



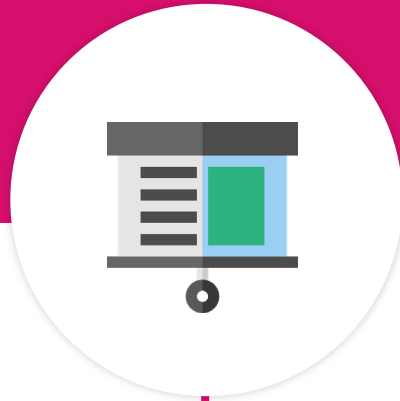
# TOOLKIT

## FOR ADVISING EUROPEAN FAMILIES

### MARRIED COUPLES

Final document June 2018

Approved by the ELI Council on 28 February 2019  
and by the ELI General Assembly on 8 May 2019



# 01

## INTRODUCTION



## TOOLKIT FOR ADVISING EUROPEAN FAMILIES

### MARRIED COUPLES

This template on the economic consequences of a marriage and its dissolution for EU cases, in particular cases with a foreign element, is intended to be a toolkit for **use by legal professionals only**. It needs to be checked with the relevant legal frameworks at the time an agreement is made, and tailored to the individual situation. Parties may discuss the options between them but they should never attempt to conclude an agreement without professional legal assistance.

As the choice of a particular law as well as further choices made under the applicable substantive law may favour the interests of one spouse while being less advantageous to the other spouse, parties should, well ahead of the day when they conclude the agreement, **seek independent legal advice**.

**Registration** of the agreement or **authentication** by a civil law notary is required by the law of many Member States, and it may be difficult to foresee where this agreement will ultimately be invoked. Parties may thus need to conclude this agreement before a **civil law notary** or to comply with other **formal requirements**.

Please note that special attention is required if the parties make any agreements on the issues dealt with in this document before the marriage is concluded as not all relevant EU and national legislation explicitly allows choice for future spouses.

The purpose of this toolkit is to inspire legal professionals who advise spouses or future spouses. Nothing in this document can relieve legal professionals of any of their obligations to fully scrutinise the facts of the case, the legal situation, and the options available to their clients, and the members of the Project Team on Empowering European Families (EEF), who have developed this toolkit on a not-for-profit basis, cannot assume any liability whatsoever for any damage that may result from the use of this toolkit or by reliance on the information contained therein. This toolkit is based on the law as it stands in 2018, unless otherwise indicated.

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For more information, including on national law, visit:

[www.empoweringeuropeanfamilies.eu](http://www.empoweringeuropeanfamilies.eu)

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# 02

## OPTIONAL CHECKLIST FOR THE LEGAL ADVISERS

## A. OPTIONAL CHECKLIST FOR THE LEGAL ADVISERS (FOR 1ST NOTARY/ LAWYER)

As legal adviser to:

*[insert name(s)]*

I have in particular, but not exhaustively, and as far as relevant in the individual case,

- (1)** discussed with my client(s) the laws that currently apply to their situation, and their legal consequences for each of the parties, including in the event of dissolution (by divorce, death etc.) of the marriage, as well as tax implications (e.g. inheritance tax). I have also discussed likely changes in their situation (e.g. children, employment abroad, future gift to or inheritance by one of the spouses) and their impact in legal terms;
- (2)** explained to my client(s) the choices they have in terms of applicable law, of substantive law, and of the competent court, and the legal consequences for each of the parties. My explanations have included potential implications in the event of dissolution (by divorce, death etc.) of the marriage, as well as tax implications (e.g. inheritance tax, or tax obligations that may arise where a change in the applicable law leads to transfer of ownership);
- (3)** explained to my client(s) the limits of any choice, such as concerning particular issues (e.g. pension rights) or in territorial terms (e.g. EU States not fully participating in EU legal regimes, links with non-EU States, or the impact of bilateral or multilateral treaties);
- (4)** explained, where applicable, to my client(s) any particular limits concerning same-sex marriages or marriages involving trans\* or inter\* persons, and have discussed with them alternative options to achieve the desired effects;
- (5)** made my client(s) aware that, when dealing with third parties (e.g. when selling or buying property), their choice of the law applicable to property relations, or their choice of a particular property regime, or particular restrictions agreed upon, may not take effect vis-à-vis the third parties, in particular where these third parties were unaware of these choices;
- (6)** made my client(s) aware that the court seised with a dispute may disregard their choice if, under the conflict-of-laws rules of that jurisdiction, the law applicable is not subject to the parties' designation, and that the court may apply overriding mandatory provisions of a different law;

- (7)** made my client(s) aware of the fact that there is currently no option under the EU jurisdiction rules to choose the court that will deal with their divorce, legal separation or marriage annulment;
- (8)** made my client(s) aware of the fact that they should always, before going to court, consider options of out-of-court dispute resolution, in particular family mediation, and that they might wish to conclude a separate mediation agreement;
- (9)** explained to my client(s) any applicable formal requirements in relation to this Agreement and made sure they understand how to comply;
- (10)** made my client(s), in particular in the case of a same-sex marriage, aware that it is advisable to each make a will if they wish to benefit their spouse. This is to avoid a situation where the court and/or the applicable law does not recognise their relationship with regard to intestate succession and/or with regard to the distribution of matrimonial property upon death;
- (11)** made my client(s), in particular in the case of a same-sex marriage, aware that it is advisable to give mutual mandates concerning healthcare and end-of-life decisions, and other decisions in cases of incapacity and/or emergency under the applicable national legislation;
- (12)** made my client(s) aware that if they own or purchase particular types of property, e.g. immovable property, vessels or companies, in the country where that property is located, irrespective of the parties' choice of law concerning matrimonial property, another law may be applied. It may therefore be in their interests to try to achieve the desired outcomes in different ways, e.g. by means of company law, the law of property or of contractual obligations.

