedence, and the jurisdiction to decide on the matters of property consequences of registered partnerships will lie with the courts of the Member State that has jurisdiction in connected matters of succession, pursuant to Regulation (EU) 650/2012 (despite a valid choice of court agreement under Article 7 of Regulation (EU) 2016/1104).<sup>24</sup>

### 6.2. *Dissolution or annulment of the registered partnership – possibility of submission to the jurisdiction of the court competent for such dissolution or annulment*

Limitations on the effectivity of a choice of court agreement are also envisaged regarding Article 5 of Regulation (EU) 2016/1104 (*Jurisdiction in cases of dissolution or annulment*).

Where a court of a Member State is seized to rule on the dissolution or annulment of a registered partnership, the courts of that Member State will also have jurisdiction to rule on the property consequences of registered partnership arising in connection with its dissolution or annulment. However, in order to achieve this coordination of jurisdiction between connected cases, the parties must **agree** to it.

Such agreement might be achieved either when the court was already seized concerning the dissolution or annulment of partnership or before that. In the latter case and according to Article 5(2) of Regulation (EU) 2016/1104, this agreement must comply with (the formal requirements of)<sup>25</sup> Article 7 of Regulation (EU) 2016/1104. If no agreement can be achieved between the parties, a previously and validly concluded *choice of court agreement* will bind the parties and the courts.<sup>26</sup>

## 7. **What is the relation between the applicable law and the competent court, if any?**

In principle, the questions of applicable law and of the competent court are two different questions, and a court of one state can be brought to apply the law of another state. However, unity of the *forum* and *lex* (Ger. *Gleichlauf*) is often a good idea, since this simplifies the proceedings and can reduce their costs and length.

Regulation (EU) 2016/1104 aims to achieve such coordination between international jurisdiction and applicable law.<sup>27</sup> It therefore promotes party autonomy, which enables the competent courts to apply their national law. This coordination is intended to facilitate the proceedings.

However, such coordination is not ensured in all cases. If the parties designate applicable law pursuant to Article 22 of Regulation (EU) 2016/1104, they may still conclude a *choice of court agreement* granting exclusive jurisdiction to the courts of the Member State under whose law the registered partnership was

<sup>24</sup> Cf. regarding the Regulation (EU) 2016/1103: Dougan, F.: Matrimonial Property and Succession – The Interplay of Matrimonial Property Regimes Regulation and Succession Regulation. In: Kramberger Škerl, J., Ruggeri, L., Viterbo, F. (eds.): Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working paper. University of Camerino. Camerino. 2019, pp. 79–80.

<sup>25</sup> Article 5(2) refers to the requirements from Article 7 in general. However, it is illogical and contrary to the parallel provision of the Regulation (EU) 2016/1103 that, beside the formal requirements from Article 7(2), also the requirements of Article 7(1) should be respected. Therefore, the authors deem that the agreements from Article 5(2) should (only) be in line with the formal requirement of Article 7(2).

<sup>26</sup> Cf., regarding the Regulation (EU) 2016/1103: Andrae, M.: Internationales Familienrecht. Nomos. Baden Baden. 2019, p. 279.

<sup>27</sup> Cf. regarding the Regulation (EU) 2016/1103: POGORELČNIK VOGRINC, N.: Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema. In: Podjetje in delo. Vol. 46 (2020). No. 1, p. 198.

created. This might lead to a disconnection between *forum* and *lex*, since Article 22 of Regulation (EU) 2016/1104 envisages various connecting factors,<sup>28</sup> but it can in some cases better serve the interests of the parties and possibly also the competent court.

Additionally, due to the principle of universal application (Article 20 of Regulation (EU) 2016/1104), it is possible for the partners to designate as applicable the law of a third state.<sup>29</sup> In such cases, the courts of that state may not be validly designated competent under Regulation (EU) 2016/1104 since that state is not bound by the regulation. However, a *choice of court agreement* might still be validly concluded in accordance with the national rules of private international law of that state.

### 8. Is it possible to choose a specific court in one of the states or only the courts of a state in general?

Article 7 of Regulation (EU) 2016/1104 refers only to international jurisdiction. Thus, it allows parties to validly agree on the jurisdiction of the courts of one state in general but not on the territorial jurisdiction of a court within that state.<sup>30</sup> The territorial jurisdiction is designated by the national civil procedure of the designated state, which will, however, in most cases allow for an in-state choice of court.

### 9. Does Regulation (EU) 2016/1104 regulate the substantial validity of the choice of court agreement?

Partly. As mentioned above, it designates a list of courts that the parties can choose. However, it does not address the questions of interpretation, defects of consent and other substantial issues. Contrary to the choice of law agreements, where the regulation provides for a conflict-of-law rule regarding material validity (Article 24), the regulation unfortunately does not provide such a rule regarding the material validity of the choice of court agreements (e.g., Article 25(1) of Regulation (EU) 1215/2012). Legal doctrine is divided regarding the solution to this issue: some deem that substantial validity should be governed by the law that is applicable, under the regulation, to the decision on the patrimonial relationship<sup>31</sup>, whereas others deem that this should be the law of the state of the competent court (including its national conflict-of-law rules)<sup>32</sup>. The authors deem that the second opinion is more convincing with regard to both validity and the coherent interpretation of the EU private international law rules.

## III. MODEL CLAUSES

☞ CHOICE OF COURT AGREEMENT BETWEEN REGISTERED PARTNERS

☞ CHOICE OF COURT AGREEMENT BETWEEN FUTURE REGISTERED PARTNERS

<sup>28</sup> The authors deem that the partner can choose the courts of the Member State in which the partnership was registered (even if they also concluded a choice of law agreement). Cf. regarding the Regulation (EU) 2016/1103: Bergquist, U., Damascelli, D. [et al.]: *The EU Regulations on Matrimonial and Patrimonial Property*. Oxford University Press. Oxford. 2019, p. 279.

<sup>29</sup> In relation to Regulation (EU) 2016/1104, third States are both Member States, which do not participate in the enhanced cooperation as well as non-Member States of the EU.

<sup>30</sup> Cf. regarding the Regulation (EU) 2016/1103: Bergquist, U., Damascelli, D. [et al.]: *The EU Regulations on Matrimonial and Patrimonial Property*. Oxford University Press. Oxford. 2019, p. 65.

<sup>31</sup> Ibid.

<sup>32</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: *Internationales Familienrecht*. Nomos. Baden Baden. 2019, p. 278.

## IV. GUIDELINES ON CHOICE OF LAW AGREEMENTS UNDER REGULATION (EU) 2016/1104

### 1. Is choice of law possible under Regulation (EU) 2016/1104?

**Yes.** According to **Article 22 of Regulation (EU) 2016/1104**, the partners may enter into an agreement with which they choose the law that will apply to the property consequences of their registered partnership. The possibility of concluding a *choice of law agreement* is not limited to partners who register their partnerships in participating Member States.

In the absence of their choice, the applicable law is determined pursuant to Article 26 of Regulation (EU) 2016/1104.

### 2. Can the parties choose the law of any state? What happens if the parties choose the law of a nonparticipating state?

Generally, **Article 20 of Regulation (EU) 2016/1104** allows the courts to **apply the law of any state** that was designated as applicable, whether or not it is the law of a participating Member State (*the principle of universal application*).

Nonetheless, **Article 22 of Regulation (EU) 2016/1104** stipulates some further limitations.

**First**, the partners may choose only the law of a state that attaches property consequences to the institution of registered partnership. This is necessary since the law of some states does not regulate registered partnerships and therefore envisages no property consequences for such unions. Parties also need to pay special attention when choosing the applicable law, since the law of some states might allow only same-sex registered partnerships; therefore, no property consequences will be envisaged for different-sex registered partnerships (and *vice versa*).

**Second**, the parties may choose between only the following laws (provided that they attach property consequences to registered partnerships):

1. the law of the state where the partners (or future partners), or one of them, are **habitually resident** at the time the agreement is concluded;
2. the law of a state of **nationality** of either partner (or future partner) at the time the agreement is concluded; or
3. the law of the state under whose law the **registered partnership was created**.

Thus, the partners are limited to the laws of states with which they are closely connected. This can be either the law of a participating Member State or the law of any other state (as long as the criteria listed above are fulfilled).

### 3. Are all courts bound by the choice of law agreement made under Regulation (EU) 2016/1104?

No. Only the courts of participating Member States are bound by a *choice of law agreement* made in accordance with Regulation (EU) 2016/1104. Therefore, in order for such a *choice of law agreement* to be effective, one of the courts in a participating Member State will have to establish its international jurisdiction pursuant to the rules of Regulation (EU) 2016/1104.

If the international jurisdiction lies with the courts of nonparticipating states, the effects of a *choice of law agreement* made in accordance with Regulation (EU) 2016/1104 are not guaranteed. Such an agreement

might, however, still produce effects if it fulfills the requirements of the private international law of the state that has international jurisdiction.

#### 4. When can the parties conclude a choice of law agreement? Can the parties later change their agreement?

The parties may conclude a *choice of law agreement* either **before** or **after** they have registered their partnership. If the partners conclude a *choice of law agreement* after registering their partnership, the chosen law applies only prospectively (unless the partners explicitly agree on retrospective effects).<sup>33</sup>

The parties may also change their agreement and choose another law as applicable. Such change of the applicable law will also have prospective effects unless the partners agree otherwise.<sup>34</sup>

If the partners change the applicable law with retroactive effects, such change of applicable law may not adversely affect the rights of third parties (Article 22(3) of Regulation (EU) 2016/1104). For more information on the rights of third parties, see the answer to question 8.

#### 5. Are there any requirements for the form of the choice of law agreement?

The *choice of law agreement* may be concluded in a **separate document** or included as a **clause in a partnership property agreement**.

Article 23 of Regulation (EU) 2016/1104 stipulates that it must be expressed **in writing** and **dated** and **signed by both parties**. A *choice of law agreement* is also deemed to be expressed in writing when it is concluded through communication **by electronic means that provide a durable record of the agreement**. However, even agreements concluded by electronic means must be dated and signed (either by hand or by a qualified electronic signature).

