

WHY REG. (EU) NO. 1103/2016 AND 1104/2016 IMPACT  
ON THE EUROPEAN CITIZENS DAILY LIFE?

*¿POR QUÉ LOS REGLAMENTOS (UE) N° 1103/2016 Y 1104/2016  
TIENEN IMPACTO EN LA VIDA COTIDIANA DE LOS CIUDADANOS  
EUROPEOS?*

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**ABSTRACT:** Why families do need the tools and instruments implemented by PSEFS Project? Why this is not an issue for lawyers, judges and University professors only. The answer to this question is that Reg. (EU) no. 1103/2016 and no. 1104/2016 impact on the European citizens daily life. We follow the problems of a young couple in order to have a better understanding and an evidence of this statement.

**KEY WORDS:** Matrimonial property regime; applicable law; habitual residence; divorce.

**RESUMEN:** *¿Por qué las familias necesitan las herramientas e instrumentos implementados por el Proyecto PSEFS? ¿Por qué esto no es un problema exclusivo para abogados, jueces y profesores universitarios? La respuesta a estos interrogantes es que los Reglamentos (UE) nº 1103/2016 y nº 1104/2016 tienen impacto en la vida diaria de los ciudadanos europeos. Exponemos los problemas de una pareja joven para tener una mejor comprensión y evidencia de esta afirmación.*

**PALABRAS CLAVE:** *Régimen económico-matrimonial; ley aplicable; residencia habitual; divorcio.*

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## **I. INTRODUCTION.**

The number of the transnational families in Europe is quite large and it is constantly increasing due to globalization and the ever greater mobility that characterizes the modern society.

When dealing with legal issues appearing as parts of their “everyday life”, all cross-borders families have to face similar problems. It is on this basis and in order to provide these families with tools for raising and increasing their awareness of the new legislative instruments that the PSEFS Project works.

But why families do need these tools? Why this is not an issue for lawyers, judges and University professors only?

In order to find an answer for the above mentioned questions, let's follow a young couple (Alice and Bob) in their life, meaning before, during and after their marriage.

## **II. AN “ERASMUS GENERATION” FAMILY LAW CASE.**

Alice and Bob are both Italian citizens and they are the best representative of the so called “Erasmus generation”. As a matter of fact, Alice and Bob feel in love during high school. After high school they decided to have an international experience moving to Munich where they studied theoretical physic at the Max Plank Institute. After their PHD, they got a postdoc for further two years but, in the meantime, they got married in Trieste (Italy), their common hometown.

We could say that Alice and Bob are lucky enough: they come from the same nation and from the same city and they work abroad but they live together: romantic relationships can be much more difficult for the Erasmus generation!

The day before the marriage, while preparing the ceremony, the priest asks them: “Tomorrow do you want to choose separation of assets regime or community of assets regime?”

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This unexpected question collapses them into our universe (the universe of law) from the faraway universe of their experience made by numbers, math and physics experiments.

Alice looks at Bob into his eyes and, after hesitating, she answers: "Well, I think, we think, separation of assets regime".

Why Alice gave that answer? Only because in Italy, separation of assets regime is the most common choice.

The day after, they tied the knot and they made the choice of the separation of assets regime that has been annotated in the margin of the marriage certificate. Alice and Bob completely forget this issue and their choice for separation of assets regime, while they keep on living in Germany for another couple of years when they decided to move back to Italy.

Alice became an "A type" researcher at the University of Trieste (she works for the International Centre for Theoretical Physics and she can see the sea outside her window) while Bob started working for a company in Milan specialised in nano materials. Bob has purchased a little house in Sesto San Giovanni using all his savings (he is happy enough because the house is near the underground station!).

At the time of signing the deed, the Notary asked Bob about the matrimonial property regime governing the marriage with Alice. Bob answered that this is the separation of assets regime. The Notary Public made a check within the public records and confirmed Bob's declaration within the deed.

Bob's hope at the time of the purchase of the house is that Alice applies to become associate professor at the University of Milan so that he can stop commuting from Milan to Trieste every weekend. Unfortunately, Alice never applies for moving to the University of Milan because she hates Sesto San Giovanni.

Alice keeps on living in a rented flat in Trieste; she has no savings and she cannot obtain a mortgage because her incomes are too low. After a short time, Bob stops commuting from Sesto San Giovanni to Trieste because the journey was too tiring for him.

Due to their estrangement, one year after moving back to Italy, they decide to separate/divorce.

In this situation, during the crisis of the marriage, Alice decides to ask for an opinion from a lawyer.

After having heard from Alice the most relevant facts of the marriage, the lawyer explains her that the case is an international family law case. Moreover, Alice's lawyer reaches the conclusion that Bob, after the legal separation, has a debt towards his wife equal to half of the value of the Sesto San Giovanni flat.

Alice is quite doubtful: she doesn't think that her case is an international case since the spouses both live in Italy and they are both Italian citizens. All their assets are in Italy too. Why does her case have international family law profiles?

