

**JURISDICTION AND APPLICABLE LAW ON LEGAL SEPARATION OR
DIVORCE AND SPOUSAL PROPERTY RIGHTS in the EUROPEAN UNION**

The Spanish view

1.- JURISDICTION ON LEGAL SEPARATION OR DIVORCE

All European Union Member States (except Denmark) are a party of the Council Regulation (EC) 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, known as “the Brussels II Regulation”. Now, this Regulation rules the jurisdiction of a EU Member State in matters relating to divorce on the following alternative grounds set out in Article 3 of the regulation.

The Spanish Law of the Judicial Power was reformed in 2015, with regards to international jurisdiction and its article 22 *quáter* c) adopts the very same grounds for jurisdiction as article 3 of the Regulation.

Spain retains the residual jurisdiction on divorce:

- when both parties are habitually resident in Spain at the time the proceedings are issued;
- when Spain was the last matrimonial habitual residence and one of the spouses still lives there;
- when Spain is the respondent’s habitual residence;
- in the case of uncontested divorce, when one of the spouses is habitually resident in Spain;
- when the petitioner is habitually resident in Spain at least one year before proceedings are issued;
- when the petitioner is Spanish and has been habitually resident in Spain for at least six months before proceedings are issued; and
- when both spouses are of Spanish nationality.

Case law defines habitual residence as the country where the party has fixed his permanent or habitual centre of his interests. This is a question of fact.

Article 8 of “the Brussels II a Regulation” rules that the Courts of the Member State where the child is habitually resident at the time the Court is seised shall have international jurisdiction for parental responsibility and childcare arrangements. The Spanish Law of the Judicial Power in its article 22 *quáter* d) meets the grounds for jurisdiction as set out in article 8 of the Regulation.

Spain retains the residual jurisdiction on parental responsibility and childcare arrangements when:

- the descendent is habitually resident in Spain at the time the proceedings are issued; and
- the petitioner is Spanish or has been habitually resident in Spain for at least six months before the proceedings are issued.

Regarding article 3 of **the 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 in Member States jurisdiction shall lie with: a) the Court where the defendant is habitually resident; b) the Court where the creditor is habitually resident; c) the Court which according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties; or d) the Court which according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Article 22 *quáter* f) of the Spanish Law of the Judicial Power rules the international jurisdiction of the Spanish Courts on maintenance obligations as set out in article 3 of the “Maintenance Regulation”.

Spain retains the residual jurisdiction on maintenance obligations when:

- the petitioner or the respondent is habitual resident in Spain.

- the Spanish Courts have jurisdiction concerning the status of a person or concerning parental responsibility and the matter relating to maintenance is ancillary to those proceedings.

Spain is party to the **Council Regulation (EU) 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, which will be applicable between Member States from 29th January 2019.

According to this Regulation the jurisdiction in matters of the matrimonial property regime in the event of the death of one of the spouses will be retained by the Court of the Member State which is ruling the succession of the spouse pursuant to **Regulation (EU) 650/2012 on Succession**. The jurisdiction in matters of the matrimonial property regime in cases of divorce, legal separation or annulment will be ruled by the Court of the Member State which is seised for the divorce, legal separation or annulment pursuant to **Regulation (EU) 2201/2003**.

Article 22 *quáter* c) of the Spanish Law of the Judicial Power rules the international jurisdiction of the Spanish Courts in matters of matrimonial property regimes.

Spain retains the residual jurisdiction in matters of matrimonial property regimes when:

- both parties are habitually resident in Spain at the time the proceedings are issued;
- Spain was the last matrimonial habitual residence and one of the spouses still lives there;
- Spain is the respondent's habitual residence;
- in the case of uncontested divorce, when one of the spouses is habitually resident in Spain;
- the petitioner is habitually resident in Spain at least one year before proceedings are issued;
- the petitioner is Spanish and has been habitually resident in Spain for at least six months before proceedings are issued; and
- both spouses are of Spanish nationality.

2.- APPLICABLE LAW ON LEGAL SEPARATION OR DIVORCE

The 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, known as the Rome III Regulation shall apply in conflicts of laws on divorce between participating member states: Belgium, Bulgaria, Germany, Spain, France, Italy, Greece, Latvia, Luxemburg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and Estonia.

Article 107.2 of the Spanish Civil Code rules the applicable law on divorce for foreign nationals and it has been reformed to converge with the grounds as set out in "Rome III Regulation": *In case the couple did not agree in advance which law to apply, the judge applies article 8 which designates firstly the law of the habitual residence of the couple at the time the court is seized*

Spain has opted in to the **2007 Hague Protocol of the EC Regulation No 4/2009** in relation to maintenance as set out in article 15. The general rule (article 3) on applicable law in accordance with the 2007 Hague Protocol on the applicable law to maintenance obligations shall be the law of the State of the habitual residence of the creditor. According to articles 7 and 9 of the Spanish Civil Code, the applicable law to maintenance obligations shall be ruled by 2007 Hague Protocol.