## B. OPTIONAL CHECKLIST FOR THE LEGAL ADVISERS (FOR 2<sup>ND</sup> NOTARY/LAWYER)

As legal adviser to:

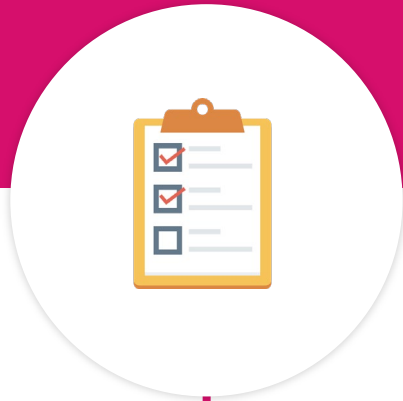
*[insert name(s)]*

I have in particular, but not exhaustively, and as far as relevant in the individual case,

- (1)** discussed with my client(s) the laws that currently apply to their situation, and their legal consequences for each of the parties, including in the event of dissolution (by divorce, death etc.) of the marriage, as well as tax implications (e.g. inheritance tax). I have also discussed likely changes in their situation (e.g. children, employment abroad, future gift to or inheritance by one of the spouses) and their impact in legal terms;
- (2)** explained to my client(s) the choices they have in terms of applicable law, of substantive law, and of the competent court, and the legal consequences for each of the parties. My explanations have included potential implications in the event of dissolution (by divorce, death etc.) of the marriage, as well as tax implications (e.g. inheritance tax, or tax obligations that may arise where a change in the applicable law leads to transfer of ownership);
- (3)** explained to my client(s) the limits of any choice, such as concerning particular issues (e.g. pension rights) or in territorial terms (e.g. EU States not fully participating in EU legal regimes, links with non-EU States, or the impact of bilateral or multilateral treaties);
- (4)** explained, where applicable, to my client(s) any particular limits concerning same-sex marriages or marriages involving trans\* or inter\* persons, and have discussed with them alternative options to achieve the desired effects;
- (5)** made my client(s) aware that, when dealing with third parties (e.g. when selling or buying property), their choice of the law applicable to property relations, or their choice of a particular property regime, or particular restrictions agreed upon, may not take effect vis-à-vis the third parties, in particular where these third parties were unaware of these choices;
- (6)** made my client(s) aware that the court seised with a dispute may disregard their choice if, under the conflict-of-laws rules of that jurisdiction, the law applicable is not subject to the parties' designation, and that the court may apply overriding mandatory provisions of a different law;

- (7)** made my client(s) aware of the fact that there is currently no option under the EU jurisdiction rules to choose the court that will deal with their divorce, legal separation or marriage annulment;
- (8)** made my client(s) aware of the fact that they should always, before going to court, consider options of out-of-court dispute resolution, in particular family mediation, and that they might wish to conclude a separate mediation agreement;
- (9)** explained to my client(s) any applicable formal requirements in relation to this Agreement and made sure they understand how to comply;
- (10)** made my client(s), in particular in the case of a same-sex marriage, aware that it is advisable to each make a will if they wish to benefit their spouse. This is to avoid a situation where the court and/or the applicable law does not recognise their relationship with regard to intestate succession and/or with regard to the distribution of matrimonial property upon death;
- (11)** made my client(s), in particular in the case of a same-sex marriage, aware that it is advisable to give mutual mandates concerning healthcare and end-of-life decisions, and other decisions in cases of incapacity and/or emergency under the applicable national legislation;
- (12)** made my client(s) aware that if they own or purchase particular types of property, e.g. immovable property, vessels or companies, in the country where that property is located, irrespective of the parties' choice of law concerning matrimonial property, another law may be applied. It may therefore be in their interests to try to achieve the desired outcomes in different ways, e.g. by means of company law, the law of property or of contractual obligations.





# 03

## DRAFT AGREEMENT FOR MARRIED COUPLES WITHIN THE EU

## DRAFT AGREEMENT FOR MARRIED COUPLES WITHIN THE EU

**Between:**

Name:	<input type="text"/>	<i>[name of spouse]</i>
Born:	<input type="text"/>	<i>[date]</i>
In:	<input type="text"/>	<i>[place]</i>
Sex:	<input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Not disclosed <sup>1</sup>	
Nationality: <sup>2</sup>	<input type="text"/>	
Current habitual residence: <sup>3</sup>	<input type="text"/>	
Refugee status: <sup>4</sup>	<input type="checkbox"/> No <input type="checkbox"/> Yes, status as follows: .....	
Identity number and type <sup>5</sup> (optional):	<input type="text"/>	

**And:**

Name:	<input type="text"/>	<i>[name of spouse]</i>
Born:	<input type="text"/>	<i>[date]</i>
In:	<input type="text"/>	<i>[place]</i>
Sex:	<input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Not disclosed	
Nationality:	<input type="text"/>	
Current habitual residence:	<input type="text"/>	
Refugee status:	<input type="checkbox"/> No <input type="checkbox"/> Yes, status as follows: .....	
Identity number and type (optional):	<input type="text"/>	

**Who have entered, or will enter,<sup>6</sup> into a marriage**

On:	<input type="text"/>	[date]
In:	<input type="text"/>	[place]
Registered in:	<input type="text"/>	[specification of register, if applicable]
Registration number:	<input type="text"/>	[if applicable]

**The parties hereby declare that**

 Please tick, specify, and attach as applicable and relevant.

at the time this Agreement is concluded, they have the property, assets and debts in countries as specified in Annex

the following agreements relating to the marriage exist and have been attached in copy:<sup>7</sup>

.....

.....

[details such as no. of annex, type of agreement, date of agreement, registration number]

## PREAMBLE

The parties have drawn up the present Agreement regarding the economic consequences<sup>8</sup> of their marriage and the dissolution thereof, and more specifically:

- the applicable law (I.);
- substantive law issues of property relations, pension rights, maintenance, and family home (II. to V.);
- dispute resolution and the competent courts<sup>9</sup> (VI.); and
- final provisions (VII.).

All issues that have not been addressed in this Agreement, including issues of interpretation and implementation of the choices made, shall be governed by the rules of the otherwise applicable law,<sup>10</sup> failing such rules by considerations of equity and fairness, respecting to the utmost extent possible the preferences which the parties have expressed in this Agreement.

The parties are aware that their choices expressed in this document may not be (fully) recognised by the courts of a number of EU Member States, and that they may not be effective vis-à-vis third parties.<sup>11</sup> In this situation, the parties wish their Agreement to remain in place as far as possible and to be interpreted in a more flexible manner in order to give maximum effect to their joint preferences.

The parties are equally aware that their choices affect the way property is dealt with upon the death of one of them, but only insofar as provided for by the law of matrimonial property or other rules addressed in this document. In contrast, **this Agreement does not affect the law of succession**, as this would require separate dispositions of property upon death.<sup>12</sup>

## I. LAW APPLICABLE TO IMPORTANT LEGAL MATTERS RELATING TO THE MARRIAGE<sup>13</sup>

- (i) The parties designate as the law<sup>14</sup> applicable to their property relations,<sup>15</sup> maintenance,<sup>16</sup> and any other economic consequences<sup>17</sup> of their marriage or its dissolution, including pension rights<sup>18</sup> the law of:

*[chosen country/territorial jurisdiction]*

as far as the law applicable is subject to their choice.