Furthermore, Article 23 of Regulation (EU) 2016/1104 envisages further requirements for formal validity that may stem from the national law of participating Member States. Four factual situations are possible:

- (1) if at the time the agreement is concluded **both partners are habitually resident in the same participating Member State**, the agreement also must satisfy any additional formal requirements that the law of that Member State lays down for partnership property agreements;
- (2) if at the time the agreement is concluded the **partners are habitually resident in different participating Member States** and the national law of those Member States provides for different (additional) formal requirements for partnership property agreements, the agreement must satisfy the formal requirements of *either* Member State;
- (3) if at the time the agreement is concluded **only one of the partners is habitually resident in a participating Member State**, the agreement also must satisfy additional formal requirements that the law of that Member State lays down for partnership property agreements; and
- (4) if at the time the agreement is concluded **neither partner is habitually resident in a participating Member State**, the agreement does not need to satisfy any additional formal requirements<sup>35</sup>.

<sup>33</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: Internationales Familienrecht. Nomos. Baden Baden. 2019, p. 295.

<sup>34</sup> Cf. regarding the Regulation (EU) 2016/1103 see also: Pogorelčnik Vogrinc, N.: Applicable Law in Matrimonial Property Regime Disputes. In: Zbornik Pravnog fakulteta Sveučilišta u Rijeci. Vol. 40 (2019). No. 3, p. 1092.

<sup>35</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: Internationales Familienrecht. Nomos. Baden Baden. 2019, p. 290.

Such additional formal requirements, as mentioned in points (1) to (3), might, for example, stipulate that the choice of law agreement needs to be concluded in the form of a notarial deed or else is considered null and void. Therefore, the model for the *choice of law agreement*, proposed below, is complete only if the law of the participating Member State, where one or both partners is habitually resident, envisages no additional formal requirements for partnership property agreements. Otherwise, the agreement will need to be completed with the abovementioned elements and/or formalities.

For more information on the possible additional formal requirements, see the *Atlas of National Legislation of the EU Member States*: <https://www.euro-family.eu/atlas>.

## 6. Does Regulation (EU) 2016/1104 regulate the material validity of the choice of court agreement?

Yes. According to Article 24 of Regulation (EU) 2016/1104, the existence and validity of a *choice of law agreement* is determined by the law that the partners chose in their agreement.

Nonetheless, **lack of consent** might also be determined by the law of the country in which the partner has his or her habitual residence at the time the court is seized. This is, however, possible only if it appears from the circumstances of the case that it would not be reasonable to determine the existence of consent in accordance with the law that the partners chose.

## 7. What are the effects of the *choice of law agreement*, and which questions are governed by the applicable law that the partners chose?

Regulation (EU) 2016/1104 does not explicitly specify the effects of the choice of law agreement. It is generally accepted that by choosing the applicable law, the partners chose the default (legal) property regime of the chosen applicable law.<sup>36</sup> However, the partners are also allowed to specify which property regime under the applicable law they wish to choose.<sup>37</sup>

The law that is determined to be applicable in accordance with Regulation (EU) 2016/1104 governs various aspects of the property consequences of registered partnerships. Article 27 stipulates that it governs, *inter alia*,

- (a) the classification of property of either or both partners into different categories during and after the registered partnership,
- (b) the transfer of property from one category to another,
- (c) the responsibility of one partner for the liabilities and debts of the other partner,
- (d) the powers, rights and obligations of either or both partners with regard to property,
- (e) the partition, distribution or liquidation of the property upon dissolution of the registered partnership,
- (f) the effects of the property consequences of registered partnerships on a legal relationship between a partner and third parties (under the conditions described under Question 8), and
- (g) the material validity of a partnership property agreement.

The list is not exhaustive. Furthermore, the unity of applicable law needs to be emphasized. According to Article 21 of Regulation (EU) 2016/1104, the law applicable to the property consequences of a registered partnership shall apply to all assets that are subject to those consequences, regardless of where

<sup>36</sup> Cf. regarding the Regulation (EU) 2016/1103: Bergquist, U., Damascelli, D. [et al.]: *The EU Regulations on Matrimonial and Patrimonial Property*. Oxford University Press. Oxford. 2019, p. 100.

<sup>37</sup> *Ibid.*

the assets are located. From this, it follows that partners cannot conclude a partial *choice of law agreement*, namely, designating applicable law only to certain property consequences and assets of their partnership.<sup>38</sup>

On the other hand, the applicable law, chosen under Regulation (EU) 2016/1104, will not govern the determination of the existence or validity of the registered partnership, the recognition of the registered partnership, the grounds for dissolution or annulment of the registered partnership, the legal capacity of the partners or their maintenance obligations, succession, etc.

## 8. How does a choice of law agreement affect the rights of third parties?

The effect of the choice of law agreement on third parties is conditioned by their (presumed) **knowledge** of the chosen law.

Namely, although under Article 27, point f), the law chosen by the partners governs the effects of the property consequences of registered partnerships on a legal relationship between a partner and third parties (*see above*), Article 28 of Regulation (EU) 2016/1104 provides that the law applicable to the property consequences of the registered partnership may be invoked by a partner against a third party (in a dispute between either or both partners and the third party) **only** if the third party **knew** or, in the exercise of due diligence, **should have known** of that law.

The third party is deemed to know the law applicable to the property consequences of 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 immovable 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 immovable property, the state in which the property is situated.

In cases where the applicable law **cannot be invoked** against a third party, the property consequences of the registered partnership with respect to the third party are governed either **by the law of the state whose law is applicable to the transaction between a partner and the third party** or, 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.**

## V. MODEL CLAUSES

- ☞ CHOICE OF LAW AGREEMENT BETWEEN REGISTERED PARTNERS
- ☞ CHOICE OF LAW AGREEMENT BETWEEN FUTURE REGISTERED PARTNERS
- ☞ CHANGE OF THE CHOICE OF LAW AGREEMENT

<sup>38</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: Internationales Familienrecht. Nomos. Baden Baden. 2019, p. 288.

## VI. GUIDELINES ON PARTNERSHIP PROPERTY AGREEMENTS UNDER REGULATION (EU) 2016/1104

### 1. What is a partnership property agreement? What is the relation between a choice of court agreement and a partnership property agreement?

A *partnership property agreement* is any agreement between the partners or future partners by which they organize the property consequences of their registered partnership (Article 2(1)(c) of Regulation (EU) 2016/1104). It consists of provisions on the rights and obligations of the partners concerning their property.

A *partnership property agreement* may also include an agreement on the applicable law. This is, however, not necessary. In the latter case, the applicable law will be determined in accordance with Article 26 of Regulation (EU) 2016/1104, and the validity of the agreement will be subject to that law (*see below*).

### 2. Are there any requirements for the form of the partnership property agreement?

Yes. Article 25 of Regulation (EU) 2016/1104 sets out several requirements for formal validity.

First, a *partnership property agreement* must be expressed **in writing** and **dated** and **signed by both parties**. Such agreements are also deemed to be expressed in writing when they are concluded through communication **by electronic means that provide a durable record of the agreement**. Nonetheless, even agreements concluded by electronic means must be dated and signed (either by hand or by a qualified electronic signature).

Second, Article 25 of Regulation (EU) 2016/1104 envisages further requirements for formal validity that may stem **from national law**

1. if at the time the agreement is concluded **both partners are habitually resident in the same participating Member State**, the agreement also needs to satisfy any additional formal requirements that the law of that Member State lays down for partnership property agreements;
2. if at the time the agreement is concluded the **partners are habitually resident in different participating Member States** and the national laws of those Member States provide for different (additional) formal requirements for partnership property agreements, the agreement needs to satisfy the formal requirements of *either* Member State;
3. if at the time the agreement is concluded **only one partner is habitually resident in a participating Member State**, the agreement also needs to satisfy additional formal requirements that the law of that Member State lays down for partnership property agreements; and
4. if at the time the agreement is concluded **neither partner is habitually resident in a participating Member State**, the agreement does not need to satisfy any additional formal requirements<sup>39</sup>.

Although Article 25 of Regulation (EU) 2016/1104 closely resembles Article 23, it stipulates one further requirement. If the **law applicable to the property consequences of a registered partnership** envisages additional formal requirements, the *partnership property agreement* also must satisfy those requirements.

The applicable law may either be the law that the partners designated in a *choice of law agreement* or, in the absence of such a designation, the law that is determined in accordance with Article 26 of Regulation

<sup>39</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: Internationales Familienrecht. Nomos. Baden Baden. 2019, p. 300.

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2016/1104.<sup>40</sup> Since Article 25 enables the potential accumulation of formal requirements, the risk that the agreement is invalid increases.<sup>41</sup>

For more information on the possible additional formal requirements in national laws of the Member States, see the *Atlas of National Legislation of the EU Member States*: <https://www.euro-family.eu/atlas>.

### **3. Does the Regulation (EU) 2016/1104 regulate the material validity of partnership property agreements?**

No. The material validity (as well as the validity of a partner's consent) is subject to the rules of the law that is applicable to the property consequences of the registered partnership.<sup>42</sup>

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<sup>40</sup> Cf. regarding the Regulation (EU) 2016/1103: Bergquist, U., Damascelli, D. [et al.]: *The EU Regulations on Matrimonial and Patrimonial Property*. Oxford University Press. Oxford. 2019, p. 109.

<sup>41</sup> *Ibid.*, p. 110.

<sup>42</sup> Cf. regarding the Regulation (EU) 2016/1103: Andrae, M.: *Internationales Familienrecht. Nomos*. Baden Baden. 2019, p. 301.



# CHAPTER 3

## CHOICE OF COURT AND APPLICABLE LAW UNDER REGULATION (EU) 650/2012

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### I. GUIDELINES ON CHOICE OF COURT

#### 1. Is choice of court allowed under the Succession Regulation?

Yes, Article 5(1) of Regulation (EU) 650/2012<sup>43</sup> allows the parties concerned to agree on a competent court (*professio fori*). However, there is an important **limitation to the freedom of the parties' choice**: the parties may do so only if the deceased has chosen the applicable law under Article 22. If this is the case, the concerned parties may agree that a court or the courts of the same Member State are to have exclusive jurisdiction to rule on any succession matter. Under Article 22 of the Succession Regulation, the person may choose as applicable the law of his or her nationality at the time of making the choice or at the time of death.<sup>44</sup> The logic behind this limitation is that when the parties choose a competent court they may choose only the court of the same Member State as the applicable law because the basic idea of the Succession Regulation is the alignment of the competent court and applicable law.<sup>45</sup>

In addition, Article 5(1) expressly refers to the courts of “the Member State”; therefore, the choice-of-court agreement under the Regulation may not designate the courts of the third State as competent. In addition, the Succession Regulation has a limited territorial scope within the European Union. Namely, Ireland and Denmark do not apply this Regulation. Therefore, for the purposes of the Succession Regulation, these two countries are considered third States.<sup>46</sup>

#### 2. May parties choose only the courts of a Member State in general, or may they also choose the exact court to be competent in the matter?

