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<ct>SCOPE OF THE APPLICABLE LAW
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ARTICLE 27: SCOPE OF THE APPLICABLE LAW

The law applicable to the matrimonial property regime pursuant to this Regulation shall govern, inter alia:

- (a) the classification of property of either or both spouses into different categories during and after marriage;
- (b) the transfer of property from one category to the other one;
- (c) the responsibility of one spouse for liabilities and debts of the other spouse;
- (d) the powers, rights and obligations of either or both spouses with regard to property;
- (e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;
- (f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and
- (g) the material validity of a matrimonial property agreement.

ARTICLE 27: SCOPE OF THE APPLICABLE LAW

The law applicable to the property consequences of registered partnerships pursuant to this Regulation shall govern, 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 the other one,
- (c) the responsibility of one partner for 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, and
- (g) the material validity of a partnership property agreement.

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<a>A. INTRODUCTORY REMARKS

<prn>**27.01** It is customary for European regulations providing rules on applicable law to include a clause entitled 'scope of the applicable law', wherein the material scope of operation of the applicable law is regulated.¹ Such provisions are not to be confused

¹ See, e.g., Art 12 of Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6; Art 15 of Council Regulation (EC) No 864/2007 on the law applicable to

with rules which narrate the material scope of the regulation in question,² or the territorial scope of the instrument.³

<prn>27.02 Article 27, the purpose of which is to narrate the scope of the applicable law in the context of the Property Regimes Regulations, applies irrespective of the manner of ascertainment of the applicable law, that is to say, regardless of whether the law designated as applicable by the Regulation has been identified through *professio iuris*, that is, by operation of Article 22 (choice of the applicable law – whether initial or subsequent choice of applicable law) or by means of Article 26 (applicable law in the absence of choice by the parties).

<prn>27.03 The ‘scope of the applicable law’ clause sets out the extent of control of the *lex causae* (the law applicable to the matrimonial or registered partnership property regime pursuant to the Property Regimes Regulations), listing the matters (or, more accurately, the illustrative matters) to be settled by that law. Recital 18 makes clear that the scope of the respective Regulations should include all ‘civil-law aspects of matrimonial property regimes’ (or, *mutatis mutandis*, the civil-law aspects of property consequences of registered partnerships). For the purposes of Regulation 2016/1103, the term ‘matrimonial property regime’ is to be interpreted autonomously and, by Recital 18, should encompass not only rules from which the spouses may not derogate, but also any optional rules to which the spouses may agree to subject themselves in accordance with the applicable law, as well as any default rules of the applicable law.

<prn>27.04 As with comparable ‘scope of the applicable law’ clauses in other EU private international law regulations, the wording of Article 27 is not comprehensive, as indicated by the phrase ‘inter alia’. The matters expressly narrated in Article 27 constitute examples of issues to which the *lex causae* is to be applied, and are not to be taken as limiting the scope of application of that law. The non-exhaustive manner of drafting affords the *lex causae* an expansive scope of operation, and correspondingly curtails the scope of operation of other potentially applicable laws, including, for example, the law of the forum or any other law which might be considered to have an interest in the resolution of the matter, such as the *lex situs* of immovable property.⁴

non-contractual obligations [2007] OJ L199/40; Art 23 of Council Regulation (EU) No 650/2012 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 [2012] OJ L201/107; Art 15 of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2008] OJ L7/1 (to be read in conjunction with Art 11 of Protocol of 23 November 2007 on the law applicable to maintenance obligations, <http://hcch.net> (accessed 3 February 2020) and [2009] OJ L331/19); and Art 7 of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings [2015] OJ L141/19. (~~Applicable law~~). While some regulations on applicable law, such as Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10, do not specifically narrate in any article the material scope of the applicable law, interpretative guidance typically is provided in the recitals (Recital 10).

² See, e.g., Art 1 of Regulation 593/2008 (‘Material scope’); Art 1 of Regulation 864/2997 (‘Scope’); Art 1 of Regulation 1259/2010 (‘Scope’); Art 1 of Regulation 650/2012 (‘Scope’); Art 1 of Regulation 4/2009 (to be read in conjunction with Art 1 of the 2007 Protocol on the law applicable to maintenance obligations – ‘Scope’); and Art 1 of Regulation 2015/848 (‘Scope’).