- This law shall also apply to the divorce or legal separation.<sup>19</sup>

**?** *If you do not tick the box the chosen country must be the State of the habitual residence or nationality (refugees, stateless: habitual residence) of one of the spouses. The choice would be recognised by the courts of AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, GR, HR, IT, LU, LT, MT, NL, PL, PT, RO, SCO, SE, SI and possibly the courts of further States.*

*If you tick the box concerning divorce and legal separation the chosen country must be the State of the spouses' common habitual residence, or last common habitual residence where one of them still resides, or of the nationality (refugees, stateless: habitual residence) of one of the spouses. The choice would be recognised by the courts of AT, BE, BG, DE, EE, ES, FR, GR, IT, LU, MT, PT, RO, SI and possibly the courts of further States.*

*Avoid in any case choosing a country whose law does not recognise the marriage.*

- (ii) To the extent that the court seised fails to give effect to their designation of the applicable law, the parties wish their choices made under II. to V. to be understood in the way they would have been understood under the designated law, and they agree, as far as this would be recognised by the court seised, on rights and obligations equivalent to the rights and obligations they would have had if the designated law had been applied.<sup>20</sup>

## II. MATRIMONIAL PROPERTY


### 1. GENERAL CHOICE OF REGIME

The parties agree on the following general regime for their property relations,<sup>21</sup> in the specific form which this regime has in the law designated under point I:

 Tick only one of the boxes below. Make sure the option selected is permitted by the law chosen under point I.

#### Community of property

Property acquired by either spouse will, in principle, become 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 up between the spouses or between the surviving spouse and the other spouse's estate.

 Default statutory regime under the law of: BE, BG, CZ, EE, ES (except Balearic Islands, Catalonia), FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK. Available under the law of: AT, DE, EL. By virtue of freedom to contract also accepted under the law of Scotland, but note the absence of a statutory background regime.

**Including only property acquired during the marriage**

Also including pre-marital property

#### 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 existing property of either spouse will normally be split up between the spouses or between the surviving spouse and the other spouse's estate.

 Statutory regime under the law of: DK, FI, SE. Available under the law of AT, CZ, SK.

**Including only property acquired during the marriage**

Also including pre-marital property

**Participation in accrued gains**

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, e.g. lump sum, solutions, in particular in the case of dissolution by death.

**?** *Default statutory regime under the law of: CY, DE, EL. Available under the law of: EE, ES (state law, Catalonia), FR, HU, LU, MT, NL, PL, PT, RO. By virtue of freedom to contract also accepted under the law of AT, BE, BG, Scotland, but note the absence of a statutory background regime.*

**Equitable redistribution of property upon divorce**

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 divorce, the spouses' property, including debts, will be redistributed according to what is equitable and just, taking into account criteria such as the spouses' needs and those of children, compensation of relationship-generated disadvantages, the principle of sharing, and contributions made.

**?** *Default statutory rules under the law of: AT, IE, England & Wales, Scotland.*

**Including only property acquired during the marriage**

Also including pre-marital property

**Pure separation of property**

Property and debts of each spouse remain entirely unaffected by the marriage. In case of divorce and/or death no property or debts will be shared, nor any value equalised.

**?** *Default statutory regime under the law of: Balearic Islands, Catalonia (but with limited compensation for household work). Available or achievable by way of agreement under the law of: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK.*

*Note that full exclusion of any kind of sharing, in particular when combined with further exclusions under III. to V., is particularly prone to be set aside by a court.*

**Other:**

.....

## 2. EXCLUSIONS AND INCLUSIONS

a.  The parties leave the issues addressed below entirely to statutory<sup>22</sup> rules of the designated law subject to any derogations or additions under 4.

**?** *Either tick the box above and skip point b., or tick the box at point b. and make further choices as indicated.*

b.  The parties agree to exclude, from any community/calculation of value/redistribution agreed to under point 1, the following property ('excluded property'), as well as rights or debts related to excluded property. Any assets received in exchange of excluded property, e.g. proceeds of a sale, shall also be excluded (substitution):

**?** *The list is exhaustive, i.e. where a box has not been ticked this shall mean the parties want the relevant property to be included even where this property would be excluded by default rules under the designated law. However, the designated law still decides about issues of, e.g., how to interpret a particular item or any other details not explicitly dealt with below. Always make sure choices are allowed by the applicable law.<sup>23</sup>*

*Any choice parties have made under point 1 as to the general exclusion of pre-marital property remains in any case in place, and if pre-marital property is excluded the principles of substitution and fair reimbursement shall apply.*

- property received as a gift
- inherited property
- personal belongings
- damages for personal injury
- recognition for personal achievement (e.g. prizes) and consequences of personal misconduct (e.g. fines)
- gains and losses from lottery or gambling
- profession-related property
- company shares and property held in a business (unless mere investment)
- real property
- the particular assets listed in Annex .....
- .....

Pension rights shall exclusively be dealt with as agreed below under III.

The parties agree that, where excluded property has been used for the benefit of non-excluded property, or vice versa, or one spouse's excluded property has been used for the benefit of the other spouse's excluded property, the spouse significantly benefitting from this upon the dissolution of the regime shall pay fair reimbursement.



### 3. RESTRICTIONS TO DISPOSITION OF PROPERTY

a.  The parties leave the issues addressed below entirely to statutory rules of the designated law subject to any derogations or additions under 4.  
 ? *Either tick the box above and skip point b., or tick the box at point b. and make further choices as indicated.*

b.  The parties agree that transactions concerning the following property require the other's consent irrespective of who owns the property:<sup>24</sup>  
 ? *Tick as many of the following boxes as the parties deem appropriate. This is without prejudice to any further restrictions concerning transactions under the applicable law(s), including provisions on the dissipation of property.*

- family home
- household objects
- real property
- unusual gifts
- transactions with a value over .....
- .....

The parties wish any violation of this clause to have the most far-reaching effect foreseen by the applicable law(s), but at the very least to give rise to a claim for damages.