Under the Succession Regulation, the parties may confer jurisdiction on “a court or the courts of that Member State”, as stated in the provision of Article 5(1) of the Succession Regulation. This in fact means

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<sup>43</sup> Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

<sup>44</sup> See this part, section III.

<sup>45</sup> See Whereas 27 and 28 of the Succession Regulation. See also Marongiu Buonaiuti, Fabrizio, in: Calvo Caravaca, Alfonso-Luis/Davì, Angelo/Mansel, Heinz-Peter (eds.) *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 150.

<sup>46</sup> Fuchs, Angelika, *The new EU Succession Regulation in a nutshell*, ERA Forum, Vol. 16, 2015, p. 122.

that it is possible that the choice-of-court agreement is phrased in **either of two ways**, to designate a named court in a Member State or, generally, the courts of a Member State.

Since the Succession Regulation deals only with international jurisdiction, whereas territorial and subject-matter jurisdiction are determined by the national law of the Member State,<sup>47</sup> there may be pros and cons for choosing one or the other option. The choice would in most cases depend on the circumstances of a case, such as whether there is territorial competence with a single court in a Member State or whether more courts are competent and, in the former case, whether the parties know the exact court competent in the chosen Member State, whether it is likely that such competence might change between the conclusion of the choice-of-court agreement and the succession proceedings, and whether the chosen Member State comprises several territorial units, each of which has its own rules of law with respect to succession.

### 3. May the parties choose more than one court to have jurisdiction?

The parties may choose **only one court** to have jurisdiction over the succession matter, or they may choose the courts of **only one Member State**, in which case the exact court will depend on the territorial jurisdiction pursuant to the national law of that Member State, as explained above.<sup>48</sup> In either case, the chosen court(s) will have **exclusive jurisdiction**. This entails that whenever the court is chosen as competent, other courts seized with the matter must decline jurisdiction.<sup>49</sup>

### 4. Does the choice-of-court-agreement have to be concluded in writing?

Yes, Article 5(2) prescribes that the choice-of-court agreement **must be expressed in writing**. Moreover, it must be **dated and signed** by the parties concerned. In line with other European private international law regulations, any communication by electronic means that provides a durable record of the agreement is deemed equivalent to writing.<sup>50</sup> When concluded in the electronic form, the written agreement will normally have the date recorded as part of the electronic communication (in any case, the parties should ensure that it is recorded), while the signature should be an electronic signature or another technical means that identifies the respective person, as per most commentators.<sup>51</sup>

### 5. May the parties conclude a choice-of-court agreement at any time?

Yes, Article 5(1) of the Succession Regulation does not specify at what point in time the parties concerned may enter into a choice-of-court agreement. However, as previously indicated, the chosen court must coincide with the law chosen by the deceased. The deceased may choose only the law of his or her nationality, and he or she may choose between the nationality he or she has at the time of making the choice or that at the time of death. Therefore, it follows that the parties concerned may agree on a competent court during the deceased's life or upon his or her death. However, if the parties do so during the deceased's life, there is a risk that he or she may become a national of another Member State and thus trigger an according change in the choice of law. A more likely scenario could involve a deceased who possesses two nationalities and, after initially choosing the applicable law of one nationality, decides to change the applicable law to the one corresponding to the other nationality. In these circumstances, the choice-of-court agreement aligned with the previously chosen law becomes invalid.

<sup>47</sup> See in relation to territorial, Poretti, P., *Nadležnost, nadležna tijela i postupci prema Uredbi (EU) br. 650/2012 o nasljeđivanju*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 37, No. 1, 2016, p. 571.

<sup>48</sup> See this section, question 2.

<sup>49</sup> See Article 6 of the Succession Regulation.

<sup>50</sup> See for instance Art. 25(2) of the Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

<sup>51</sup> Marongiu Buonaiuti, *op. cit.*, p. 158.

## 6. Who are the necessary parties to the choice-of-court agreement?

This is an important issue because it might prove to be a difficult task to list in advance all persons with an interest in the succession following the death of a person. Some interested parties appear only after the choice-of-court agreement is concluded. Actually, **all parties interested in succession are necessary parties to the choice-of-court agreement**, but the absence of any of them may be remedied subsequently under the strict condition of submission to the jurisdiction. Article 9 provides that the chosen court will retain competence under the agreement only if parties external to the agreement enter an appearance without contesting the jurisdiction of the court. If, however, the parties external to the choice-of-court agreement contest the jurisdiction, the chosen court must decline jurisdiction.

## 7. Is the chosen court competent for all or just some of the assets?

In principle, the court designated by the choice-of-court agreement has the **competence to decide on all assets of the deceased**, regardless of their location, pursuant to the general principle of the Regulation on unity of assets (see Article 4). However, under Article 12(1), if the estate of the deceased comprises assets located in a third State, the Member State court seized to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision about those assets will not be recognized and declared enforceable in the third State. In addition, the parties may agree that any issue of succession may be subject to the limitation of the scope of the proceedings under the law of the Member State of the court seized.

## 8. In what circumstances is it recommended that the parties conclude a choice-of-court agreement?

The backbone of the Succession Regulation jurisdictional rules is the **deceased's habitual residence**. According to the general rule of jurisdiction prescribed in Article 4, jurisdiction lies with the court in which the deceased has his habitual residence at the time of death, and this is coupled with the applicable law determined by the same connecting factor. If the habitual residence of the deceased at the time of death is not located in a Member State, pursuant to Article 10, the courts of a Member State in which assets of the estate are located are competent to rule on the succession as a whole if the deceased either had the nationality of that Member State at the time of death or previously had his or her habitual residence in that Member State and, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed.

It follows that in the absence of the choice-of-court agreement, jurisdiction is linked with the deceased's habitual residence or the location of his or her assets. If the deceased, in the years preceding his or her death, lived in more than one Member State or throughout the year lived periodically in different Member States, it may be questionable whether he or she had established habitual residence in one or more of these Member States.<sup>52</sup> With regard to localization of assets, if the deceased has assets in multiple states, the localization of the assets may prove to be a burdensome and time-consuming task.<sup>53</sup> In such circumstances, the parties concerned may benefit from agreeing on a competent court, provided that the deceased chose the applicable law in accordance with Article 22 of the Succession Regulation, the choice of law being advantageous for the same reasons.

<sup>52</sup> See Whereas 23 and 24 on determining habitual residence of the purposes of the Succession Regulation. See also Knol Radoja, Katarina, Odstupanja od načela jedinstva nasljeđivanja u Uredbi EU-a o nasljeđivanju, *Pravni vjesnik*, Vol. 35, No. 2, 2019, pp. 54-55.

<sup>53</sup> Wautelet, Patrick, Drafting choice of law and choice of court provisions under the EU Succession Regulation, Fifteen questions and some answers, available at: <https://orbi.uliege.be/bitstream/2268/207471/1/Wautelet%20Succession%20Regulation%20Choice%20of%20court%20choice%20of%20law.pdf> (4.5.2020), p. 1.

## II. MODEL CLAUSES

### ☞ CHOICE-OF-COURT AGREEMENT

## III. GUIDELINES ON CHOICE OF APPLICABLE LAW

### 1. Is the choice of applicable law allowed under the Succession Regulation?

Yes, as was already indicated, under Article 22(1), a person may choose applicable law to govern his or her succession (*professio iuris*). The possibility of **choosing applicable law** is considered an advantage of the Succession Regulation in generating legal certainty as to the law applicable to succession,<sup>54</sup> as well as providing the option for the person to organize his or her succession in advance and more efficiently.<sup>55</sup>

### 2. How is the choice determined?

The choice of applicable law may be **explicit or tacit**. Article 22(2) lays down that the choice can be made expressly in a declaration in the form of a disposition of property upon death. In addition, the deceased's choice of applicable law may be demonstrated by the terms of such a disposition. Whereas 39 explains that a tacit choice of law can be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his or her disposition to specific provisions of the law of the State of his or her nationality or where he or she had otherwise mentioned that law. However, if a person wishes the law of his or her nationality to govern his or her succession, it is advisable that he or she make an express choice and not rely on the referral and mention of that law in disposition.

### 3. May the law of any State be chosen as applicable?

No, **only the law of the State of the deceased's nationality may be chosen**, meaning either his or her nationality at the time of making the choice or his or her nationality at the time of his or her death. If a person possesses multiple nationalities at the time of making the choice or at the time of death, he or she may choose as applicable the law of any of those States. Nationality is chosen as a sole option for the choice of law in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.<sup>56</sup>

The fact that the person chose the law to govern his or her succession gives the concerned parties possibility of designating the competent court located in the Member State whose law has been chosen.<sup>57</sup> If the parties concerned use this option, the competent court and applicable law will be aligned, as generally occurs in situations where no law and no court are chosen.<sup>58</sup>

### 4. Is it possible to choose the law of a third State as applicable?

Yes, Article 20 provides for the **universal application** of the Succession Regulation. Thus, any law referred to by the Succession Regulation is applied whether or not it is the law of a Member State.

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<sup>54</sup> Rodríguez-Uría Suárez, Isabel, La ley aplicable a las sucesiones *mortis causa* en el Reglamento (UE) 650/2012, InDret, Vol. 2, 2013., p. 11, available at SSRN: <https://ssrn.com/abstract=2266493> (5.5.2020).

<sup>55</sup> Whereas 38 of the Succession Regulation.

<sup>56</sup> Whereas 38 of the Succession Regulation.

<sup>57</sup> See section I.

<sup>58</sup> Damascelli, Domenico, Diritto internazionale privato delle successioni a causa di morte, Giuffrè, 2013, pp. 59 et seq.