³ Rules concerning the territorial scope of an instrument are particularly significant in the context of regulations which have been implemented by means of enhanced cooperation procedure, e.g., Recital 11 of Regulation 1259/2010.

⁴ Although note the protection of the interests of the *lex situs* in Art 28(2)(a)(iii) and (b)(iii) and Art 28(3)(b); see the analysis under Art 28 in this Commentary (effect in respect of third parties).

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<prn>27.05 Article 27 purports to give a universal (that is, comprehensive) effect to the law applicable to the matrimonial (or registered partnership) property regime pursuant to the Property Regimes Regulations, applying the rules of one legal system to the entirety of matters pertaining to the matrimonial (or registered partnership) property regime. One justification for an expansive ‘scope’ clause such as this is certainty, ensuring that there is consistency of treatment of issues across the different participating Member States, and avoiding fragmentation of the matrimonial or partnership property regime.⁵ Conferring a very wide function on the law designated (that is, the law applicable to the matrimonial or registered partnership property regime pursuant to the relevant Regulation), ensures broad consistency and certainty across participating Member States.

<prn>27.06 Although the list of issues which are subject to regulation by the designated *lex causae* is not exhaustive, Article 27 is useful since different Member State legal systems traditionally have adopted different classifications, the same issue in one legal system being treated as substantive and subject, therefore, to application of the *lex causae*, but in another Member State court as procedural, for determination in accordance with the *lex fori*.

<prn>27.07 Generally, it may be said that there is an observable trend in legislative provision in the conflict of laws and in EU regulations, in particular, to favour application of the *lex causae* over the *lex fori*. In traditional conflict-of-laws methodology, the domains of the *lex causae* and the *lex fori*, respectively, are demarcated by the distinction between substance⁶ and procedure,⁷ and that distinction has been central to orthodox conflict-of-laws reasoning: it cannot be determined what law governs a particular issue until, crucially, that issue has been characterised as substantive, on the one hand, or procedural, on the other. The distinction, traditionally, has been the fulcrum, or axis, of the choice-of-law process. Characterisation of an issue as substantive or procedural has taken the forum a stage closer to identification of the governing law: the law which regulates substantive issues is the *lex causae* (as identified by the forum’s conflict rules), and the law which is ‘master of procedure (in its own house) is the *lex fori*.’⁸ The task of designating a particular issue as substantive or procedural has long been an important and delicate one.⁹ Where, however, a European Regulation explicitly determines the scope of the applicable law, the characterisation by a court of a given issue as pertaining to substance or to procedure diminishes in significance, for the legislative instrument prescribes *a priori* those matters which fall within the scope of the applicable law. Article 27 does not eliminate the difficult interface between the applicable law and the law of the forum, between substance and procedure, but by expanding the territory (by means of an open-ended list of topics) over which the *lex causae* explicitly extends, and including a wide range of matters within the governance of the *lex causae*, the significance of the borderland between substance and procedure is reduced. Deeming

⁵ Cf, the position under Regulation 650/2012, per Art 23, in respect of which see Esperanza Castellanos Ruiz, ‘Article 23—The Scope of the Applicable Law’ in Alfonso-Luis Calvo Caravaca, Angelo Davi and Heinz-Peter Mansel (eds), *The EU Succession Regulation* (CUP 2016) 351 *et seq.*

⁶ Broadly, matters of right; see Walter Cook, ‘“Substance” and “Procedure” in the Conflict of Laws’ (1932–33) 42 *Yale L.J.* 333, 334.

⁷ Broadly, matters of remedy; see, *ibid.*

⁸ Elizabeth Crawford, ‘The Adjective and the Noun: Title and Right to Sue in International Private Law’ (2000) *Jur.Rev.* 347, 349.