### 4. SPECIAL AGREEMENTS

In derogation of/addition to the statutory provisions of the applicable law, the parties agree on the following special rules concerning the issues addressed under 1 to 3 above, and in particular concerning the dissolution/liquidation of the regime:<sup>25</sup>

.....

.....


.....

? *Make sure choices are allowed by the applicable law.*

### III. PENSION RIGHTS

#### 1. GENERAL CHOICES

- a.  The parties leave the issues addressed below entirely to statutory rules of the applicable law(s)<sup>26</sup> subject to any derogations or additions under 2. Where the applicable law differs from the law designated under point I (i) the parties agree to exercise any options afforded to them, or to refrain from exercising such options, in a way that brings the results as closely as possible to the hypothetical results under the law designated under point I (i).<sup>27</sup>


 *Either tick the box above and skip point b., or tick the box at point b. and make further choices as indicated.*

- b.  The parties agree to treat pension rights of any kind,<sup>28</sup> including insurance products that may serve the function of retirement or disability pension, in case of divorce, as follows:

(i) Where pension rights are, under the applicable law, subject to a special statutory mechanism of splitting/sharing/participation,<sup>29</sup> including by court order, that mechanism takes precedence.

However, as far as this is possible, the parties agree to opt out for:


- Public pension schemes
- Occupational pension schemes
- Private pension schemes
- .....

 *Tick a box only where the parties wish the statutory mechanism not to apply.*

(ii) As far as pension rights are not included in a special statutory mechanism referred to under (i) pension rights, or their value, they shall be included in any community/calculation of value/redistribution the parties have agreed upon under point II. 1., i.e. the pension rights shall be shared/split/equalised upon divorce.<sup>30</sup>

However, as far as this is possible, the parties agree to opt out for:

- Public pension schemes
- Occupational pension schemes
- Private pension schemes
- .....

 *Tick a box only where the parties do not wish sharing/splitting/participation.*

(iii) As far as an ex-spouse is, due to age or health condition, unable to make a living despite any sharing/splitting/participation resulting from (i) and/or (ii) the applicable rules concerning spousal maintenance on the grounds of age or health condition may become relevant.<sup>31</sup>

## 2. SPECIAL AGREEMENTS

In derogation of/addition to the statutory provisions of the applicable law, the parties agree on the following special rules:<sup>32</sup>

.....

.....


.....

 *Make sure choices are allowed by the applicable law.*

## IV. SPOUSAL MAINTENANCE

### 1. MAINTENANCE DURING FACTUAL SEPARATION

- a.  The parties leave the issues addressed below entirely to statutory rules of the designated law subject to any derogations or additions under 3.

 *Either tick the box above and skip point b., or tick the box at point b. and make further choices as indicated.*

- b.  The parties agree that, during a period of intended factual separation that does not exceed a period of  months the economically stronger spouse shall pay maintenance to the other spouse in order to allow the other spouse to maintain the marital standard of living. Maintenance shall not be due to the extent that the first spouse would be deprived of the means required for the same standard of living.

## 2. MAINTENANCE IN CASE OF DIVORCE, LEGAL SEPARATION OR ENDURING FACTUAL SEPARATION

- a.  The parties leave the issues addressed below to statutory rules of the designated law subject to any derogations or additions under 3.
- ?** *Either tick the box above and skip point b., or tick the box at point b. and make further choices as indicated.*

- b.  The parties agree that, after a divorce, legal separation or expiry of a period of factual separation as specified in point 1, each spouse will seek to achieve self-sufficiency.
- However, the economically stronger ex-spouse will pay maintenance to the other ex-spouse insofar and for as long as the other ex-spouse fulfills the conditions set out below and does not, despite best efforts, have sufficient means to maintain the specified standard of living.

The other ex-spouse ...	Relevant standard of living:			no claim
	marital	adequate	minimum	
(i) cannot be expected to earn a living due to care for common small children or sick/disabled family members. <sup>33</sup>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(ii) is unable to earn a living due to relationship-generated disadvantages.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(iii) is unable to earn a living due to age, health condition or lack of education.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(iv) does not succeed in earning a living for other reasons.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(v) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Maintenance shall not be due to the extent that the first ex-spouse would be deprived of the means required for the same standard of living.

**?** *Tick exactly one box per line. Options shown dashed are particularly prone to be set aside by a court. Agreement is not recognised by courts in DK, FR, possibly not by courts in IT, NL, SE, if made before or during the marriage.*

*Rules concerning the modalities of how maintenance is to be provided as well as any special modifications, restrictions etc. under the designated law shall still apply. This includes the significance of maintenance rights or obligations either ex-spouse may have vis-à-vis new spouses, partners or children, or of misconduct on the part of an ex-spouse.*

As far as possible under the applicable law, this obligation shall pass to the economically stronger ex-spouse's estate and heirs.<sup>34</sup>

### 3. SPECIAL AGREEMENTS

In derogation of/addition to the statutory provisions of the applicable law, the parties agree on the following special rules (e.g. concerning conditions, duration, calculation, payment modalities):

.....

.....

.....

.....

 *Make sure choices are allowed by the applicable law.*

## V. TEMPORARY ALLOCATION OF FAMILY HOME AND HOUSEHOLD OBJECTS

### 1. OCCUPATION AND USE AFTER SEPARATION

- a.  The parties leave the issues addressed below entirely to statutory rules of the applicable law<sup>35</sup> subject to any derogations or additions under 2.

 *Either tick the box above and skip point b., or tick the box at point b.*

- b.  The parties agree that, in case of separation, irrespective of ownership and of their choices under point II., the family home and household objects shall be reallocated to one of the parties on a temporary basis where this is justified by urgent needs on the part of that party and/or the best interests of children and taking into account any legitimate interest of the other party or that party's estate/heirs. The party benefitting from the reallocation shall bear all running costs during the time of reallocation and shall provide compensation if and insofar as this is fair.

 *Tick this box if parties strive to make sure a party urgently in need of the family home does not have to leave the home just because it is owned by the other party.*

### 2. SPECIAL AGREEMENTS

- In derogation of/addition to the statutory provisions of the applicable law, the parties agree on the following special rules e.g. concerning conditions, duration<sup>36</sup>:

.....

.....

.....

 *Make sure choices are allowed by the applicable law.*

## VI. DISPUTE RESOLUTION

The parties are aware that their choice of court<sup>37</sup> does not prevent any other court that is seised with proceedings for divorce, legal separation or marriage annulment to hear the case,<sup>38</sup> and that this may also have implications for jurisdiction for property relations.<sup>39</sup> The parties are also aware that courts in most Member States will not consider as binding a promise to try mediation. However, the parties wish to make a binding choice to the extent legally possible. Even where their choice is not binding, the court may still attach some legal consequences to their choice.

