

CONTENTS

<i>Foreword</i>	vii
<i>Preface</i>	xi
<i>Acknowledgments</i>	xix
<i>List of Cases</i>	xxvii

Introduction: Uncertainty and Inconsistency Surrounding the Determination of the Applicable Law in the EU Instruments on Matrimonial Issues	1
1. Legal Pluralism and its Adverse Effects on Married Couples.....	2
2. Conflict of Laws System as a Mechanism to Tackle Legal Pluralism.....	7
3. Harmonization of Conflict of Laws Rules to Overcome Problems from Competing Systems.....	8
4. Legal Uncertainty and Inconsistency in the EU Instruments on Private International Law.....	11
4.1. Drawbacks of the Legal Provisions on Conflicts in Absence of a Choice of Law Agreement.....	12
4.1.1. The Conflict Rule for Maintenance Obligations.....	12
4.1.2. The Conflict Rule for Divorce and Legal Separation	16
4.1.3. The Conflict Rule for Matrimonial Property.....	19
4.1.4. Practical Problems Arising from the Application of the Legal Provisions to a Single Case.....	22
4.2. Drawbacks of the Legal Provisions on Choice of Law Agreements	23
4.2.1. Mismatch and Lack of Congruency	25
4.2.1.1. Agreements on the Law Governing Maintenance Obligations	25
4.2.1.2. Agreements on the Law Governing the Divorce or Legal Separation.....	30
4.2.1.3. Agreements on the Law Governing the Matrimonial Property Regime.....	32
4.2.1.4. Practical Problems Arising from the Application of the Legal Provisions to a Single Case	33
4.2.2. Limited Range of Eligible Options	35
5. Concluding Remarks	39

**PART I. ECONOMICS AS A POINT OF DEPARTURE TO EXPLAIN
THE SUBSTANTIVE RULES ON MATRIMONIAL ISSUES**

Chapter 1. Marriage as a Contract and its Economic Function for the Spouses	43
1. The Economic Function of Contracts	46
1.1. Private Law from an Economic Perspective	47
1.2. Contracts and Contract Law from an Economic Perspective	49
2. The Economic Function of Marriage	52
2.1. Characterization of Marriage as a Contract in an Economic Sense	53
2.2. Subject Matter of Marriage from an Economic Perspective	56
2.3. Marriage as an Economic Means	57
2.4. Investments Made by Spouses in the Household	59
2.5. Society's Partial Assumption of Procedural Costs to Achieve Proper Administration of Justice	60
3. Concluding Remarks	61
Chapter 2. Explaining Enforcement of Promises in Substantive Marriage Law from an Economic Perspective	63
1. Economic Rationale Behind the Determination of Enforceable Promises	63
1.1. Specialization in the Administration of Justice as a Cost Factor	64
1.2. Ambiguity of Specific Terms as a Cost Factor	66
1.3. Extralegal Mechanisms at the Spouses' Disposal as a Cost Factor	68
1.3.1. Endogenous Extralegal Mechanisms	68
1.3.2. Exogenous Extralegal Mechanisms	70
1.4. Legal Enforcement of Promises between Spouses	71
2. Economic Rationale Behind Remedies in Marriage Law	74
2.1. Waiting Periods in Contested Divorces	74
2.2. Maintenance Obligations after the Dissolution of Marriage	76
3. Concluding Remarks	80
Chapter 3. Explaining Mandatory and Default Rules in Substantive Marriage Law from an Economic Perspective	83
1. Rules of Obligatory Compliance for the Spouses	83
1.1. Externalities as Limits on the Spouses' Freedom of Choice	84
1.1.1. Role of Other Mechanisms to Mitigate Externalities	87
1.1.2. Risk as Justification for Mandatory Rules	88

1.2. Asymmetric Information as a Limit on Spouses' Freedom of Choice	89
1.2.1. Failures Caused by Asymmetric Information	90
1.2.2. Asymmetric Information in Marriage	91
1.3. Decision-Making Constraints as a Reason for Limits on Spouses' Freedom of Choice	94
1.3.1. Age and Disorders Affecting a Person's Judgement	94
1.3.2. Dire Circumstances Provoked by One of the Parties	95
1.4. Monopolistic Position as a Limit on Spouses' Freedom of Choice	97
1.4.1. Dire Constraints not Provoked by One of the Parties	97
1.4.2. Non-Enforceability of Agreements Preventing a Spouse from Requesting a Divorce	98
2. Rules Governing the Relationship in Absence of Agreement between Spouses	100
2.1. Default Rules in Contract Law	101
2.2. Default Rules in Marriage Law	102
2.2.1. Majoritarian will of the Parties as the Default Rule	102
2.2.2. Silence as a Default Rule	103
2.3. The Cheapest-Cost-Avoider Principle	104
2.3.1. Efficiency of Default Rules Following the Cheapest-Cost-Avoider	104
2.3.2. Cheapest-Cost-Avoider in Disputes between Contractual Parties	106
2.3.3. Cheapest-Cost-Avoider in Disputes between Spouses	107
2.4. The Parsimony Principle	109
3. Interim Findings	111

Chapter 4. Substantive Marriage Law from a Law and Economics Perspective

1. Economics of Marriage Law	114
2. Legal Pluralism and Marriage in an International Context	117

PART II. ECONOMICS AS A POINT OF DEPARTURE TO BUILD A SYSTEM OF CONFLICT OF LAWS FOR MATRIMONIAL ISSUES

Chapter 5. Legal Pluralism and its Costs for Married Couples

1. Economic Analysis of Legal Pluralism	123
1.1. Constitutional Uncertainty	124
1.1.1. Law as an Incentive for Cooperation	124