Spain is a party of the **Council Regulation (EU) 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** and the **Council Regulation (EU) 2016/1104** of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions **in matters of the property consequences of registered partnerships**. These Regulations shall apply in conflicts of laws between participating members to marriages or civil partnerships performed after 29 January 2019.

Otherwise, the Spanish Civil Code rules in articles 2–3 and 9, that the applicable law to the matrimonial regimes is determined by:

- Common nationality when they got married.

- Public Deed choosing between the national law/habitual residence of any spouse.
- First common habitual residence after the marriage.
- Country where the marriage took place.

Foreign law can be applicable by the Spanish Courts, subject to the proof of the Foreign Law by the party who seeks its application.

How to give evidence of the Foreign Law before the Spanish Court:

1. Content and validity of the Foreign Law: by a public document issued by the Embassy in Madrid or the Spanish Embassy in the foreign country.
2. Application of the Foreign Law to the specific case: two different expert reports (foreign lawyers) explaining to the Spanish Judge how the Foreign Law would be applied to this case by the foreign Court.

There is the risk that, if the Judge considers that the Foreign Law was not sufficiently proved, Spanish law will be directly applied.

3. SPOUSAL PROPERTY RIGHTS UPON LEGAL SEPARATION OR DIVORCE

There are two types of different “financial orders on divorce” in most Continental Europe countries:

- Maintenance obligations, and
- Liquidation of the matrimonial property regime

The aim of maintenance orders is to redistribute the family incomes in order to minimise the effects of the divorce mainly upon the children’s costs and expenses and, secondarily, upon the spouses. The spouse with the larger income must pay more child maintenance and, eventually, maintenance to the other spouse. Maintenance obligations between spouses are not commonplace in Spain.

Capital orders are made regarding the rules of the liquidation of the matrimonial property regimes of the Spanish Civil Code. The assets and liabilities of the marriage will be split between the spouses following these articles in quite an impartial manner.

Maintenance obligations and the use of the family home are taken into account in the divorce proceedings and the evaluation by the Court then it is similar to the equity that the UK /US Judge considers to split the finance matters after a divorce in the United Kingdom / United States of America

The liquidation of the matrimonial property regime happens because of the divorce or because of death of one spouse.

It will be difficult to apply the Spanish matrimonial regime before the UK/ US Courts in case of agreement, because usually both parties signed the Deed together before the Spanish public notary without receiving independent legal advice separately. The Spanish Deed will not pass the “contract test”.

The matrimonial property regime will finish “*ope legis*” at the Divorce Decree date (or the death of one spouse). The parties must issue the specific liquidation of matrimonial property regime proceeding to distribute the assets and liabilities between them. They can also have an out-of-court agreement and liquidate the matrimonial property regime in a notary public Deed.

Spain comprises several territorial units, some of which have **their own rules of law in respect of family and succession**. The common point is that in all of them you can choose your matrimonial property regime in a notary public Deed. But, in the absence of agreement, a matrimonial property regime will apply by default:

- Civil Code: Joint ownership of assets (*Régimen de gananciales*).
- Catalonia, Aragón, and the Balearic Islands: Separate ownership of assets.

- Galicia: Joint ownership of assets.
- Basque Country (differences between the counties): Joint ownership of assets/Universal community of assets.
- Navarra: Matrimonial company of conquests “*Sociedad conyugal de conquistas*”.
- Parts of Extremadura: Community of assets “*Fuero del Baylio*”.

There are three matrimonial property regimes recognised in the Spanish Civil Code: Joint ownership of assets; Separation of assets; and Participation in acquisitions.

Joint ownership of assets: the acquisitions obtained by each of the spouses during the marriage are common and are divided equally when the matrimonial property is liquidated. The assets that each spouse brought into the marriage and those inherited or acquired gratuitously afterwards are considered personal property of each spouse.

Separation of assets: each spouse retains what he/she brought into the marriage and becomes sole owner of the property acquired during the marriage. Where it cannot be established to whom the property belongs, there is a presumption of a half share for each spouse.

Participation of acquisitions: each of the spouses retains what he/she brought into the marriage and becomes the sole owner of property he/she acquired during the marriage. At the end of the marriage, the acquisitions made will be calculated and each spouse is entitled to a share of the acquisitions made by the other spouse during the marriage. This regime is rather unusual in Spain.

There are other matrimonial property regimes recognised under the family law of some autonomous communities, as explained before.

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