### 1. ALTERNATIVE DISPUTE RESOLUTION

The parties agree that going to court is only a means of last resort and that all disputes arising from their marriage or its dissolution shall, if possible and appropriate, be settled amicably by way of alternative dispute resolution, e.g. mediation.

**?** *Tick this box only if parties think family mediation should definitely be tried before going to court. Note that the legal effects are very limited.*

### 2. AMICABLE AGREEMENT ON COURT

In the event of a dispute which cannot be settled amicably,<sup>40</sup> including where one or both of the parties wish to initiate proceedings for divorce or legal separation, they undertake to make best efforts to reach a consensus as to what is, at that time, the most suitable Member State for the proceedings.<sup>41</sup> Each party undertakes not to start proceedings in a country that will fail to recognise this Agreement.



*Note that the legal effects of this agreement are very limited.*



### 3. CHOICE OF COURT

However, in the event the parties cannot reach a consensus at that time, the parties promise to initiate proceedings exclusively in the following order of priority:<sup>42</sup>

in a court in the Member State whose law the parties have chosen as applicable law for matrimonial matters above under I:<sup>43</sup>

in a court in the Member State where, at the time the proceedings are initiated<sup>44</sup>,

- the parties are both habitually resident; failing that,
- the parties were last habitually resident and one of them still resides there; failing that,
- the respondent (or in the case of a joint application: either spouse), is habitually resident; failing that,
- the Member State of their common nationality (court in UK, Ireland: 'domicile'; refugees, stateless: habitual residence).

in a court in the Member State where the marriage was concluded.<sup>45</sup>

**?** Rank the three available options by writing 1, 2 and 3 into the boxes, according to the parties' preferences. Note that the options may, in a concrete case, lead to the same result. Avoid in any case choosing a Member State whose law would not recognise either the relationship or the choice of law made under point I, in which case the relevant box would be left blank.

Where the court of choice cannot or does not assume jurisdiction<sup>46</sup> for the whole or substantial parts<sup>47</sup> of their dispute the next ranked choice applies.

The parties agree that, to the extent legally possible, a court seised should deal with all aspects of their dispute,<sup>48</sup> except where the proceedings have been initiated in breach of this agreement.

## VII. FINAL PROVISIONS

1. The parties wish this Agreement to enter into force on

*[insert date]*

- As far as legally possible and compatible with the rights of third parties, the parties want their choices made in this document to have **retroactive effect**.<sup>49</sup>

**?** *By ticking this box you strive to ensure that, in particular, not more than one national law, and not more than one property regime, apply to the property relations. If this box is not ticked the Agreement has no retroactive effect. If this results in a change of property regime the previous regime needs to be liquidated.*

Subject to the foregoing, the parties want their choices made in this document to take precedence over any conflicting choices they may have made in earlier agreements.

2. The parties agree that they will always deal with each other in **good faith** and in particular that they will **fully disclose** their assets and debts to the other spouse whenever the other spouse has a legitimate interest in obtaining the information.

3. The parties agree that in cases of **exceptional hardship**, such as where the marriage was of extremely short duration or in the event of serious unilateral misconduct, each of them can apply to the competent court for the adjustment of the effects of this Agreement.

4. Any clause in this Agreement shall be interpreted in accordance with **good faith**. In the event any clause in this Agreement is **not valid or not enforceable**, the remaining clauses shall remain unaffected but may need to be interpreted in a more flexible manner in order to give maximum effect to the parties' preferences expressed in this document.

5. This Agreement may only **be amended** by mutual consent. Any amendments shall be made in writing, dated and signed by both parties and in accordance with such additional formal requirements as may apply.

- <sup>506</sup>. The parties should **review this Agreement** at regular intervals, and definitely when their situation changes, e.g. when the habitual residence or nationality of both or one of them changes, or the parties have children, or the parties buy immovable property or a company in another country. The parties are also aware that laws may change, and will therefore keep it under review.

I herewith confirm that I have had the content of this document and what the choices made, or their absence, would mean for my situation explained to me by an independent legal adviser, and I have fully understood the implications. I have had sufficient time to pose questions and to reflect. In particular I have had sufficient financial disclosure; and no further disclosure would have affected my decision to enter into this Agreement.

*[date]*

*[place]*

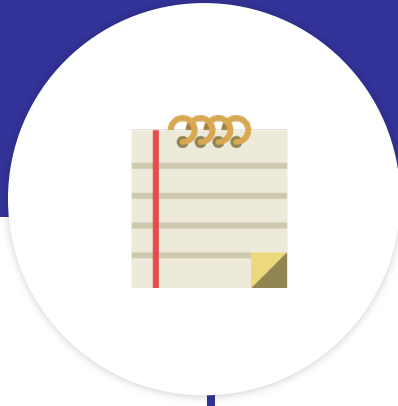
*[signature spouse]*

I herewith confirm that I have had the content of this document and what the choices made, or their absence, would mean for my situation explained to me by an independent legal adviser, and I have fully understood the implications. I have had sufficient time to pose questions and to reflect. In particular I have had sufficient financial disclosure; and no further disclosure would have affected my decision to enter into this Agreement.