Furthermore, Article 22(1) allows the person to choose “the law of the State”, thus not restricting the choice to the law of a Member State. However, if the person has the nationality of a third State, the persons concerned will not be able to agree on a competent court.<sup>59</sup>

## 5. May multiple laws be chosen?

No, the Succession Regulation does not allow for the choice of multiple laws, either vertically or horizontally, for a single succession.<sup>60</sup> This is because it is founded on the principle of unity of assets (see Articles 4 and 21).

## 6. May the choice be modified or revoked?

Given that the person has the right to choose the applicable law in relation to his or her anticipated succession, he or she may **modify that choice or revoke it** without choosing another law instead.<sup>61</sup> However, there are issues of validity related to such modification and revocation, which are mentioned below.<sup>62</sup>

Concerns have been raised in relation to this issue of whether a modification or revocation of the act of disposition of property upon death entails the modification and revocation of the choice of law, because it remains unresolved in the Succession Regulation.<sup>63</sup> For this reason, it is important for the person organizing his or her succession by choosing applicable law to always explicitly state the destiny of the choice of law when modifying or revoking previous dispositions containing the choice-of-law clause.

## 7. Who may choose the applicable law?

Only the person, whose succession is at stake, has the right to choose the applicable law for his or her succession. The Succession Regulation does not allow such a choice to be made by any other person, including heirs, before or after the death of the person or opening of the succession proceedings.<sup>64</sup>

## 8. Does the choice-of-law clause have to be in writing?

The choice-of-law agreement does not have to be in writing. However, the issue of the formal validity of **dispositions of property upon death made orally is excluded from the scope** of the Succession Regulation. Therefore, whether orally made choice of law is valid is decided subject to the law applicable under the national conflict of laws of the Member State whose court is seized with the matter.

If the disposition is a will, the formal validity of the will and the choice of law contained therein is determined by the 1961 Hague convention on the conflict of laws relating to the form of testamentary dispositions, provided that the Member State of the court seized is a party to that Convention. When the court of the Member State, that is not a party to this Convention, is seized, the formal validity of the will and the choice of law in it are subject to the Succession Regulation, in particular Article 27(1). The

<sup>59</sup> See this part, section I.

<sup>60</sup> Max Planck Institute for Comparative and International Private Law, Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 74, 2010, pp. 609-613.

<sup>61</sup> See also Article 22(4) of the Succession Regulation.

<sup>62</sup> See this section, question 8.

<sup>63</sup> Castelanoz Ruiz, Esperanza, in Calvo Caravaca, Alfonso-Luis/Davi, Angelo/Mansel, Heinz-Peter (eds.) *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, pp. 340 et seq.

<sup>64</sup> Damascelli, Domenico, *Diritto internazionale privato delle successioni a causa di morte*, Giuffrè, 2013, p. 56.

same Article also governs the issue of the formal validity of a choice of law contained in a disposition of property upon death, before the courts of the Member State in which the Succession Regulation applies.<sup>65</sup>

Article 27(1) lays down that a disposition of property upon death made in writing is valid in form if its form complies with at least one of the laws referred to in that paragraph. This provision is designed to favor formal validity and is consistent with the 1961 Hague convention.<sup>66</sup> Hence, despite the above differentiation between wills in the Member States not parties and Member States being parties to the 1961 Hague convention, the outcome should be the same.

When determining whether a given disposition of property upon death is formally valid under this Regulation, the competent authority should disregard the fraudulent creation of an international element to circumvent the rules on formal validity.

If the person wishes to modify or revoke the choice of law, according to Article 22(4), the modifications or revocation must meet the requirements of form for the modification or revocation of a disposition of property upon death.

## 9. What law governs the substantive validity of the choice of law?

In line with the principle established in private international law, Article 22(3) prescribes that the **substantive validity of the choice of applicable law is governed by the chosen law**, that is, whether the person making the choice may be considered to have understood and consented to what he or she was doing. The same should apply to the act of modifying or revoking a choice of law. The validity of choice of law is not affected by the fact that the chosen law does not allow a choice of law in matters of succession.<sup>67</sup> Furthermore, as *professio iuris* represents an independent act, it is not affected by the invalidity of a will or an agreement regarding succession of which it is part.<sup>68</sup>

## 10. In what circumstances is it recommended that the person choose the applicable law?

The general rule that applies in the absence of choice in the majority of cases is Article 21, according to which the law of the State in which the deceased has his or her habitual residence at the time of death is applicable. However, in certain circumstances, such as those in which a person divides his or her time between two States during the year or expects to change his or her residence, the habitual residence might be difficult to establish. For the sake of the predictability of the result, it might be beneficial to choose the law applicable to succession. It has been suggested that the option of choosing the applicable law could be particularly useful for persons who have settled abroad but still have strong connections with their State of origin and wish for the law of that State to govern succession.<sup>69</sup>

In contrast, if the person finds the law of his or her nationality unfavorable for estate planning, there is no option to “confirm” the application of the law of the State of his or her habitual residence. This might become important in view of the escape clause in Article 21(2) and, more importantly, the tacit choice of law in Article 22(2) should the circumstances be interpreted to trigger their operation. Therefore, it is recommended that the person “unchooses” the law by a statement indicating that he or she in no way intends for the law of his or her nationality (or any other law, for that matter) to govern the succession, thus removing any potential doubt regarding his or her intentions.<sup>70</sup>

<sup>65</sup> See this part, section I.

<sup>66</sup> Whereas 52 of the Succession Regulation.

<sup>67</sup> Whereas 40 of the Succession Regulation.

<sup>68</sup> Rodríguez-Uría Suárez, *op. cit.*, p. 13.

<sup>69</sup> Damascelli, Domenico, I criteri di collegamento impiegati dal regolamento n. 650/2012 per la designazione della legge regolatrice della successione a causa di morte, in: Franzina, Pietro/Leandro, Antonio (eds.), *Il diritto internazionale privato Europeo delle successioni mortis causa*, Giuffrè, 2013, p. 99.

<sup>70</sup> Wautelet, *op. cit.*, p. 11.

#### **IV. MODEL CLAUSES**

☞ CHOICE OF APPLICABLE LAW

☞ DEROGATION OF THE LAW OF NATIONALITY AS APPLICABLE



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**ANNEX 1**  
**MODEL CLAUSES IN PDF FORMAT**



**CHOICE OF COURT AGREEMENT BETWEEN SPOUSES OR FUTURE SPOUSES**

**This choice of court agreement is entered into between:**

Mr./Mrs. NAME and SURNAME \_\_\_\_\_ with date of birth \_\_\_\_\_ from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_], with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_ with date of birth \_\_\_\_\_ from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_], with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

Pursuant to Article 7 of Council Regulation (EU) 2016/1103 of 24 June 2016: In cases covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime. We must remember that all this shall be expressed in writing and dated and signed by the parties.

**The parties agree:**

that the courts of [INSERT STATE \_\_\_\_\_] shall have exclusive jurisdiction to rule on the property consequences of the future spouses, who are married / will be married in [INSERT place and date \_\_\_\_\_].

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## CHOICE OF COURT AGREEMENT IN MATRIMONIAL PROPERTY REGIMES IN CONNECTION TO DIVORCE, LEGAL SEPARATION OR MARRIAGE ANNULMENT (ART. 5.1 OF COUNCIL REGULATION (EU) 2016/1103)

Jurisdiction in matters of matrimonial property regimes under Article 5.1 of Council Regulation (EU) 2016/1103 shall be subject to the spouses agreement on where the court is seized to rule on the application for divorce, legal separation or marriage annulment:

### This choice of court agreement is entered into between:

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,  
and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_\_] of [MONTH \_\_\_\_\_] of [YEAR \_\_\_\_\_]

*Pursuant to Article 5 of Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes, the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended as of 22 August 2022, when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable as far as family disputes are concerned, since its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.*

### The parties agree:

that the courts of [INSERT STAT \_\_\_\_\_] shall have exclusive jurisdiction to rule on the property consequences of the future spouses, who will be married in [INSERT place and planned date \_\_\_\_\_].

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## CHOICE OF LAW AGREEMENT BETWEEN THE SPOUSES OR FUTURE SPOUSE BEFORE NOTARY/LAWYER

### This choice of law agreement is entered into between:

Before me, Mr./Mrs. [NAME OF NOTARY/LAWYER\_\_\_\_\_], Notary Public of the  
Illustrious College\_\_\_\_\_/Bar Association of \_\_\_\_\_]

Mr./Mrs. NAME and SURNAME\_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS\_\_\_\_\_], [LOCALITY\_\_\_\_\_,  
with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME\_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS\_\_\_\_\_], [LOCALITY\_\_\_\_\_,  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION\_\_\_\_\_] on [DAY\_\_\_\_\_] of [MONTH\_\_\_\_\_] of [YEAR\_\_\_\_\_]

*Pursuant to Article 22 of Council Regulation (EU) 2016/1103 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes.*

### The parties agree:

that the courts of [INSERT STATE AND STATE LAW \_\_\_\_\_] shall to rule on  
the property consequences of the future spouses, who are married / will be married in [INSERT  
place and date\_\_\_\_\_].

### Choose:

1. As set out in Article 22.2 of Regulation (EU) 2016/1103, the choice of applicable law shall have prospective effect only, in other words, in the future.
2. As set out in Article 22.2 of Regulation (EU) 2016/1103, the choice of applicable law shall not have any adverse retroactive effect for third parties deriving from that law.

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## **CHOICE OF LAW AGREEMENT IN MARRIAGE AGREEMENT: AGREEMENT FOR MATRIMONIAL PROPERTY REGIME FOR SPOUSES OR FUTURE SPOUSES**

Regulation (EU) 2016/1103 gives spouses the possibility to choose the law applicable to the substance of the economic consequences of the marriage. The rules for this purpose are those laid down in Article 22(1), which do not give the parties absolute freedom of choice. That freedom is subject to the condition that the law chosen has a close connection with them by reason of their habitual residence or nationality.

It must therefore be the law of the state in which one or both of them have their habitual residence or the nationality of either of them. In both cases, refer to the time of the conclusion of the agreement.