### III. A "LITTLE MAGIC BOTTLE".

Why the situation is different from that it seems at a first glance?

If Alice and Bob would have used *Taxonomy* and *Atlas* from [www.euro-family.eu](http://www.euro-family.eu) immediately before the marriage (or the Notary Public who drafted the deed transferring to Bob the flat in Sesto San Giovanni would have used the same tools) they would have learned the answer of her doubts.

Luckily for Alice, "the little magic bottle had now had its full effect": her lawyer is a real fan of *Taxonomy* and *Atlas* from [www.euro-family.eu](http://www.euro-family.eu) and he is really well oriented in international family law!

Let's go one step at a time.

Reg. (EU) n. 1103/2016<sup>1</sup> implements enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. The regulation applies to procedures started after 21 January 2019 and, with regard to the provisions on the determination of the applicable law, only with respect to spouses who married after that date<sup>2</sup>.

Chapter III of the regulation deals with the law applicable to matrimonial property regime.

According to Art. 22 of the Regulation, the spouses (or future spouses) may agree to designate the law applicable to their matrimonial property regime, provided that that law is one of the following:

<sup>1</sup> The full text of the Reg. (UE) n. 1103/2016 (OJ L. 183, 8 July 2016) is available in the multilingual version on <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32016R1103>. Together with this regulation, Reg. (UE) n. 1104/2016 (implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships) has been issued.

<sup>2</sup> According to Art. 69.

(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.

The choice is not definitive since the parties may change it both for the future and for the past (in the last case, in respect with the rights of third parties).

If the spouses do not choose the law applicable to their property relationships, the criteria for the determination of the law applicable are indicated in Art. 26 of Reg. (EU) n. 1103/2016. The criteria are mentioned in a hierarchical order, meaning that the following ones operate only where the previous ones cannot be applied.

As a matter of facts, according to Art. 26 of Reg. (EU) n. 1103/2016, in the absence of a choice of law agreement pursuant to the above mentioned Art. 22, the law applicable to the matrimonial property regime shall be the law of the State:

(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

(c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

Alice and Bob never choose the applicable law to their marriage. This means that Art. 26 applies to their case.

Even if Alice and Bob are both Italian nationals, the criterion of the law of the common citizenship as the law applicable to their marriage (Italian law) cannot be applied since it works only in case the spouses do not have a common habitual residence after the marriage.

It is undisputed that Alice and Bob have lived in Germany for a long time during their relationship but, above all, it is undisputed that they resided in Germany together immediately after marriage celebration. This means that the law applicable to the matrimonial property regime is the German law as the law of their first habitual residence as spouses (Art. 26, lett. a).

According to German law, the default or statutory family property regime is the community of accrued gains, the so called *Zugewinnngemeinschaft*, according to §§1363-1390 of the BGB.

If the spouses live under the statutory regime, neither the husband's nor the wife's assets purchased before the marriage become the spouses' joint property. The same applies to the assets that a spouse acquires after the celebration of the marriage. However, the accrued gains (meaning the increase in the spouses' assets) that occurs during the course of the marriage are equalized (meaning divided equally) once the property regime ends, in particular when the crisis of the marriage (legal separation or divorce) occurs (§ 1363, paragraph 2 of the BGB).

According to the rules above mentioned, the value of the flat in Sesto San Giovanni – which is the only asset accrued by the spouses (in particular by Bob) over the course of the marriage – has to be equally shared within the spouses.

What about the choice of the matrimonial property regime – in particular, the choice of the separation of assets regime – that the parties made before the priest (as a public officer according to Italian law) at the time of the celebration of the marriage? Maybe that declaration should have effect also under German law being considered as a choice of a “different regime”, meaning different from the *Zugewinnngemeinschaft* regime?

In order to answer to this question, let's consider Art. 25 of the Reg. (EU) n. 1103/2016. According to Art. 25 of the Regulation, matrimonial property agreements shall be expressed in writing, dated and signed by both spouses. However, if the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply. Moreover, if the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements shall apply.

#### IV. CONCLUSION.

The election of the separation of assets regime as the regime applicable to their marriage was made by Alice and Bob in writing, it was dated and also signed. Nevertheless, since Germany was the State where both the spouses had their habitual residence at the time of the Italian agreement of separation of assets regime, the formal validity of the agreement depends on German law.

According to § 1411 of the BGB, the marriage contract must be recorded by a notary, and both parties must be present. This requirement is far away from Italian law where the presence of the Notary is mandatory only in case the agreement is not entered during the marriage ceremony.

Since both spouses had their habitual residence in Germany at the time when the separation of assets agreement was concluded and the law applicable to matrimonial property regime is German law, the additional formal requirement provided for by German law shall apply.

Since Italian agreement was not signed in front of a Notary Public as required per German law, the separation of assets agreement is void. The German default matrimonial property regime shall apply to the marriage of Alice and Bob. *Zugewinnngemeinschaft* regime applies to the marriage and Bob has to share the value of the flat in Sesto San Giovanni.