⁹ See, e.g., Janeen Carruthers, ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 *ICLQ* 691, 696.

issues to be substantive and subject, therefore, to regulation by the designated *lex causae*, ensures the comprehensive application of that law, subject (mainly)¹⁰ only to the application of overriding mandatory provisions,¹¹ and public policy (*ordre public*).¹²

<prn>27.08 The 2011 European Commission Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes¹³ did not contain any provision on ‘scope of the applicable law’. The scope clause was inserted late in the drafting and negotiation of the instrument.¹⁴ The brevity of the relevant passage of the Explanatory Memorandum accompanying the 2016 proposal¹⁵ means that there is less transparency in respect of the meaning of, and justification for, inclusion of the various issues detailed in Article 27 than is the case in relation to the corresponding ‘scope of applicable law’ clauses contained in certain other European Regulations.¹⁶

<a>B. ISSUES EXPRESSLY GOVERNED BY THE DESIGNATED LEX CAUSAE

<prn>27.09 Article 27 provides that the law applicable to the matrimonial property regime pursuant to Regulation 2016/1103 (that is, the designated *lex causae*) governs, inter alia: the classification of property of either or both spouses into different categories during and after marriage (Article 27(a)); the transfer of property from one category to the other one (Article 27(b)); the responsibility of one spouse for liabilities and debts of the other spouse (Article 27(c)); the powers, rights and obligations of either or both spouses with regard to property (Article 27(d)); the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property (Article 27(e)); the effects of the matrimonial property regime on a legal relationship between a spouse and third parties (Article 27(f)); and the material validity of a matrimonial property agreement (Article 27(g)).

1. Classification and transfer of property

<prn>27.10 Property typically is classified or characterised for the purposes of private international law as movable or immovable in accordance with the *lex situs*. Joseph Story made the point many years ago, that ‘every nation, having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character which it shall choose, and no other nation can impugn or vary that character’.¹⁷ However, the classification of property between different categories of property loses some of its significance insofar as Regulation 2016/1103, in Article 21, adopts a principle of unity of the applicable law, namely, the law applicable to the matrimonial property regime pursuant to Article 22 or 26 shall apply to *all* assets falling under that regime, regardless of where the assets are

¹⁰ See the analysis under Art 28 in this Commentary.

¹¹ See the analysis under Art 30 in this Commentary.

¹² See the analysis under Art 31 in this Commentary.

¹³ COM(2011) 126 final.

¹⁴ The provision inserted as Art 27 of the 2016 Commission Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2016) 106 final) is identical to Art 27 of Regulation 2016/1104.

¹⁵ Commission Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2016) 106 final, para 5.3.

¹⁶ As, e.g., in relation to Art 15 of Regulation 864/2007, reference can be made to the Commission Proposal for a regulation on the law applicable to non-contractual obligations, which was accompanied by a detailed explanatory memorandum, COM(2003) 427 final, 23 *et seq.*

¹⁷ Joseph Story, *Commentaries on the Conflict of Laws* (Maxwell 1841) 654. See also *Macdonald v Macdonald* [1932] UKHL 3, 1932 SC (HL) 79.

located.¹⁸ The classification of property, and the law according to which property is classified, would have been considerably more significant, had the Regulation incorporated a scissionist approach to choice of law.

<prn>27.11 Distinct from the classification of property *per se*, however, some legal systems render the classification of property significant insofar as the matrimonial or registered partnership property regime imposed or permitted by that law affects only some, but not all, assets belonging to either or both spouse(s) or partner(s). Only certain categories of property may fall into a community regime or, conversely, may be subject to separate treatment. A community of property regime may be full or universal, extending to all property owned by either or both spouse(s) or partner(s) at the time of marriage or registration *and* property subsequently acquired by either or both spouse(s) or partner(s) during the subsistence of the marriage or registered partnership; or it may be limited to property acquired during the marriage or registered partnership, except by means of gift or inheritance. To the extent that the particular classification of property may be relevant for the purposes of the matrimonial or partnership property regime in question, the classification of property, and transfer of assets between different categories of property (for example, from within the scope of a community regime to beyond that regime), shall be determined by the designated *lex causae*.¹⁹

<prn>27.12 The rule seeks to diminish the significance of temporal problems by specifying that the classification of property both *during and after marriage or registered partnership* is a matter for the designated applicable law. It should be borne in mind that, unless the spouses or partners agree otherwise, a change of the law applicable to the matrimonial or partnership property regime made during the marriage or partnership shall have prospective effect only.²⁰ Moreover, even if the parties agree to change the applicable law retrospectively, that change shall not prejudice the rights of third parties which derive from that law.²¹

2. Liabilities and obligations

<prn>27.13 The liability of one spouse or partner for the debts of the other is determined by the designated *lex causae*, as is the ability of either or both of them to manage or dispose of property, for example, by way of gift, sale or in security.²² Any change in the applicable law and, in turn, any change in the liability of spouses or partners, cannot operate retrospectively unless the couple agrees otherwise; and in any event shall not adversely affect the rights of third parties.