In these models, we must bear in mind that the agreement requires, for its validity, the concurrence of requirements of substance (Art. 24 "Consent and material validity" and of form (Art. 23) and must be made in writing, dated and signed. For this purpose, any communication made by electronic means that provides a durable record of the agreement shall be deemed to be in writing. This provision states that if the law of the state of the common habitual residence at the time of the conclusion of the agreement lays down additional formal requirements for settlements, those requirements apply. If the parties have their habitual residences in different Member States at the time of the conclusion of the agreement, and the laws of both states provide for different formal requirements for the conclusion of the agreement, the agreement is formally valid if it meets the requirements of one of the two laws. If only one of the spouses has his or her habitual residence in a Member State at the time of the conclusion of the agreement, and the law of that state lays down additional formal requirements for the settlement, those requirements shall apply.

### **MARRIAGE AGREEMENT**

Different agreements can be included in marriage contracts to organize the couple's assets. The substantive validity of the pacts or agreements included in settlements will be governed by the provisions of the state law applicable to the matrimonial property regime (Art. 27, Letter g). Formal validity requires at least that the agreement be in writing and be dated and signed by both parties. Any communication made by electronic means that provide a durable record of the agreement is deemed to be "writing" (Art. 25 (1)).

The following model can be adapted to the requirements of each country's private law rules, provided that the country allows for such agreements, so that future spouses or partners, before or after marriage, can establish their desired matrimonial property regime, as well as agreements affecting the ownership, management or administration of the assets that comprise the matrimonial property, and determine liability for debts or obligations contracted individually or jointly.

### **MODEL OF AGREEMENT FOR ECONOMIC REGIME FOR SPOUSES OR FUTURE SPOUSES**

Before me, Mr./Mrs. [NAME OF NOTARY/LAWYER\_\_\_\_\_] of the Illustrious College\_\_\_\_\_ /Bar \_\_\_\_\_

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
 from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
 with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
 from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
 with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

**Two situations:**

Who have entered into a marriage on [DATE \_\_\_\_\_], in  
 [PLACE \_\_\_\_\_], registered in [ \_\_\_\_\_] with registration number  
 [ \_\_\_\_\_].

Who have not entered into a marriage on [DATE SCHEDULED \_\_\_\_\_],  
 in [PLACE SCHEDULED \_\_\_\_\_].

**THE PARTIES INTERVENING AGREE**

Choose and specify the agreement about decisions in matters of matrimonial property regimes according to the interest and will of the parties.

**FIRST:** That your marriage will be governed by the economic regime of \_\_\_\_\_,  
 regulated by [STATE LAW \_\_\_\_\_].

**INFORMATION:**

1. Default statutory regime under the law; see the table in question 11.
2. Choose the economic matrimonial regime:

By virtue of freedom to contract, also accepted under the law of some countries, see the table in question 12.

**Community of property:** Property acquired by either spouse will, in principle, become the property of both, and both spouses may have to pay for particular debts regardless of who incurred them. In case of dissolution of the regime, this community property will be split between the spouses or between the surviving spouse and the other spouse's estate.

**Deferred community of property:** During the marriage, all property is owned by the spouse(s) who acquired it, and all debts have to be paid by the spouse(s) who incurred them. However, upon death or divorce, the net value of the existing property of either spouse will normally be split between the spouses or between the surviving spouse and the other spouse's estate.

**Participation in accrued gain:** All property is owned by the spouse(s) who acquired it, and all debts have to be paid by the spouse(s) who incurred them. Upon dissolution of the regime, the net gain made by each spouse during the marriage will be calculated, and the spouse with the higher gain has to pay a certain percentage of the difference to the other. The applicable law

may provide fixed, flexible or simplified solutions, e.g., lump sum, in particular in the case of dissolution by death.

**Separation of property:** The property and debts of each spouse remain entirely unaffected by the marriage. In the case of divorce and/or death, no property or debts will be shared, nor will any value be equalized.

**Other**\_\_\_\_\_.

**SECOND:** That, in the event that the two spouses jointly acquire any property, its ownership will be determined by \_\_\_\_\_ (decide whether to include only property acquired during the marriage or the opposite, including all or some premarital property).

**THIRD:** That the goods of one of the spouses will not respond to the debts, the obligations and the responsibilities contracted by the other spouse\_\_\_\_\_.

**FOURTH:** At the time this agreement is concluded, the spouses have the property, assets and debts in countries specified in Annex\_\_\_\_\_

**FIFTH:** That in the event of separation, divorce or marriage annulment, both parties agree \_\_\_\_\_

**SIXTH:** The following agreements relating to the marriage exist and have been copied in \_\_\_\_

...

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature

\_\_\_\_\_

Signature

\_\_\_\_\_

**APPLICABLE LAW BASED ON HABITUAL RESIDENCE IN A MEMBER STATE  
AT THE TIME OF THE CONCLUSION OF THE MARRIAGE AGREEMENT**

**This choice of law agreement is entered into between:**

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,  
and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

*In accordance with the requirements of Regulation (EU) 2016/1103 establishing Articles 23 and 24 on the choice of law agreement and Article 25 on marriage agreement. Both the agreement on the applicable law and the marriage agreement shall be in writing, dated and signed by both spouses, it being understood that any communication made by electronic means that provides a durable record of the agreement under "Articles 23.1 and 25.1 of Regulation (EU) 2016/1103" shall be considered writing.*

**The spouses may choose the national law of any Member State provided that it is the law of the state of the habitual residence** of both or one of them (Articles 22.1(a) and 33.1 of Regulation (EU) 2016/1103) at the time of the conclusion of the agreement. The option corresponds to the provisions of Articles 23 and 25 of Regulation (EU) 2016/1103 considering the possible additional formal requirements:

1. Where the law of the Member State in which both spouses have their habitual residence at the time of the conclusion of the marriage contract lays down additional formal requirements for marriage contracts, those requirements shall apply.

Clause: Both spouses declare/confirm that they have their habitual residence at the time of the conclusion of the marriage contract in \_\_\_\_\_.

2. Where the spouses have their habitual residence in different Member States at the time of the conclusion of the marriage contract, and the laws of the two states provide different formal requirements for marriage contracts, the agreement is formally valid if it satisfies the requirements of one of the two laws.

Clause: The spouses have their habitual residence in different Member States at the time of the conclusion of the marriage contract. One of them resides in \_\_\_\_\_, and the other resides in \_\_\_\_\_.

There are two possibilities:

- The agreement satisfies the requirements of only one of the two states. This state will apply: \_\_\_\_\_.

- The agreement satisfies the requirements of both states. The parties can then choose to apply the law of state\_\_\_\_\_.

3. Where, at the time of the conclusion of the marriage agreement, only one of the spouses has his or her habitual residence in a Member State, and the law of that state lays down additional formal requirements for marriage agreement, those requirements shall apply.

Clause: Both spouses declares/confirms that their habitual residence at the time of the conclusion of the marriage contract is in Member State \_\_\_\_\_.

Depending on the case, we will draft the appropriate clause for the specific case, and we will incorporate it into the agreements that the parties may enter into, into the procedure for the liquidation of the economic system or into the lawsuit before the competent court.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature

\_\_\_\_\_

Signature

\_\_\_\_\_

**CHOICE OF LAW APPLICABLE TO ADVERSARIAL LEGAL SEPARATION OR  
DIVORCE PROCEDURE**  
(jurisdiction to rule on matters of matrimonial property regimes arising in connection  
with that application: marriages celebrated before 29 January 2019)

**This choice of law agreement is entered into between:**

Before me, Mr./Mrs. [NAME OF NOTARY\_\_\_\_\_], Notary Public of the Illustrious  
College of [COLLEGE OF NOTARY\_\_\_\_\_].

Mr./Mrs. NAME and SURNAME\_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS\_\_\_\_\_], [LOCALITY\_\_\_\_\_,  
with IDENTITY CARD NUMBER \_\_\_\_\_,  
and

Mr./Mrs. NAME and SURNAME\_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS\_\_\_\_\_], [LOCALITY\_\_\_\_\_,  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION\_\_\_\_\_] on [DAY\_\_\_\_\_] of [MONTH\_\_\_\_\_] of [YEAR\_\_\_\_\_]

**Several issues should be clarified beforehand:**

- Regulation (EU) 2016/1103 is applicable in Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

- Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes states in Article 5 that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of the regulation. Article 5 states that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended from 22 August 2022 when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable. Regarding family disputes, its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.

It should also be remembered that Regulation (EU) 1259/2010 sets out its scope in Article 1 as applying only to situations involving a conflict of laws, divorce and legal separation and excluding preliminary ruling questions such as marriage annulment in the context of a divorce or legal separation procedure.

- In view of Whereas 32, 33 and 34, Regulation (EU) 2016/1103 should concentrate its jurisdiction in matters relating to matrimonial property regimes on the Member State whose courts

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are to rule on the succession of one of the spouses in accordance with Regulation (EU) 650/2012 or on divorce, legal separation or marriage annulment in accordance with Council Regulation (EC) 2201/2003. For separation and divorce, Article 8 a) of Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation states that the place of habitual residence of the spouses at the time when the application is lodged shall be the common place, which in our case is an EU member country.

**The parties agree regarding law applicable to the patrimonial property regime:**

Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date: According to the Civil Code of \_\_\_\_\_ (State) Art. \_\_\_\_\_, the Law \_\_\_\_\_ of (the country) is applicable as the country of common habitual residence immediately after the celebration of the marriage.

Signature

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Signature

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## CHOICE OF LAW APPLICABLE TO MARRIAGES ENTERED INTO BEFORE 29 JANUARY 2019

### **This choice of law agreement is entered into between:**

Before me, Mr./Mrs. [NAME OF NOTARY\_\_\_\_\_], Notary Public of the Illustrious College of [COLLEGE OF NOTARY\_\_\_\_\_].

Mr./Mrs. NAME and SURNAME\_\_\_\_\_, with date of birth \_\_\_\_\_ from [NATIONALITY \_\_\_\_\_], living at [ADDRESS\_\_\_\_\_], [LOCALITY\_\_\_\_\_], with IDENTITY CARD NUMBER \_\_\_\_\_,  
and

Mr./Mrs. NAME and SURNAME\_\_\_\_\_, with date of birth \_\_\_\_\_ from [NATIONALITY \_\_\_\_\_], living at [ADDRESS\_\_\_\_\_], [LOCALITY\_\_\_\_\_], with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION\_\_\_\_\_] on [DAY\_\_\_\_\_] of [MONTH\_\_\_\_\_] of [YEAR\_\_\_\_\_]

### **Several issues should be clarified beforehand:**

- Regulation (EU) 2016/1103 is applicable in Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

- Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes states in Article 5 that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of the regulation. Article 5 states that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended from 22 August 2022, when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable to family disputes, since its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.