1.1.2.	Costs Arising from Overlapping Legal Systems at an International Level.	125
1.2.	Transaction Dilemma	127
1.2.1.	Zero-Sum Games	127
1.2.2.	Requirements to Create a Favorable Climate for Cooperative Exchanges	129
1.2.3.	Supranational Rules on Private Law to Discourage Zero-Sum Games	130
2.	Formal Features of the Conflict of Laws System Encouraging Spouses' Cooperation.	131
2.1.	Accuracy	132
2.2.	Uniformity.	134
2.3.	Consistency.	136
2.4.	Simplicity.	138
3.	The Role of Legal Certainty in the Marital Relationship.	140
4.	Concluding Remarks	142
 Chapter 6. Regulatory Competition and the Law Market for Matrimonial Issues		 145
1.	Theoretical Framework of the Law Market.	147
1.1.	Regulatory Competition and Conflict of Law Rules	148
1.2.	Expected Dynamic in the Law Market	149
1.3.	Current Situation	151
2.	Conditions for the Functioning of the Law Market.	152
2.1.	Responsiveness on the Demand Side	152
2.2.	Responsiveness on the Supply Side	155
2.2.1.	Benefits of Allowing the Use of Foreign Law	155
2.2.1.1.	Improving the Situation of Nationals in Legal Proceedings Conducted Abroad.	156
2.2.1.2.	Increased Competitiveness to Attract Investments and Workers	157
2.2.2.	Benefits from Reforms in Accordance with the Demand	158
2.2.2.1.	Profits for Certain Interest Groups	158
2.2.2.2.	Political Gains for Local Representatives	160
3.	Evidence Supporting the Plausibility of Law Market.	161
3.1.	Current Situation	162
3.1.1.	Evidence of a Response on the Demand Side	162
3.1.1.1.	Actual Use of the Choice of Law by People	163

3.1.1.2. Specific Features of the Law as Reasons to be Chosen	164
3.1.2. Evidence of a Response on the Supply Side	165
3.2. Historic Evidence Related to the Emergence of a Law Market for Matrimonial Issues	167
3.2.1. The Case of the Northeast	167
3.2.2. The Case of the American Frontier	169
3.3. Further Evidence	170
4. Law Market Failures	172
4.1. Regulatory Competition Across History	173
4.2. Risks Linked to the Market of Law	174
4.3. Normative Implications	175
5. Concluding Remarks	177
 Chapter 7. Advantages of Allowing Free Determination of the Applicable Law to Matrimonial Issues	 179
1. Legal Certainty	179
1.1. Choice of Ambiguous Rules by Spouses	180
1.2. Ambiguous Rules and Uncertainties in the Law Governing the Relationship	181
2. Greater Capacity to Influence One's Well-Being	182
2.1. Bounded Rationality as Justification to Restrict the Number of Options	182
2.2. Accuracy of Heuristics in Decision-Making: The Less-is-More Effect	184
2.3. Brand Names and Choice of Law	187
3. Safeguarding the Rights of Minorities	188
3.1. Benefits of Allowing Choice of Law from the Perspective of Minorities	190
3.2. Benefits of Allowing Choice of Law from the Perspective of the Majority	193
4. Experimentation and Innovation in Law-Making	194
4.1. Detecting the People's Preferences Easily	195
4.2. Discovering Unforeseeable Improvements: States as Research Centers	197
4.3. Reduction of Testing Costs	198
4.4. What about an Optional Substantive Marriage Law for Europe or Elsewhere?	200
5. Tendency Towards a Convergence	203
6. Incentives for the Formalization of the Relationship	205
7. Concluding Remarks	206

Chapter 8. Applicable Law in Absence of a Choice of Law Agreement	209
1. Economic Rationale Behind Default Legal Provisions	
in Conflict of Laws	210
1.1. Hypothetical Will of the Parties in Substantive Law	211
1.2. Hypothetical Will of the Parties in Private International Law	212
2. Access to Information as Starting Point to Design Conflict Rules	214
2.1. Costs of Internationality	214
2.2. Law of the Country of Residence as the “Own Law”	215
3. Determination of the Applicable Law When Partners Reside	
in the Same Jurisdiction	217
4. Determination of the Applicable Law When Partners Reside	
in Different Jurisdictions	218
4.1. Default Conflict Rule in International Contract Law	219
4.1.1. Creditor of the Characteristic Performance	
as Cheapest-Cost-Avoider	221
4.1.2. Further Advantages of Applying the Law	
of the Performer of the Characteristic Performance	223
4.1.3. Inclusion of a Different Conflict of Law Rule	
in Situations Involving Consumers	225
4.1.4. Promoter of the Transaction and Determination	
of the Applicable Law	226
4.1.5. Promoter of the Transaction as Residual	
Connecting Factor	228
4.2. Default Conflict Rule in International Marriage Law	229
4.2.1. Cohabitation as Characteristic Feature of Married	
Couples	230
4.2.2. Allocation of Costs between Spouses	232
4.2.3. First Place of Residence as the Prime Connecting	
Factor	235
4.2.4. Place of Celebration of the Marriage as Residual	
Connecting Factor	237
5. Concluding Remarks	242
 Conclusion: Certainty, Precision, Coherence, and Simplicity in the	
Determination of the Applicable Law	245
 Bibliography	249
Index	279