<prn>27.14 By Article 1(2)(c) of Regulation 593/2008 and Article 1(2)(b) of Regulation 864/2007, obligations arising out of matrimonial property regimes are excluded from the scope of the respective instruments, as are obligations arising out of property regimes of relationships deemed by the law applicable to such relationships to have

¹⁸ See analysis under Art 21 in this Commentary.

¹⁹ See, in relation to registration of certain kinds of property, Dieter Martiny, 'The Effects of Marital Property Agreements in Respect of Third Parties' in Alain-Laurent Verbeke, Jens M. Scherpe, Charlotte Declerck, Tobias Helms and Patrick Senaevé (eds), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* (Intersentia 2012) 903, 910.

²⁰ Art 22(2). Cf, Art 8 of the Convention of 14 March 1978 on the law applicable to matrimonial property regimes, <http://hcch.net>, accessed 3 February 2020.

²¹ Art 22(3) and Recital 46. Cf, Art 8 of the Convention of 14 March 1978 on the law applicable to matrimonial property regimes.

²² See Recital 20 with regard to the specific powers and rights of either or both spouse(s) with regard to property as between themselves or as regards third parties.

comparable effects to marriage. There is no possibility of conflict, therefore, between Regulation 2016/1103 and Regulations 593/2008 or 864/2007 in respect of the obligations owed by either or both spouse(s) or partner(s).

3. Dissolution of the matrimonial property regime

<prn>27.15 There is a modest difference in the wording of paragraph (e) of Regulation 2016/1103 and Regulation 2016/1104, respectively. The latter instrument refers only to ‘the partition, distribution or liquidation of the property upon dissolution of the registered partnership’, without any reference to the dissolution of the registered partnership regime per se.

<prn>27.16 The law applicable to the matrimonial property regime pursuant to Regulation 2016/1103 shall determine the dissolution of that regime (for example, by option of the spouses – without prejudice to the vested rights of third parties –²³ or by way of the death of either or both spouse(s), or by virtue of the divorce or dissolution of the parties’ relationship) and the effect of that dissolution on the parties’ matrimonial property. Special care must be given to the interaction of Regulation 2016/1103 with each and all of the following: Regulation 2201/2003 on matrimonial matters and matters of parental responsibility,²⁴ Regulation 650/2012 and Regulation 4/2009 on matters relating to maintenance obligations.²⁵

<prn>27.17 The matrimonial property regime having been dissolved, the designated *lex causae* will govern the division and distribution of the parties’ matrimonial property as between themselves and also any transfer or transmission due to third parties. The same is true, *mutatis mutandis*, of the law applicable to the property consequences of registered partnerships.

4. Effects of the matrimonial property regime

<prn>27.18 ‘Matrimonial property regime’ is defined, for the purposes of Regulation 2016/1103, in Article 3(1)(a) as meaning ‘a set of rules concerning the property relationships between the spouses *and in their relations with third parties*, as a result of marriage or its dissolution’ (emphasis added).²⁶ As elaborated in Recital 18, the term ‘matrimonial property regime’:

<quotation>includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses *and in their relations with third parties*,²⁷ resulting directly from the matrimonial relationship, or the dissolution thereof.</quotation>

²³ Art 22(2).

²⁴ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338/1 now recast by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L178/1 applicable as of 1 August 2022.

²⁵ See analysis under Art 1 in this Commentary.

²⁶ Cf, Art 3(2)(b) of Regulation 2016/1104, which defines the property consequences of a registered partnership as:

<quotation>the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution.</quotation>

²⁷ Cf, *ibid.*, Recital 20 (emphasis added).

<prn>27.19 A matrimonial property regime is important not only internally, that is, between the spouses *inter se* (during the existence of the marriage, but particularly also upon dissolution of the marriage by death or divorce); but it may also be important externally, that is, as regards either or both spouse(s) in his or her property and/or contractual dealings with third parties. A third party is likely to present as a creditor of one or both spouse(s) or as a contracting party with either or both spouse(s) in the context of a sales contract or, more rarely, as a donee.