It should also be remembered that Regulation (EU) 1259/2010 set out its scope in Article 1 as applying only to situations involving a conflict of laws, divorce and legal separation and excluding preliminary ruling questions such as marriage annulment in the context of a divorce or legal separation procedure.

- In view of Whereas 32, 33 and 34, Regulation (EU) 2016/1103 should concentrate jurisdiction in matters relating to matrimonial property regimes on the Member State whose courts are to rule on the succession of one of the spouses in accordance with Regulation (EU) 650/2012 or on divorce, legal separation or marriage annulment in accordance with Council Regulation (EC)

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2201/2003. In addition, for separation and divorce, Article 8 a) of Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation states that the place of habitual residence of the spouses at the time when the application is lodged shall be the common place, which in our case is an EU member country.

**Marriages celebrated before 29 January 2019:**

- Marriages celebrated before 29 January 2019 and without a later choice of law agreement: According to the Private International Law Rules Art. \_\_\_\_ of the country of residence\_\_\_\_, is applicable the law of the spouses at the time of the marriage.

**The parties agree regarding the law applicable to the matrimonial property regime:**

- Marriages celebrated before 29 January 2019 that after this date specified the applicable law or marriages celebrated after this date that designated the applicable law: the law of the EU country chosen by the spouses as agreed and formalized by the parties on \_\_\_\_\_ in \_\_\_\_\_, in accordance with Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes, Art. 22 et seq.

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## CHOICE OF LAW APPLICABLE TO MATRIMONIAL PROPERTY IN CONTENTIOUS LEGAL SEPARATION OR DIVORCE

The competent court to rule on the matrimonial property regime must often be determined at the time of the judicial separation or divorce proceedings (Art. 5) or on the death of one of the spouses (Art. 4).

Since divorce is the most common procedure in connection with the liquidation of the matrimonial property regime when determining the applicable law, the following clauses can be incorporated into these procedures.

The applicable law for divorce proceedings is Council Regulation (EU) 1259/2010, which establishes in Article 8 that the applicable law shall be that of the place where the spouses had their last habitual residence until less than one year ago, provided that one of them continues to reside there. If more than one year has elapsed between the filing of the lawsuit and the termination of cohabitation, the law of the nationality of both spouses at the time the lawsuit is filed applies if it were common, and in another case, would apply the law of the State before whose courts the lawsuit is filed.

### APPLICABLE LAW

#### Several issues should be clarified beforehand:

- Regulation (EU) 2016/1103 is applicable in Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

- Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes states in Article 5 that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of the regulation. Article 5 states that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended from 22 August 2022, when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable to family disputes, since its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.

It should also be remembered that Regulation (EU) 1259/2010 set out its scope in Article 1 as applying only to situations involving a conflict of laws, divorce and legal separation and excluding preliminary ruling questions such as marriage annulment in the context of a divorce or legal separation procedure.

- In view of Whereass 32, 33 and 34, Regulation (EU) 2016/1103 should concentrate jurisdiction in matters relating to matrimonial property regimes on the Member State whose courts are to rule on the succession of one of the spouses in accordance with Regulation (EU) 650/2012 or on divorce, legal separation or marriage annulment in accordance with Council Regulation (EC) 2201/2003

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
 from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
 with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
 from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
 with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

### APPLICABLE LAW IN SEPARATION/DIVORCE

Article 8 a) of Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation states that the place of habitual residence of the plaintiff in the EU at the time when the application is lodged shall be the place where the application is lodged.

This regulation is applicable in sixteen EU countries participating in enhanced cooperation on this issue: Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

Clause: In accordance with Article 5 of Council Regulation (EU) 1259/2010 of 20 December 2010 establishing enhanced cooperation on the law applicable to divorce and legal separation, the spouses have agreed to designate [\_\_\_\_\_] (the law of the country) as the applicable law.

### LAW APPLICABLE TO THE MATRIMONIAL PROPERTY REGIME

Choose the appropriate option:

1. Marriages celebrated before 29 January 2019 or without a choice of law agreement after that date:

a. Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date when both spouses are not of the same nationality: Article \_\_\_\_\_ of the Civil Code of \_\_\_\_\_ (country) and the law of \_\_\_\_ is applicable, as it is the country of marital domicile immediately after the marriage.

You must choose the article according to the country (see tables in questions 11 and 12-chapter 1).

b. Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date when the spouses are of the same nationality at the time of the marriage: The common personal law of the spouses shall apply to the marriage\_\_\_\_\_.

2. Marriages concluded after 29 January 2019: Pursuant to Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes, Article 26(1)(a), the law of \_\_\_\_\_ applies, as the state in which the spouses had their habitual residence after the marriage.

3. Marriages celebrated before 29 January 2019 that after this date have specified the applicable law or marriages that were celebrated after this date and have designated the applicable law: The law of \_\_\_\_ (e.g., Spain), as agreed and formalized by the parties on \_\_\_\_\_, is applicable in accordance with Regulation (EU) 2016/1103 of the Council of 24 June 2016, establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions concerning matrimonial property regimes, Art. 22 et seq.

Signature:

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Signature:

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**CHOICE OF COURT AGREEMENT BETWEEN REGISTERED PARTNERS**

**This *choice of court agreement* is entered into between**

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

Pursuant to Article 7 of *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*,

**The parties agree**

that the courts of [INSERT MEMBER STATE] shall have exclusive jurisdiction to rule on the property consequences of the partnership, which was registered on the [DATE OF REGISTRATION] in [LOCATION OF REGISTRATION].

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

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**CHOICE OF COURT AGREEMENT  
BETWEEN FUTURE REGISTERED PARTNERS**

**This *choice of court agreement* is entered into between**

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

Pursuant to Article 7 of *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*,

**The parties agree**

that the courts of **[INSERT MEMBER STATE]** shall have exclusive jurisdiction to rule on the property consequences of the partnership, which the parties intend to register **[INSERT THE DATE AND LOCATION OF THE REGISTRATION OF PARTNERSHIP IF KNOWN]**.

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## CHOICE OF LAW AGREEMENT BETWEEN REGISTERED PARTNERS

This *choice of law agreement* is entered into between

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

Pursuant to Article 22 of *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*,

### The parties agree

that the law of **[INSERT THE STATE]** is applicable to the property consequences of their partnership, which the parties registered on the **[DATE OF REGISTRATION]** in **[LOCATION OF REGISTRATION]**.

*CHOOSE:*

- . In accordance with Article 22(2) of Regulation (EU) 2016/1104, the choice of applicable law shall apply prospectively.
- . In accordance with Article 22(2) of Regulation (EU) 2016/1104, the choice of applicable law shall apply retrospectively.

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

**CHOICE OF LAW AGREEMENT  
BETWEEN FUTURE REGISTERED PARTNERS**

**This *choice of law agreement* is entered into between**

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,  
and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

Pursuant to Article 22 of *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships,*

**The parties agree**

that the law of **[INSERT THE STATE]** is applicable to the property consequences of their partnership, which the parties intend to register **[INSERT THE DATE AND LOCATION OF THE REGISTRATION OF PARTNERSHIP IF KNOWN]**.

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## CHANGE OF THE CHOICE OF LAW AGREEMENT

*This change of the choice of law agreement is entered into between*

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

The parties concluded a *choice of court agreement* on [DATE] in [LOCATION], with which they designated the law of [INSERT THE STATE] as applicable to the property consequences of their registered partnership.

Pursuant to Article 22 of *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships* (hereinafter Regulation (EU) 2016/1104),

### The parties agree

to the change of applicable law and designate the law of [INSERT THE STATE] as applicable to the property consequences of their partnership, which the parties registered on the [DATE OF REGISTRATION] in [LOCATION OF REGISTRATION].

### Choose:

In accordance with Article 22(2) of Regulation (EU) 2016/1104, the change of applicable law shall apply prospectively.

In accordance with Article 22(2) of Regulation (EU) 2016/1104, the change of applicable law shall apply retrospectively.

Signature:

\_\_\_\_\_

Signature:

\_\_\_\_\_

## CHOICE-OF-COURT AGREEMENT

**This *choice-of-court agreement* is entered into between**

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_,

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

and

Mr./Mrs. NAME and SURNAME \_\_\_\_\_, with date of birth \_\_\_\_\_  
from [NATIONALITY \_\_\_\_\_], living at [ADDRESS \_\_\_\_\_], [LOCALITY \_\_\_\_\_],  
with IDENTITY CARD NUMBER \_\_\_\_\_.

In [LOCATION \_\_\_\_\_] on [DAY \_\_\_\_] of [MONTH \_\_\_\_] of [YEAR \_\_\_\_]

Pursuant to Article 5(1) of *Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*,

**The parties agree**

that the courts of **[INSERT MEMBER STATE]**, as the Member State whose law is chosen as applicable, shall have exclusive jurisdiction to rule on succession regarding assets belonging to **[FIRST AND SECOND NAME], [DATE OF BIRTH], [NATIONALITY], [ADDRESS]**.

Signature:

Signature:

Signature:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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### CHOICE OF APPLICABLE LAW

I, **[FIRST AND SECOND NAME]**, **[DATE OF BIRTH]**, **[ADDRESS]**, living at **[ADDRESS\_\_\_\_\_]**, **[LOCALITY\_\_\_\_\_]**, with IDENTITY CARD NUMBER \_\_\_\_\_, national of **[INSERT STATE]**, pursuant to Article 22 of *Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, choose the law of **[INSERT STATE]** as applicable to succession of my assets.

On the **[DATE]** in **[LOCATION]**

Signature:

---

**DEROGATION OF THE LAW OF NATIONALITY AS APPLICABLE**

on the **[DATE]** in **[LOCATION]**

I, **[FIRST AND SECOND NAME]**, **[DATE OF BIRTH]**, **[ADDRESS]**, living at **[ADDRESS\_\_\_\_\_]**, **[LOCALITY\_\_\_\_\_]**, with IDENTITY CARD NUMBER \_\_\_\_\_national of **[INSERT STATE\_\_\_\_\_]**, hereby declare that I in no way intend for the law of **[INSERT STATE\_\_\_\_\_]** as the law of the State of my nationality to be applicable to succession of my assets pursuant to Article 22 of *Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*.

