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# Cross-border divorce within the EU

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# Topics of the seminar

- Regulation No. 2201/2003 (Brussels IIa)
  - Jurisdiction
  - *Lis Pendens*
  - Recognition and enforcement
- Regulation No. 1259/2010 (Rome III)
  - Applicable law

# **REGULATION 2201/2003**

of 27 November 2003

It entered into force on

1 August 2004

It applies since 1 March 2005

(in Bulgaria and Romania since 1 January 2007;  
In Croatia since 1 January 2013)

# 1. Scope of application

A. With regard to **PIL aspects**, the Regulation provides rules on:

- jurisdiction
- recognition and enforcement
- cooperation between Central Authorities

B. As to the **material scope**

- matrimonial matters
- parental responsibility

# **1. Scope of application**

## **B. Case law on the material scope of application**

Court of Justice, 13-10-2016, case C-294/15,  
Mikołajczyk

- what about an **action for annulment of marriage** brought by a third party following the death of one of the spouses?

**It falls within the scope of BIIa Reg.**

# 1. Scope of application

## C. As to the **geographical** scope

- all EU MS
- Denmark opted out
- the UK and Ireland opted in
  - they gave notice of their wish to take part in the adoption and application of the Regulation immediately
  - BUT in the UK for how long?

# The BIIa Reg. does not apply

- to **purely internal situations**
- between different territorial units of **States with different legal systems** (such as the UK, at least for the time being), being this an internal aspect of civil procedure

## 2. Exclusions

### Art. 1(3) BIa

The Regulation does not apply to

- establishment/contesting of the parent-child relationship (domestic law)
- adoption
- name rights
- emancipation
- maintenance obligations (**Reg. 4/2009**)
- trusts
- successions (**Reg. 650/2012**)
- measures regarding criminal offences by children

## 2. Exclusions

With specific regard to **matrimonial matters**, the BIIa Reg. does not apply to

- 1) decisions that **deny the claim** for divorce, legal separation or marriage annulment (i.e. negative decisions) ONLY positive decisions, i.e. constitutive judgments (*favor divorii*)
- 2) **property consequences** of the marriage: **Reg. 2016/1103 of 24 June 2016** = enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes<sup>9</sup>

## 2. Exclusions

### 3) non-traditional partnerships

BUT no definition of marriage in the Reg.:  
autonomous interpretation or rather a  
formal concept of marriage defined by  
national private law?

= the Reg. applies to same-sex marriages only  
in those MS that recognize them (Italy only  
allows these as registered partnerships, as  
Germany; whereas Spain does recognise  
them)

## 2. Exclusions

4) fault-based claims in proceedings for legal separation or divorce

BUT Italian courts usually rule on the fault-based aspect of the separation/divorce claim (so-called “*addebito*”) without specifically assessing the relevant PIL aspects. As a result, it is not clear whether they apply the BIIa also with regard to the fault-based aspect of the claim

### 3. Definitions

#### Art. 2 BIIa

- “Court”
  - any authority having jurisdiction in the matters falling within the scope of the Reg.
    - including *social services* (in some MS the proceedings are carried out by administrative authorities, e.g. in Sweden)
- “Judge”
  - the judge or an official having equivalent powers
- “Judgment”
  - any judgment rendered by a Court of a MS, whatever the judgment may be called (including a decree, order or decision)

### 3. Definitions

#### Case law on definitions of “court” and “decision”

Court of Justice, 12-5-2016, case C-281/15, Sahyouni

##### Facts

- 2 Syrian nationals (who were also German by naturalisation) married in 1999 within the jurisdiction of the Islamic Court of Homs (Syria)
- they lived in Germany since 2003, then moved to Homs. Due to the civil war, they returned to Germany and from February 2012 lived alternately in Kuwait and Lebanon
- 20 May 2013: a religious sharia court in Syria declared the couple divorced

### 3. Definitions

Court of Justice, 12-5-2016, case C-281/15,  
*Sahyouni*

- 30 October 2013: the husband applied before German courts to have the divorce recognised
- 5 November 2013: Higher Regional Court of Munich granted the application
- 18 February 2014: the wife applied to have the decision set aside, but the application was dismissed (it was held that the recognition is governed by Rome III Reg., which also applied to private divorces)

### 3. Definitions

Court of Justice, 12-5-2016, case C-281/15, Sahyouni

Decision of the Court

- correct subject matter of the preliminary ruling: not Rome III, but BIIa Reg.
- in accordance with Art. 2, point 4, and Art. 21(1), the BIIa Reg. limits its **scope of application** to **recognition of decisions delivered by a court of a MS**
- given that the BIIa Reg. applies only between the MS, the recognition of a **divorce decision delivered in a third country** does **not fall within** the scope of EU law