*[date]*

*[place]*

*[signature spouse]*



# 04

NOTES

## NOTES

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- 1** In a number of Member States sex/gender need to be disclosed because the validity of the marriage may depend on it.
- 2** In the event a spouse, or future spouse, has more than one nationality, please list all nationalities. In the event a spouse is stateless please replace, for the purpose of the whole document, the country of nationality by the country of that spouse's habitual residence, cf. Article 12 of the Convention of 28 September 1954 on the Status of Stateless Persons. Because Cyprus, Estonia, Malta and Poland are not parties to that Convention it remains uncertain whether they would apply habitual residence in these cases.
- 3** There is no official definition of 'habitual residence'. What is meant is the place that, considering all circumstances of the case, is the centre of an individual's life. It is the place where the individual usually resides and routinely returns to after visiting other places, where the centre of interests of the individual's family and social life is located ('home'). Relevant factual elements to be taken into account are, *inter alia*, the duration and regularity of the individual's presence in the State concerned and the conditions and reasons for that presence. An individual usually has only one State of habitual residence, but the habitual residence may change when the individual moves to another State in order to establish a new centre of life in that State; it is not necessary that the individual plans to stay there forever.
- 4** According to Article 12 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967, the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. In most countries this means that habitual residence replaces nationality as a connecting factor. Please be particularly careful when advising parties who are in doubt about their concrete status, in particular whose refugee status has not been officially recognised or who qualify only for subsidiary protection.
- 5** Ideally parties should provide a unique identifier. Depending on the concrete situation of the spouses, this may be, e.g., their passport/identity card number, or national registry number, or national insurance number.
- 6** Please note that special attention is required if the parties choose the applicable law, or the competent court or agree on any issues of substantive law, before the marriage is concluded as not all relevant EU and national legislation explicitly allows choice for future spouses. It is, in particular when the connecting factor they choose (habitual residence or nationality) changes with or immediately after the conclusion of the marriage, that it may be safer to choose the applicable law only after the conclusion of the marriage and after the change of connecting factor has taken effect.
- 7** This includes any agreement the spouses may have made concerning matters pertaining to their marriage and that go beyond the agreement to enter into a marriage itself. It covers previous agreements on the applicable law or competent court as well as agreements deviating from, or adding to, the default rules provided by the applicable law.
- 8** This model agreement does not cover child-related issues, since there is hardly any choice for partners which does not require reconsideration in the light of the child(ren)'s best interests at the relevant actual time. However, if the parties have children, this is a factor which they should take into account in making choices in this contract.
- 9** For the purposes of this agreement, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matrimonial matters which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate: (i) may be made the subject of an appeal to or review by a judicial authority; and (ii) have a similar force and effect as a decision of a judicial authority on the same matter.

**10** For example, where the parties have opted for a property regime an equivalent of which is regulated under the applicable law, that law will decide about all issues not addressed in this agreement, such as relevant point in time for the dissolution, ancillary relief, methods of calculation, etc. Likewise, where the parties have made a particular choice, e.g. to exclude 'property received by gift' from their regime, the applicable law would decide what counts as a 'gift'.

**11** Protection of third parties is mainly an issue of matrimonial property. A court in a Member State participating in the Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ('MPR') will consider, in the first place, the rules included in the MPR. As of 2018, the following Member States participate in the MPR: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, France, Finland, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.

Under Article 28 MPR the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law. Under certain circumstances specified in Article 28(2) MPR, the third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime. Similar rules apply at substantive law level, i.e. where the parties opt, within the framework of the applicable national law, for a particular matrimonial property regime.

**12** Matters of succession law are governed, inter alia, by Regulation (EU) No 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, which applies in all Member States except the UK, Ireland and Denmark.

**13** Note that the choice of the applicable law may not be recognised, or not be recognised in its entirety, by the courts of a number of EU Member States, and these courts may apply overriding mandatory provisions of the forum or discard a particular choice made under the applicable substantive law for reasons such as public policy. Consider also that laws may change, and there may be multi- and bilateral treaties (such as the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden containing international private law provisions on marriage, adoption and guardianship, as revised in 2006) that apply only in specific situations, so the information given in these notes should only serve as a rough guidance.

**14** It is generally recommended to choose the law of only one country to deal with all the legal aspects of the marriage because a combination of different laws may produce inconsistent results and increase the costs of litigation. This is why this template encourages the choice of the law of only one country. Note that there may be more options, if the parties are prepared to accept a patchwork of applicable laws.

**15** A court in a Member State participating in the MPR (supra note 11) will identify the law applicable to issues of matrimonial property according to the MPR. With respect to the applicable law, the MPR applies to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019; with respect to jurisdiction the MPR applies to proceedings instituted on or after 29 January 2019. Under Article 22(1) MPR, the spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that it is one of the following: (a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or (b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

Note that even where the choice is recognised by a court, this may not prevent the court from applying overriding mandatory provisions of the forum where such provisions exist, e.g. concerning the family home (Article 30 MPR).

As of April 2018, the following Member States participate in the MPR: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, France, Finland, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.

Without participating in the MPR, also courts in Estonia and Scotland would recognise the parties' choice of law. Courts in Lithuania would accept the choice of the law of the common present or future residence, the nationality of either spouse or of the place where the marriage was concluded, and courts in Romania would accept the choice of the law of the habitual residence or nationality of either spouse or of the common habitual residence after conclusion of the marriage. Courts in Hungary and Slovakia would de facto accept the choice if the law chosen coincides with the law of the spouses' common nationality at the time of the conclusion of the marriage.

**16** A court in all Member States except Denmark and the United Kingdom will identify the law applicable to issues of maintenance according to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations ('2007 Hague Protocol'). Under its Article 8 the spouses may at any time designate one of the following laws as applicable to a maintenance obligation: (a) the law of any State of which either party is a national at the time of the designation; (b) the law of the State of the habitual residence of either party at the time of designation; (c) the law designated by the parties as applicable, or the law in fact applied, to their property regime; (d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

Note that, according to Article 8(4) of the 2007 Hague Protocol, the question of whether the maintenance creditor can renounce his or her right to maintenance shall always be determined by the law of the State of the habitual residence of the creditor at the time of the designation.

**17** From the point of view of the courts in most Member States, economic consequences arising from marriage or its dissolution will fall either under matrimonial property or under maintenance. However, this template foresees a choice also for 'other economic consequences' in case the court should consider particular issues, e.g. the distribution of household objects or sharing/splitting of pension rights, as 'issues *sui generis*'.

**18** Pension rights are excluded from the MPR, cf. Article 1(2)(f) MPR, although this exclusion should be strictly interpreted and the MPR still governs in particular the issue of classification of pension assets, the amounts that have already been paid to one spouse during the marriage, and the possible compensation that would be granted in the case of a pension subscribed with common assets (Recital 23). This means that even courts in Member States participating in the MPR will apply their national rules of conflict of laws, which may or may not coincide with the rules of the MPR.

**19** A court in a Member State participating in Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III') would determine the applicable law according to the Rome III Regulation. Under Article 5(1) Rome III, the spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws: (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or (d) the law of the forum.

As of 2018, the following Member States participate in Rome III: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. Note that courts in Croatia, the Czech Republic, Poland, the Netherlands and Slovakia would de facto accept the choice where the law chosen coincides with the law of the spouses' common nationality at the time of divorce.

Parties should be aware that the law applicable to divorce may, from the point of view of courts in particular jurisdictions, affect the law applicable to important economic consequences of divorce, such as the splitting/sharing of pension rights.