<prn>27.20 The general position is that the property relationships of spouses *inter se* and also in their relationships with third parties are covered by the terms of Regulation 2016/1103 and, deriving from that, the general rule in Article 27(f) is that the effects of the matrimonial property regime on any legal relationship between a spouse and a third party are regulated by the designated *lex causae*, that is, the law applicable to the matrimonial property regime pursuant to the Regulation.²⁸ Some, but not all, legal systems provide for the protection of third parties in their matrimonial property law.

<prn>27.21 This rule, however, is subject to a very significant caveat set out in Article 28, discussed in detail below. Additionally, by virtue of Article 22(3),²⁹ any retrospective change of applicable law, which is agreed by the couple under Article 22(2), shall not adversely affect the rights of third parties deriving from that law.³⁰

5. The material validity of a matrimonial property agreement

<prn>27.22 Article 27(g) is not to be confused with Article 24(1), which provides that the existence and (material) validity of an agreement on choice of law (that is, for the purpose of Article 22 – choice of the applicable law) or any term thereof, shall be determined by the putative applicable law, that is, the law which would govern it pursuant to Article 22 if the agreement or term were valid.

<prn>27.23 Rather, Article 27(g) provides that the designated *lex causae* (the law applicable to the matrimonial or partnership property regime pursuant to the Regulation) shall govern the material validity of a matrimonial property agreement, defined in Article 3(1)(b) as meaning ‘an agreement between spouses or future spouses by which they organise their matrimonial property regime’.³¹

<prn>27.24 As narrated in Recital 48,³² a matrimonial property agreement is a type of disposition on matrimonial property the admissibility and acceptance of which vary among legal systems. Although special, autonomous rules on the formal validity of a matrimonial or partnership property agreement are laid down in Article 25 of the Property Regimes Regulations, the question of material validity is left to regulation by the designated *lex causae*.

<prn>27.25 Material validity for this purpose encompasses matters not only pertaining to formation of contract (for example, evidencing of consent), but also matters such as the extent to which an *ante-nuptial*, *stante-nuptial* or *post-nuptial* agreement is recognised or has any effect on the matrimonial property relationship between the spouses; the property rights of the parties; and also the question whether or not an agreement is revocable *sua natura*. The designated *lex causae* will govern the meaning

²⁸ Cf, Art 9 of the Convention of 14 March 1978 on the law applicable to matrimonial property regimes.

²⁹ See the analysis under Art 22 in this Commentary.

³⁰ See also Recital 46. Cf, Recital 45 of Regulation 2016/1104 and Art 8 of the Convention of 14 March 1978 on the law applicable to matrimonial property regimes.

³¹ Cf, Art 3(1)(c) of Regulation 2016/1104, which defines a ‘partnership property agreement’ as meaning ‘any agreement between partners or future partners by which they organise the property consequences of their registered partnership’.

³² Cf, Recital 47 of Regulation 2016/1104.

of the terms of the agreement, including identification of the property to be affected by the agreement (which may be expressed by the parties or inferred from the language of the deed, failing which the putative applicable law of the matrimonial regime will determine the ascertainment of matrimonial assets, including the enlargement or curtailment of community property). The designated applicable law will determine if particular property, such as property acquired during the subsistence of the marriage, is affected by the community regime.

<prn>27.26 Finally, Article 27 must be read taking into account Article 1 ('Scope') of the Property Regimes Regulations. Excluded from the scope of the Regulations, and therefore from the scope of the applicable law designated by each Regulation, are the following matters:³³ the legal capacity of the couple;³⁴ the existence, validity or recognition of a marriage or registered partnership;³⁵ maintenance obligations;³⁶ the succession to the estate of a deceased spouse or partner;³⁷ social security;³⁸ the entitlement to transfer or adjustment between the couple, in the case of divorce or legal separation, dissolution or annulment, of rights to retirement or disability pension accrued during marriage or registered partnership and which have not generated pension income during the marriage or registered partnership;³⁹ the nature of rights *in rem* relating to property;⁴⁰ and any recording in a register of rights in immovable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.⁴¹

³³ In respect of which see the analysis under Art 1 in this Commentary.

³⁴ Art 1(2)(a).

³⁵ Art 1(2)(b).

³⁶ Art 1(2)(c).

³⁷ Art 1(2)(d).

³⁸ Art 1(2)(e).

³⁹ Art 1(2)(f).

⁴⁰ Art 1(2)(g).

⁴¹ Art 1(2)(h).