

COUNCIL REGULATION (EU) 2016/1104 OF 24 JUNE 2016

Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of judgments in matters of property consequences of registered partnerships

INTRODUCTION

International couples now represent several million people in the European judicial area. The lives of these couples are marked by all the legal events that a national couple might go through and their particular situation must not generate additional legal insecurity. In order to prevent such uncertainty, the European institutions have adopted several legislative instruments, dealing in particular with questions of applicable law, jurisdiction, recognition and enforcement of judgments. This is particularly true of texts relating to maintenance obligations, succession and matrimonial property regimes.

Regulation 2016/1104 follows on from these texts in order to continue the work of unifying private international family law in Europe and to take into account the subject of civil partnerships.

It is in this context that difficulties linked to the debate on same-sex unions have led some States to set aside the application of the Regulation.

Thus, the term "Member State" should be understood to mean those States that have agreed to be bound by Regulation 2016/1104 in the following developments.

Although the spirit of this regulation is innovative in certain respects, it is conservative in its structure and successively takes up the items of the succession regulation and is very close in its structure to Regulation 2016/1103 on matrimonial property regimes. It thus deals successively with questions of jurisdiction, applicable law and the recognition and enforcement of decisions.

THE RULES OF JURISDICTION

As an introductory remark, and in terms of the scope to be retained, it should be recalled that this European instrument applies to partners whose union has been entered into since 29 January 2019.

It applies equally to proceedings initiated since that date.

Finally, as regards application in time, the text shall apply to judgments given on or after that date if the court which gave the judgment had jurisdiction under the provisions of this Regulation.

This Regulation defines its scope by setting its perimeter both positively by explaining recurring terms and negatively by excluding certain areas.

Indeed, it applies to the property effects of persons bound by a registered partnership, the terms of which are defined in Article 3, classically excluding tax, customs and administrative matters. Moreover, questions of personal capacity or maintenance obligations and inheritance, for example, are excluded since they are dealt with by other instruments.

Moreover, it goes without saying that Regulation 2016/1104, like Regulation 2016/1103, only applies when there is a foreign element. On reading the text, this foreign element may be past, present or future. The question may be delicate if the nationality of the partners is not in the State where their assets are located, or if the habitual residence of the spouses is in a State other than the one where the partnership was registered.

Once the scope has been defined, the rules of jurisdiction can be set out. Like other European tools, these are strictly hierarchical and the court seised must proceed by way of elimination to determine whether it has jurisdiction.

The principle is the concentration of jurisdiction for obvious reasons of simplicity. Indeed, the court will have jurisdiction to decide on all issues. However, exceptions exist and jurisdiction will be limited to certain issues or property.

The competence of the succession judge: if a judge has to rule on the succession of one of the partners then he will be competent to rule on questions relating to the property effects of the partnership. The same solution is applied to the matrimonial regime of married spouses.

The competence of the judge for the dissolution or annulment of the partnership: here again, concentration is required but this is conditional on the will of the partners

As before, the question of the annulment or dissolution of the partnership must already be effectively before a court and there must be a connection between such dissolution or annulment and the question of the property effects of the partnership.

Apart from these two cases, the Regulation provides for hierarchical and subsidiary rules of jurisdiction, since they apply in the absence of jurisdiction based on the previous criterion. One finds successively criteria on habitual residence, then nationality and the State in which the partnership was registered.

Article 7 of the Regulation leaves room for the will of the partners through the mechanism of choice of court, except in the aforementioned cases of prior referral to the judge of succession or of annulment or dissolution. Moreover, the choice of court is framed in terms of the jurisdiction that may be chosen by the partners and the formalism surrounding this choice.

The alternative will be between the jurisdiction of the State under the law of which the partnership was created on the one hand, and on the other hand the jurisdiction of the State whose law is applicable in accordance with the choice of law available to the partners under Article 22, which we shall discuss below.

Finally, other jurisdictional rules can be mentioned.

The first is the voluntary appearance of one of the partners, provided that this appearance is not solely related to the challenge to jurisdiction.

The substitution competence provided for in Article 9 is also worth noting since it may be of particular importance in this particular case of partnership. Indeed, some of the States bound by this Regulation do not recognise same-sex partnerships. The courts of these States should therefore be excluded in the event of a dispute.

In any event, a court lacking jurisdiction will have to declare it *ex officio*.

THE APPLICABLE LAW

Here again, there is room for the will of the partners since they can choose the applicable law and they can also decide to change it. This choice is nevertheless subject to restrictions.

Article 22 contains the criteria of habitual residence, nationality and the place where the partnership was registered.

The choice of law can be made at any time but has no retroactive effect.

The formalism is dictated by the regulation, but to this can be added specificities of each State.

If the partners have not made a choice of law, the Regulation provides that only the law of the State of registration of the partnership will apply.

It should be noted that the Partnership Regulation is very different from the Matrimonial Property Regulation.

Exceptionally, under the terms of the Regulation and at the request of one of the partners, the competent court may decide that another law will be applicable, and under certain conditions that the requesting partner will have to meet cumulatively.

The applicable law will cover a non-exhaustive list of subjects set out in the Regulation.

As regards third parties (Article 28), this law will be effective if they have been aware of it or should have been aware of it by taking due care. The Regulation goes on to specify the cases in which third parties are deemed to have knowledge of the applicable law. These are cases in which the law is that of the State in which an agreement exists between the third party and one of the partners, that of the State in which they have their habitual residence, or that of the State in which the immovable property at issue is situated.

In addition, and classically, the notion of public policy and public order is addressed, allowing the court to set aside, if necessary, a provision that would contravene it.

RECOGNITION AND ENFORCEABILITY

The Member States bound by this Regulation recognise and accept it.

Nevertheless, the authority that will be required to enforce its decision will have to ensure that the decision is enforced in a State bound by the Regulation. Otherwise, any bilateral conventions between the State of origin and the State of enforcement will apply.

Recognition is in principle implicit, but there are cases of non-recognition. These are cases of irreconcilability with another decision and with public policy. A decision rendered by default is also a ground for non-recognition if the writ of summons or the document instituting the proceedings was not delivered in time for the defendant to defend himself.

It should be noted that the Regulation expressly provides that the review of the court's jurisdiction cannot constitute a ground for non-recognition, since this review of jurisdiction is carried out by the court seised.

The registry of the court of origin will be asked by the requesting party to issue the form certifying the enforceability of the decision. The decision, translated into the language of the State of enforcement, together with this certificate, will be deposited with the registry of the court of the State of enforcement so that the latter can establish its enforceability.

If the decision is a notarial deed, then the certificate is issued by the notary and the application for a declaration of enforceability is filed with the Chamber of Notaries

<https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32018R1990>

CONCLUSION

Regulation 2016/1104 is a further step forward in the standardisation of private international family law rules and reflects the evolution of attitudes and law. However, it is regrettable that this instrument is not binding on all EU Member States, which may lead to future conflicts of law. (Bound and non-bound states with or without a bilateral convention).

It should be noted, however, that this regulation will only apply in the absence of an agreement between the partners.