**20** Even if the choice of the applicable law fails to be recognised by the court seised, the substantive law applied by that court may allow the spouses to agree by way of contract on particular legal consequences, thus indirectly achieving the same or similar results as they would have achieved with a valid choice of law. For example, if the law chosen by the parties as the law applicable to maintenance would provide for a payment of 2,000 EUR per month to be made by one spouse to the other but the court seised fails to recognise the choice and instead applies another law under which no maintenance would be due but under which maintenance contracts are possible, the court would, by virtue of this clause, have to treat the agreement as a substantive law maintenance contract in which the parties have agreed on a payment of 2,000 EUR.

**21** The wording chosen in this model agreement differs slightly from the wording chosen in point 7. of Form V – Annex III to Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 Form V – Annex III the following property regimes are listed: 7.1. separation of property, 7.2. universal community of property, 7.3. community of property, 7.4. community of accrued gains, 7.5 deferred community property. In this model agreement, the term 'community of accrued gains' was avoided because it is apt to mislead parties, the regime being, in essence, one of separation of property, modified by the existence of an equalisation claim for money. 'Universal community' was not listed separately because its effects can be achieved by ticking the box for inclusion of pre-marital property.

**22** For the avoidance of doubt 'statutory' includes case law, in particular in common law jurisdictions.

**23** Note that statutory regimes foresee a list of types of assets that are normally not included in the community property, or that will not count towards calculation of value of gains, or that will not be subject to redistribution. Some of these lists also make reference to property parties already had when entering into the marriage (pre-marital property) while other legal systems would already exclude pre-marital property from the outset. Be aware that, under some legal systems, parties may only exclude property they already have when they conclude the agreement, e.g. under the laws of Denmark, Finland and Sweden.

**24** Note that, when parties agree among themselves on restrictions that are not part of the statutory regime, or that are part of a statutory regime but which a third party was not aware of and could not reasonably have been expected to be aware of, these restrictions normally do not take effect vis-à-vis third parties, unless provided otherwise by the applicable law (which could, e.g., foresee that where the agreement is registered and publicised the agreement nevertheless has third party effects). However, where a restriction the parties agreed upon between themselves fails to have third party effect, it may still trigger a claim for damages or have other legal effects.

**25** Think, in particular, of whether assets, or accrued gains, should be distributed equally or whether parties wish to agree on a different share (such as 33%), or whether a particular party should, in any case, be allocated particular pieces of property. Think also about methods of calculation including the relevant points in time, conditions of payment including the granting of respites, presumptions as to ownership, etc. Parties may also wish to include property that would otherwise be excluded by the applicable law. Make sure anything the parties agree upon is allowed by the applicable law.

**26** In the case of pension rights, the designation of the applicable law under point I. will often not be recognised by the courts (in the wider sense, see supra n. 9), in particular where a spouse has acquired pension rights under public pension schemes ('first pillar') or occupational pension schemes ('second pillar') as far as the latter are governed by regimes of a quasi-public law nature.

**27** Where a public pension scheme or a pension scheme with a quasi-public law nature provides for some kind of sharing/splitting/participation it is not generally advisable to apply point I (ii), i.e. to assume that the parties agree to undo any results produced by the public



law schemes. However, as far as the relevant mechanism of sharing/splitting/participation is of an optional nature the parties should not deliberately thwart the agreement they made under point I by exercising options, or refraining from the exercise of options, in such a way as would produce results that are significantly different from the results hypothetically produced under the law designated under point I (i).

**28** Note that the qualification of assets as 'pension rights', as contrasted with other types of assets owned by one or both spouses, is, at least from the point of view of courts in Member States participating in the MPR (supra n. 11), governed by the law applicable to matrimonial property (supra n. 18). If the parties wish to have more certainty concerning, e.g., particular insurance products they may wish to add a clarification in the 'special agreements' box.

**29** Within the EU, only the laws of DE and NL provide for a private law mechanism of sharing/splitting/participation. Under the laws of IE, Scotland as well as England and Wales, pension assets – like other assets – may be reallocated between the ex-spouses by way of a court order. In other Member States, there are also mechanisms of a public law nature, either because the relevant pension scheme is a 'first pillar' State pension or because it is a 'second pillar' occupational pension but is governed by terms and conditions resembling public law and often approved by public law bodies. One of the reasons why the parties may wish to give priority to these mechanisms is that most of these mechanisms have third party effect, e.g. vis-à-vis a pension funds.

**30** Note that sharing/splitting/participation under matrimonial property law may only exceptionally have third party effect, such as within Member States where assets may be reallocated by way of a court order. In the vast majority of cases the agreement under (ii) produces legal effects only between the parties.

**31** These rules could be the statutory maintenance rules or the agreement made by the parties under point IV. 2. (iii). Parties should be made aware of the fact that the law governing maintenance may provide for an extinction of maintenance claims after an ex-spouse has managed to become self-sufficient, even if self-sufficiency is only of a temporary nature and the same ex-spouse does not have sufficient means to maintain him- or herself after reaching retirement age.

**32** In making decisions, parties should take account of a number of factors, including potential tax effects, and the effect that the death of one of the spouses would have on pension rights. E.g. where pension rights are shared/split immediately upon divorce, this means that pension rights transferred from one spouse to the other may be lost when the other spouse dies. Conversely, where pension rights are shared upon accrual, they will be lost upon the death of the spouse primarily entitled to the pension. Maintenance claims which one spouse has against the other may or may not survive the maintenance debtor's death, depending on the applicable law and the terms of the agreement.

**33** Who counts as a 'common' child or other family member should not be decided solely on the basis of affiliation in legal or biological terms, but also considering any choices the parties jointly made during the marriage. This means, e.g., that a child that is not the biological child of one of the parties, and in the absence of an adoption by that party, may still count as a 'common' child if that party had informally accepted to raise the child as a parent.

**34** Under the applicable law, maintenance payments may come to an end upon the death of the maintenance debtor, depending on the applicable law.

**35** Member States participating in the MPR (supra n. 11) will normally apply the law governing matrimonial property in general also to the allocation of the family home. However, the temporary allocation due to urgent needs or domestic violence is often governed by overriding mandatory provisions of the forum where such provisions exist (Article 30 MPR). Member States not participating in the MPR may qualify the allocation of the family home as a matter of matrimonial property, or of divorce, or as a matter *sui generis*, but they may equally apply overriding mandatory provisions.