## **4. Relations with other instruments**

### **Art. 59 BIa**

**General rule:** the Reg. **supersedes** conventions existing at the time of its entry into force which have been concluded between two or more MS

### **Art. 60 BIa**

It takes **precedence** over:

- 1961 Hague Convention (protection of minors)
- 1967 Luxembourg Convention (recognition of decisions relating to the matrimonial bond)
- 1970 Hague Convention (recognition of divorces and legal separation)
- 1980 Luxembourg Convention (custody of children)

## **4. Relations with other instruments**

### **1961 Hague Convention (protection of minors)**

- entered into force on 4 February 1969
- 14 Contracting States
- its regime is superseded by the 1996 Hague Convention

### **1967 Luxembourg Convention (recognition of decisions relating to the matrimonial bond)**

- Entered into force on 10 December 1977
- 3 Contracting States (Austria, Netherlands, Turkey)

## **4. Relations with other instruments**

### **1970 Hague Convention (recognition of divorces and legal separation)**

- Entered into force on 24 August 1975
- 20 Contracting States

### **1980 Luxembourg Convention (custody of children)**

- Entered into force on 1 September 1983
- 37 Contracting States (among which all EU MS)

# PIL issues

1. Jurisdiction
2. Recognition and enforcement of decisions

# 1. Jurisdiction in matrimonial matters

To determine the MS where the courts have the right to rule on the case

## Art. 3 BIa

- 7 **ALTERNATIVE grounds of jurisdiction** based on either the **habitual residence** (lett. a) or the **common nationality** of the parties (lett. b)
- reference to the same grounds of jurisdiction is made under Art. 4 (counterclaim) and Art. 5 (conversion of legal separation into divorce)

# **1. Jurisdiction in matrimonial matters**

## **Art. 3 BIIa**

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the MS

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of that MS

# 1. Jurisdiction in matrimonial matters

## Art. 3 BIa

- (b) of the nationality of both spouses or **domicile** in the forum State according to the domestic law **regarding the UK and Ireland**
- **domicile** is a peculiar legal notion that is used in common law systems
  - place where a person has **fixed his/her residence** with the **intention** of making it **permanent**
  - a person may hold different residences, but his/her **domicile** is **unique**

# **1. Jurisdiction in matrimonial matters**

**2 main connecting factors in matrimonial matters**

- a) habitual residence
- b) nationality

**Neither** one of them is defined by the Reg., but the CJEU has ruled on both notions for the purposes of their application in the BIIa system

# 1. Jurisdiction in matrimonial matters

## a) Habitual residence

- **autonomous interpretation under EU law:** well-established CJEU case law on the concept, BUT for other areas of law (many times as regards the habitual residence of children) -> analogy?
- Court of Justice, 15-9-1994, case C-452/93, Magdalena Fernandez, para. 22, regarding an expatriation allowance

*“the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account”*

**mainly objective factors + a subjective element**

# 1. Jurisdiction in matrimonial matters

## b) Nationality

Court of Justice, 7-7-1990, case C-469/90, Micheletti, para. 10, regarding the fundamental freedom of establishment

- “*under international law, it is **for each MS**, having due regard to Community law, to lay down the conditions for the **acquisition and loss of nationality**”*
- the court seised **applies its own law** to determine the alleged status of nationals of the parties
- nationality can ground the jurisdiction **only** when it is **common to both spouses**

# 1. Jurisdiction in matrimonial matters

## b) Nationality

**Dual nationality common to both spouses**

Court of justice, 16-7-2009, case C-168/08, Hadadi

- **no hierarchy** among the different grounds of jurisdiction under **Art. 3 BIa**: the parties can freely choose potentially among several courts having jurisdiction
- even if the plaintiff is linked to the court seised **only** on the basis of the **sole common nationality** of the couple, that is **enough to determine the jurisdiction** of such a judge (no other links are required with the forum)

# 1. Jurisdiction in matrimonial matters

## Forum shopping

Art. 3 + Art. 19 (*lis pendens*) + lack of uniform rules on applicable law

- favour towards the spouse who first brings an action before the court
- wide margin of discretion in choosing the court having jurisdiction on the case

# 1. Jurisdiction in matrimonial matters

## Art. 6 BIIa: exclusive nature of jurisdiction

- whenever the court of a MS has jurisdiction under Arts. 3-5, national rules on jurisdiction cannot be applied
  - at the time of **recognition**, jurisdiction cannot be reviewed by the requested judge (**Art. 24**)
  - the **court** of a MS that is **different from those indicated in Arts. 3-5** must declare **of its own motion (ex officio)** the **lack of jurisdiction** even in case the defendant does not raise any exception (**Art. 17**)