Signature:

\_\_\_\_\_



## **ANNEX 2**

### **EDITABLE MODELS CLAUSE<sup>1</sup>**

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<sup>1</sup> Please note that the forms include a drop-down menu in which are listed all States of the European Union for the sole purpose of facilitating a quick editing of the model.

The reader is also given the opportunity to enter States which are different from those of the European Union simply by writing the name of the State in a specific empty box.

This technological solution facilitates the drafting with the maximum degree of flexibility and adaptability to the specific case”. The reader should bear in mind that the parties are limited in their choice by the Regulation. Information on limitations can be found in the Guidelines on choice of jurisdiction and applicable law agreements.



## CHOICE OF COURT AGREEMENT BETWEEN SPOUSES OR FUTURE SPOUSES

**This choice of court agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 7 of Council Regulation (UE) 2016/1103 of 24 June 2016: In cases covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime. We must remember that all this shall be expressed in writing and dated and signed by the parties.*

**The parties agree:**

that the courts of ..... shall have exclusive jurisdiction  
to rule on the property consequences of the ..... in .....  
on .....

**Signature:**

**Signature:**

**CHOICE OF COURT AGREEMENT IN MATRIMONIAL PROPERTY REGIMES IN CONNECTION TO DIVORCE, LEGAL SEPARATION OR MARRIAGE ANNULMENT (ART. 5.1 OF COUNCIL REGULATION (EU) 2016/1103)**

Jurisdiction in matters of matrimonial property regimes under Article 5.1 of Council Regulation (EU) 2016/1103 shall be subject to the spouses agreement on where the court is seized to rule on the application for divorce, legal separation or marriage annulment:

**This choice of court agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 5 of Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes, the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EU) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended as of 22 August 2022, when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable as far as family disputes are concerned, since its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.*

**The parties agree:**

that the courts of ..... shall have exclusive jurisdiction  
to rule on the property consequences of the ..... in .....  
on .....

**Signature:**

**Signature:**

**CHOICE OF LAW AGREEMENT BETWEEN THE SPOUSES OR FUTURE SPOUSE  
BEFORE NOTARY/LAWYER**

**This choice of law agreement is entered into between:**

Before me, ....., ,  
..... ,

....., with date of birth .....,

from ....., living at .....

in ....., with identity card number .....,

**and**

....., with date of birth .....,

from ....., living at .....

in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 22 of Council Regulation (EU) 2016/1103 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes.*

**The parties agree:**

that the courts of ..... shall have exclusive jurisdiction

to rule on the property consequences ..... in .....

on .....

**Choose:**

a) As set out in Article 22.2 of Regulation (EU) 2016/1103, the choice of applicable law shall have prospective effect only, in other words, in the future.

b) As set out in Article 22.2 of Regulation (EU) 2016/1103, the choice of applicable law shall not have any adverse retroactive effect for third parties deriving from that law.

**Signature:**

**Signature:**

## **CHOICE OF LAW AGREEMENT IN MARRIAGE AGREEMENT: AGREEMENT FOR MATRIMONIAL PROPERTY REGIME FOR SPOUSES OR FUTURE SPOUSES**

Regulation (EU) 2016/1103 gives spouses the possibility to choose the law applicable to the substance of the economic consequences of the marriage. The rules for this purpose are those laid down in Article 22(1), which do not give the parties absolute freedom of choice. That freedom is subject to the condition that the law chosen has a close connection with them by reason of their habitual residence or nationality.

It must therefore be the law of the state in which one or both of them have their habitual residence or the nationality of either of them. In both cases, refer to the time of the conclusion of the agreement.

In these models, we must bear in mind that the agreement requires, for its validity, the concurrence of requirements of substance (Art. 24 "Consent and material validity" and of form (Art. 23) and must be made in writing, dated and signed. For this purpose, any communication made by electronic means that provides a durable record of the agreement shall be deemed to be in writing. This provision states that if the law of the state of the common habitual residence at the time of the conclusion of the agreement lays down additional formal requirements for settlements, those requirements apply. If the parties have their habitual residences in different Member States at the time of the conclusion of the agreement, and the laws of both states provide for different formal requirements for the conclusion of the agreement, the agreement is formally valid if it meets the requirements of one of the two laws. If only one of the spouses has his or her habitual residence in a Member State at the time of the conclusion of the agreement, and the law of that state lays down additional formal requirements for the settlement, those requirements shall apply.

### **MARRIAGE AGREEMENT**

Different agreements can be included in marriage contracts to organize the couple's assets. The substantive validity of the pacts or agreements included in settlements will be governed by the provisions of the state law applicable to the matrimonial property regime (Art. 27, Letter g). Formal validity requires at least that the agreement be in writing and be dated and signed by both parties. Any communication made by electronic means that provide a durable record of the agreement is deemed to be "writing" (Art. 25 (1)).

The following model can be adapted to the requirements of each country's private law rules, provided that the country allows for such agreements, so that future spouses or partners, before or after marriage, can establish their desired matrimonial property regime, as well as agreements affecting the ownership, management or administration of the assets that comprise the matrimonial property, and determine liability for debts or obligations contracted individually or jointly.

**MODEL OF AGREEMENT FOR ECONOMIC REGIME FOR SPOUSES  
OR FUTURE SPOUSES**

Before me, .....,  
.....,  
....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

**Two situations:**

Who have entered into a marriage in ..... on  
....., registered in .....  
with registration number .....

Who have not entered into a marriage in ..... on  
.....

**The parties intervening agree:**

Choose and specify the agreement about decisions in matters of matrimonial property regimes according to the interest and will of the parties.

**FIRST:** That your marriage will be governed by the economic regime of  
....., regulated  
by the laws of .....

**Information:**

- a) Default statutory regime under the law.
- b) Choose the economic matrimonial regime:

**Community of property:** Property acquired by either spouse will, in principle, become the property of both, and both spouses may have to pay for particular debts regardless of who incurred them. In case of dissolution of the regime, this community property will be split between the spouses or between the surviving spouse and the other spouse's estate.

**Deferred community of property:** During the marriage, all property is owned by the spouse(s) who acquired it, and all debts have to be paid by the spouse(s) who incurred them. However, upon death or divorce, the net value of the existing property of either spouse will normally be split between the spouses or between the surviving spouse and the other spouse's estate.

**Participation in accrued gain:** All property is owned by the spouse(s) who acquired it, and all debts have to be paid by the spouse(s) who incurred them. Upon dissolution of the regime, the net gain made by each spouse during the marriage will be calculated, and the spouse with the higher gain has to pay a certain percentage of the difference to the other. The applicable law may provide fixed, flexible or simplified solutions, e.g., lump sum, in particular in the case of dissolution by death.

**Separation of property:** The property and debts of each spouse remain entirely unaffected by the marriage. In the case of divorce and/or death, no property or debts will be shared, nor will any value be equalized.

**Other** .....

**SECOND:** That, in the event that the two spouses jointly acquire any property, its ownership will be determined by ..... (decide whether to include only property acquired during the marriage or the opposite, including all or some premarital property)

**THIRD:** That the goods of one of the spouses will not respond to the debts, the obligations and the responsibilities contracted by the other spouse .....

**FOURTH:** At the time this agreement is concluded, the spouses have the property, assets and debts in countries specified in annex .....

**FIFTH:** That in the event of separation, divorce or marriage annulment, both parties agree .....

**SIXTH:** The following agreements relating to the marriage exist and have been copied in .....

**Signature:**

**Signature:**

**APPLICABLE LAW BASED ON HABITUAL RESIDENCE IN A MEMBER STATE AT  
THE TIME OF THE CONCLUSION OF THE MARRIAGE AGREEMENT**

**This choice of law agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*In accordance with the requirements of Regulation (EU) 2016/1103 establishing Articles 23 and 24 on the choice of law agreement and Article 25 on marriage agreement. Both the agreement on the applicable law and the marriage agreement shall be in writing, dated and signed by both spouses, it being understood that any communication made by electronic means that provides a durable record of the agreement under "Articles 23.1 and 25.1 of Regulation (EU) 2016/1103" shall be considered writing.*

**The spouses may choose the national law of any Member State provided that it is the law of the state of the habitual residence** of both or one of them (Articles 22.1(a) and 33.1 of Regulation 2016/1103) at the time of the conclusion of the agreement. The option corresponds to the provisions of Articles 23 and 25 of Regulation 2016/1103 considering the possible additional formal requirements:

a) Where the law of the Member State in which both spouses have their habitual residence at the time of the conclusion of the marriage contract lays down additional formal requirements for marriage contracts, those requirements shall apply.

**Cláusula:** Clause: Both spouses ..... that they have their habitual residence at the time of the conclusion of the marriage contract in .....

b) Where the spouses have their habitual residence in different Member States at the time of the conclusion of the marriage contract, and the laws of the two states provide different formal requirements for marriage contracts, the agreement is formally valid if it satisfies the requirements of one of the two laws.

**Clause:** The spouses have their habitual residence in different Member States at the time of the conclusion of the marriage contract. One of them resides in ....., and the other resides in .....

The agreement satisfies the requirements of only one of the two states. This state will apply:  
.....

The agreement satisfies the requirements of both states. The parties can then choose to apply the law of state: .....

c) Where, at the time of the conclusion of the marriage agreement, only one of the spouses has his or her habitual residence in a Member State, and the law of that state lays down additional formal requirements for marriage agreement, those requirements shall apply.

**Clause:** Both spouses ..... that their habitual residence at the time of the conclusion of the marriage contract is in Member State: .....

Depending on the case, we will draft the appropriate clause for the specific case, and we will incorporate it into the agreements that the parties may enter into, into the procedure for the liquidation of the economic system or into the lawsuit before the competent court.

**Signature:**

**Signature:**

.....

**CHOICE OF LAW APPLICABLE TO ADVERSARIAL LEGAL SEPARATION  
OR DIVORCE PROCEDURE**

**(jurisdiction to rule on matters of matrimonial property regimes arising in connection  
with that application: marriages celebrated before 29 January 2019)**

**This choice of law agreement is entered into between:**

Before me, ....., ,  
..... ,

..... , with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

..... , with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

**Several issues should be clarified beforehand:**

- Regulation (EU) 2016/1103 is applicable in Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.
- Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes states in Article 5 that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of the regulation. Article 5 states that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended from 22 August 2022 when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable. Regarding family disputes, its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.