**36** Note that these issues are frequently dealt with under statutory provisions that are considered to be overriding mandatory provisions of the forum, and that they are therefore not necessarily governed by the same law the parties have chosen as the applicable law.

**37** This toolkit is based on the premise that ideally one court should deal with as many aspects of a case as possible, thus avoiding inconsistencies between the decisions concerning, e.g., maintenance and property relations, and reducing the costs of litigation.

**38** The courts in all Member States except Denmark will decide matters of jurisdiction for divorce or legal separation according to Council Regulation (EU) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIbis'). As it currently stands, Brussels IIbis does not provide a possibility to choose the competent courts.

This means that an agreement made in this template does not prevent a spouse from seising a court in either of the following: the Member State in whose territory (a) (i) the spouses are habitually resident, or (ii) the spouses were last habitually resident, insofar as one of them still resides there, or (c) the respondent is habitually resident, or (iii) in the event of a joint application, either of the spouses is habitually resident, or (iv) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or (v) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there; or (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

However, this does not mean the choice made in this template is useless because it remains valid for maintenance. Courts in all Member States will assume jurisdiction according to the rules of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ('Maintenance Regulation'). Under Article 4(1) of the Maintenance Regulation, the parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them: (a) a court or the courts of a Member State in which one of the parties is habitually resident; (b) a court or the courts of a Member State of which one of the parties has the nationality; (c) in the case of maintenance obligations between spouses or former spouses: (i) the court which has jurisdiction to settle their dispute in matrimonial matters; or (ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year. The conditions referred to in points (a), (b) or (c) have to be met at the time the choice of court agreement is concluded or at the time the court is seised.

The choice also remains valid for property relations, but only in rather few cases: Courts in Member States participating in the MPR (see note 11) will assume jurisdiction according to the rules in Chapter II of the MPR. According to Article 7(1), parties may, in cases which are covered by Article 6, i.e. where either the dispute does not arise in the immediate context of proceedings for divorce, legal separation or marriage annulment, or where the other spouse has not agreed with the concentration of proceedings under Article 5(1) because the court seised has only a remote connection with the marriage, i.e. where it is not a court of either (a) the Member State of the spouses' common nationality; (b) the Member State in whose territory the spouses are both habitually resident, or, failing that, were last habitually resident insofar as one of them still resides there, or (c) the Member State in whose territory the respondent (in the case of a joint application: either spouse) is habitually resident. In these cases the parties can agree that the courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1) or the courts of the Member State under whose law the marriage was created shall have exclusive jurisdiction to rule on issues of matrimonial property.

Consider also that the court seised may well take into account, when exercising discretion within the margins of discretion provided for by the applicable law, that one of the spouses has 'rushed off' to a court other than the court agreed upon.

**39** A court in a Member State participating in the MPR (on which see note 11) will assume jurisdiction according to the rules of the MPR. Article 5(1) MPR provides that where a court of

a Member State is seised to rule on an application for divorce, legal separation or marriage annulment under Brussels IIbis, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. For exceptions see note 38.

**40** This provision is limited to disputes between spouses and cannot bind their heirs under the Succession Regulation or otherwise.

**41** When choosing the country where the parties would start proceedings, they should consider whether the court of that country would recognise their choice of law made under I of this model agreement. They may also want to consider the law applicable to the matters that are at stake (if possible, allowing a court to apply its own substantive law), access to justice (e.g. language barriers), and proximity of the court to the situation (e.g. where the spouses have lived during the most important part of their marriage, where property is located). In the boxes parties find choices which reflect these considerations, but more choices would be available under the applicable rules.

**42** This template is based on the premise that ideally one court should deal with as many aspects of a case as possible, thus avoiding inconsistencies between the decisions concerning, e.g., maintenance and property relations, and reducing the costs of litigation.

**43** This option would seek to achieve that the court seised may apply its own substantive law. Where a court applies its own substantive law, this tends to enhance the quality of judgments and to reduce the duration and the costs of proceedings.

**44** This option would seek to achieve that the court seised is as close as possible to where the spouses live or used to live. Proximity of the court to the situation of the spouses tends to facilitate the taking of evidence and reduce the costs of travel. Note that this choice coincides with the default rule for independent proceedings concerning property relations under Article 6(1) MPR.

**45** This option may be attractive, in particular, for same-sex spouses who have concluded their marriage in a State which is neither the State of habitual residence nor the State of nationality of either spouse.

**46** It is possible that the choice the spouses made does not result in a court that has jurisdiction, e.g. it is a same-sex marriage and the court declines jurisdiction under Article 9(1) MPR, or the spouses chose the court of the Member State whose law is the applicable law, and as the applicable law they chose the Member State where the spouses were both habitually resident at the time the agreement was concluded (and which is not the State of the spouses' common nationality), but later they both become habitually resident in another Member State. In the latter case, the choice is not among the countries whose courts may be seised under Article 3 Brussels IIbis (supra note 38).

**47** Note that there may still be some issues, in particular concerning pension rights of a public law nature, where none of the chosen courts can assume jurisdiction. This should not be a reason for discarding a choice and moving on to the next ranked choice.

**48** The typical situation would involve jurisdiction for property relations and maintenance following jurisdiction assumed for divorce. Concerning property relations see note 39, i.e. parties can, before or after initiating the proceedings, agree on the concentration of proceedings, see Article 5(2) and (3) with Article 7(2) MPR. Under Article 4(1)(c)(ii) of the Maintenance Regulation, the parties may agree that the court which has jurisdiction to settle their dispute in matrimonial matters shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them.

**49** Retroactivity is mainly an issue for matrimonial property, but note that, if the box is ticked, retroactive effect would also extend to economic matters, such as pension rights, as far as legally possible. Under Article 22(2) and (3) MPR, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only, unless the spouses agree otherwise. Any retroactive change of the applicable law or the property regime shall not adversely affect the rights of third parties deriving from that law. The advantage of retroactivity is that not more than one law and not more than one property regime applies, even if the parties' property relations have been governed up until now by a different law or regime. However, it must be borne in mind that retroactivity may result in a

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change in the allocation of property, e.g. if community of property is retroactively replaced by separation of property, any property that one spouse has previously acquired in their own name will become that spouse's property. Where choice of the applicable law results in a change of the applicable law, and in particular where it results in a change of property regime, there may be difficulties also where the parties do not opt for retroactive effect, as the old property regime needs to be liquidated.