It should also be remembered that Regulation (EU) 1259/2010 sets out its scope in Article 1 as applying only to situations involving a conflict of laws, divorce and legal separation and excluding preliminary ruling questions such as marriage annulment in the context of a divorce or legal separation procedure.

- In view of Whereas 32, 33 and 34, Regulation (EU) 1103/2016 should concentrate its jurisdiction in matters relating to matrimonial property regimes on the Member State whose courts are to rule on the succession of one of the spouses in accordance with Regulation (EU) 650/2012 or on divorce, legal separation or marriage annulment in accordance with Council Regulation (EC) 2201/2003. For separation and divorce, Article 8 a) of Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation states that the place of habitual residence of the spouses at the time when the application is lodged shall be the common place, which in our case is an EU member country.

**The parties agree regarding law applicable to the patrimonial property regime:**

Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date: According to the Civil Code of ....., the Law ..... is applicable as the country of common habitual residence immediately after the celebration of the marriage.

**Signature:**

**Signature:**

**CHOICE OF LAW APPLICABLE TO MARRIAGES ENTERED  
INTO BEFORE 29 JANUARY 2019**

**This choice of law agreement is entered into between:**

Before me, .....,  
.....,

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

**Several issues should be clarified beforehand:**

- Regulation (EU) 2016/1103 is applicable in Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.
- Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes states in Article 5 that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of the regulation. Article 5 states that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended from 22 August 2022 when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable. Regarding family disputes, its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.

It should also be remembered that Regulation (EU) 1259/2010 sets out its scope in Article 1 as applying only to situations involving a conflict of laws, divorce and legal separation and excluding

preliminary ruling questions such as marriage annulment in the context of a divorce or legal separation procedure.

- In view of Whereas 32, 33 and 34, Regulation (EU) 1103/2016 should concentrate its jurisdiction in matters relating to matrimonial property regimes on the Member State whose courts are to rule on the succession of one of the spouses in accordance with Regulation (EU) 650/2012 or on divorce, legal separation or marriage annulment in accordance with Council Regulation (EC) 2201/2003. For separation and divorce, Article 8 a) of Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation states that the place of habitual residence of the spouses at the time when the application is lodged shall be the common place, which in our case is an EU member country.

**Marriages celebrated before 29 January 2019:**

- Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date: According to the Private International Law Rules of ....., is applicable the law of the spouses at the time of the marriage.

The parties agree regarding the law applicable to the matrimonial property regime:

- Marriages celebrated before 29 January 2019 that after this date specified the applicable law or marriages celebrated after this date that designated the applicable law: is the law of the EU country chosen by the spouses as agreed and formalized by the parties on ....., in accordance with Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes, Art. 22 et seq.

**Signature:**

**Signature:**

## **CHOICE OF LAW APPLICABLE TO MATRIMONIAL PROPERTY IN CONTENTIOUS LEGAL SEPARATION OR DIVORCE**

The competent court to rule on the matrimonial property regime must often be determined at the time of the judicial separation or divorce proceedings (Art. 5) or on the death of one of the spouses (Art. 4).

Since divorce is the most common procedure in connection with the liquidation of the matrimonial property regime when determining the applicable law, the following clauses can be incorporated into these procedures.

The applicable law for divorce proceedings is Council Regulation (EU) 1259/2010, which establishes in Article 8 that the applicable law shall be that of the place where the spouses had their last habitual residence until less than one year ago, provided that one of them continues to reside there. If more than one year has elapsed between the filing of the lawsuit and the termination of cohabitation, the law of the nationality of both spouses at the time the lawsuit is filed applies if it were common, and in another case, would apply the law of the State before whose courts the lawsuit is filed.

### **APPLICABLE LAW**

**Several issues should be clarified beforehand:**

- Regulation (EU) 2016/1103 is applicable in Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.
- Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes states in Article 5 that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of the regulation. Article 5 states that the court of a Member State shall have jurisdiction to accept an application for divorce, legal separation or marriage annulment on the basis of Regulation (EC) 2201/2003, which specifies the courts that shall have jurisdiction in that Member State to rule on the matrimonial property regime arising in connection with such an application, without prejudice to paragraph 1 of Article 2, and that will be amended from 22 August 2022, when the new Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, as well as on international child abduction, becomes applicable to family disputes, since its scope will affect civil matters relating to divorce, legal separation and marriage annulment, among others.

It should also be remembered that Regulation (EU) 1259/2010 set out its scope in Article 1 as applying only to situations involving a conflict of laws, divorce and legal separation and excluding preliminary ruling questions such as marriage annulment in the context of a divorce or legal separation procedure.

- In view of Whereas 32, 33 and 34, Regulation (EU) 1103/2016 should concentrate jurisdiction in matters relating to matrimonial property regimes on the Member State whose courts are to rule on the succession of one of the spouses in accordance with Regulation (EU) 650/2012 or on divorce, legal separation or marriage annulment in accordance with Council Regulation (EC) 2201/2003.

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

### **APPLICABLE LAW IN SEPARATION/DIVORCE**

Article 8 a) of Council Regulation (EU) 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation states that the place of habitual residence of the plaintiff in the EU at the time when the application is lodged shall be the place where the application is lodged.

This regulation is applicable in sixteen EU countries participating in enhanced cooperation on this issue: Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

#### **Clause:**

In accordance with Article 5 of Council Regulation (EU) 1259/2010 of 20 December 2010 establishing enhanced cooperation on the law applicable to divorce and legal separation, the spouses have agreed to designate ..... as the applicable law.

### **LAW APPLICABLE TO THE MATRIMONIAL PROPERTY REGIME**

1. Marriages celebrated before 29 January 2019 or without a choice of law agreement after that date:

- a) Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date when both spouses are not of the same nationality: the applicable is the law of .....,  
..... as it is the country of marital domicile immediately after the marriage.

b) Marriages celebrated before 29 January 2019, or without a choice of law agreement after that date when the spouses are of the same nationality at the time of the marriage: The common personal law of the spouses shall apply to the marriage .....

2. Marriages concluded after 29 January 2019: Pursuant to Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions in matrimonial property regimes, Article 26(1)(a), the law of ....., applies, as the state in which the spouses had their habitual residence after the marriage.

3. Marriages celebrated before 29 January 2019 that after this date have specified the applicable law or marriages that were celebrated after this date and have designated the applicable law: The law of ....., as agreed and formalized by the parties on ....., is applicable in accordance with Regulation (EU) 2016/1103 of the Council of 24 June 2016, establishing enhanced cooperation on jurisdiction, applicable law, and recognition and enforcement of decisions concerning matrimonial property regimes, Art. 22 et seq.

**Signature:**

**Signature:**

## CHOICE OF COURT AGREEMENT BETWEEN REGISTERED PARTNERS

**This choice of court agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 7 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.*

**The parties agree:**

that the courts of ..... shall have exclusive jurisdiction  
to rule on the property consequences of the partnership, which was registered in .....  
on .....

**Signature:**

**Signature:**

## CHOICE OF COURT AGREEMENT BETWEEN FUTURE REGISTERED PARTNERS

**This choice of court agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 7 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.*

**The parties agree:**

that the courts of ..... shall have exclusive jurisdiction  
to rule on the property consequences of the partnership, which the parties intend to register in  
..... on .....

**Signature:**

**Signature:**

## CHOICE OF LAW AGREEMENT BETWEEN REGISTERED PARTNERS

**This choice of law agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 7 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.*

**The parties agree:**

that the law of ..... is applicable to the property consequences of their partnership, which the parties registered in ..... on .....

**Choose:**

- a) In accordance with Article 22(2) of Regulation (EU) 2016/1104, the choice of applicable law shall apply prospectively.
- b) In accordance with Article 22(2) of Regulation (EU) 2016/1104, the choice of applicable law shall apply retrospectively.

**Signature:**

**Signature:**

## CHOICE OF LAW AGREEMENT BETWEEN FUTURE REGISTERED PARTNERS

**This choice of law agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 7 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.*

**The parties agree:**

that the law of ..... is applicable to the property consequences of their partnership, which the parties intend to register in ..... on .....

**Signature:**

**Signature:**

## CHANGE OF THE CHOICE OF LAW AGREEMENT

**This change of the choice of law agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....

In ..... on .....

*Pursuant to Article 22 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (hereinafter Regulation (EU) 2016/1104)*

**The parties agree:**

to the change of applicable law and designate the law of .....  
as applicable to the property consequences of their partnership, which the parties registered in  
..... on .....

**Choose:**

- a) In accordance with Article 22(2) of Regulation (EU) 2016/1104, the choice of applicable law shall apply prospectively.
- b) In accordance with Article 22(2) of Regulation (EU) 2016/1104, the choice of applicable law shall apply retrospectively.

**Signature:**

**Signature:**

## CHOICE-OF-COURT AGREEMENT

**This choice-of-court agreement is entered into between:**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

**and**

....., with date of birth .....,  
from ....., living at .....,  
in ....., with identity card number .....,

In ..... on .....

*Pursuant to Article 5(1) of Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession,*

**The parties agree:**

that the courts of ..... as the Member State whose law is chosen as applicable, shall have exclusive jurisdiction to rule on succession regarding assets belonging to ....., with date of birth ....., living at ..... in .....

**Signature:**

**Signature:**

**Signature:**

## CHOICE OF APPLICABLE LAW

I, ..... , with identity card number  
....., national of ..... , living at ..... ,  
in ..... , pursuant to Article 22 of Regulation (EU) 650/2012 of the  
European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and  
enforcement of decisions and acceptance and enforcement of authentic instruments in matters of  
succession and on the creation of a European Certificate of Succession, choose the law  
of ..... as applicable to succession of my assets.

In ..... on .....

**Signature:**

**DEROGATION OF THE LAW OF NATIONALITY AS APPLICABLE**

I, ..... , with identity card number  
..... , national of ..... , living at ..... ,  
in ..... , hereby declare that I in no way intend for the law  
of ..... as the law of the State of my nationality  
to be applicable to succession of my assets pursuant to Article 22 of Regulation (EU) 650/2012 of the  
European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and  
enforcement of decisions and acceptance and enforcement of authentic instruments in matters of  
succession and on the creation of a European Certificate of Succession.

In ..... on .....

**Signature:**

.....