# **1. Jurisdiction in matrimonial matters**

## **Art. 7 BIIa: residual jurisdiction**

- where **no court** of a MS has jurisdiction pursuant to Arts. 3-5, jurisdiction shall be determined, **in each MS**, by the **laws of that State**
- residual jurisdiction is not connected to the lack of a personal prerequisite for the application of the BIIa Reg., but rather to the **lack of jurisdiction of any court of a MS**

# 1. Jurisdiction in matrimonial matters

## EU case law on Art. 6-7 BIa

Court of Justice, 29-11-2007, case C-68/07, Sundelind Lopez

### Facts

- Swedish wife and Cuban husband, living in France during their marriage; then the husband moved to Cuba
- the wife filed for divorce in Sweden: petition dismissed because under Art. 3 BIa only the French courts have jurisdiction and Art. 7 precludes Swedish rules from applying
- The wife appealed to the Supreme Court -> referral

# 1. Jurisdiction in matrimonial matters

## EU case law on Art. 6-7 BIa

Court of Justice, 29-11-2007, case C-68/07, Sundelind Lopez

Referral for preliminary ruling

- where, in divorce proceedings, a respondent is not habitually resident in a MS and is not a national of a MS, can the courts of a MS (i.e. the Swedish court) base their jurisdiction to hear the petition on their national law, even though the courts of another MS (i.e. the French courts) have jurisdiction under Art. 3 of BIa Reg.?

# 1. Jurisdiction in matrimonial matters

Court of Justice, 29-11-2007, case C-68/07,  
*Sundelind Lopez*, para. 26

- BIIa Reg. applies also to nationals of non-MS whose links with the territory of a MS are sufficiently close, in keeping with the grounds of jurisdiction laid down in that Reg.
- In such a situation, the courts of a MS cannot base their jurisdiction to hear the petition on their national law, if the courts of another MS have jurisdiction under Art. 3 BIIa

# 1. Jurisdiction in matrimonial matters

## Italian case law where the spouses were both third-country nationals

1. habitual residence of both spouses (Art. 3(1)(a), I indent):  
Tribunale di Trento, 28-4-2011 (2 Albanians); Tribunale di Padova, 4-8-2015 (2 Romanians); Tribunale di Roma, 9-8-2016 (2 Peruvians)
2. in the event of a joint application, habitual residence of one of the spouses (Art. 3(1)(a), IV indent): Tribunale di Belluno, 6-3-2009 (2 Indians); Belluno, 27-10-2016 (2 Albanians)
3. habitual residence of the applicant (Art. 3(1)(a), V indent):  
Tribunale di Belluno, 30-12-2011 (2 Moroccans); Roma, 27-1-2015 (2 Peruvians); Mantova, 19-1-2016 (2 Chineses)

# **1a. Common provisions on jurisdiction**

## **Art. 16 BIa: seising of a court**

**2 instances, depending on the domestic rules of civil procedure**

- a) at the time when the **document instituting the proceedings** or an equivalent document is **lodged** with the court, or
- b) if the document has to be **served before** being lodged with the court, at the time when it is **received by the authority responsible for service**

**In both cases, provided that the applicant has been “active”**  
(i.e. taking the steps to have service effected on the respondent or have the document lodged with the court)

# 1a. Common provisions on jurisdiction

## Art. 16 BIa: seising of a court

Interaction with another EU PIL instrument:

**Regulation No 1393/2007, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)**

- the **document to be transmitted** shall be accompanied by a **request** drawn up using a **standard form** (Annex I), to be completed in the official language of the Member State addressed
- **exemption** from legalisation or any equivalent formality
- the **applicant** shall bear any **costs of translation** prior to the transmission of the document

# 1a. Common provisions on jurisdiction

## EU case law on Art. 16 BIIa

Court of Justice, 22-6-2016, case C-173/16, M.H. v M.H.

- Determination of the time when a court is seised: autonomous definition in the EU system

*“the ‘time when the document instituting the proceedings or an equivalent document is lodged with the court’, within the meaning of Art. 16(1)(a) BIIa, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not in itself immediately initiate proceedings”*

# 1a. Common provisions on jurisdiction

## Art. 17 BIIa: examination as to jurisdiction

Where a court of a MS is seised of a case over which it has no jurisdiction under the BIIa Reg. and over which a court of another MS has jurisdiction by virtue of this Reg., it shall **declare of its own motion** that it has **no jurisdiction**

-> the rule: *iura novit curia*

# **1a. Common provisions on jurisdiction**

## **Art. 18 BIa: examination as to admissibility**

the court with jurisdiction shall go on with the proceedings only if it is demonstrate that the respondent received the document commencing the proceedings in sufficient time to arrange for his defence, or that all necessary steps have been taken to this end (possible interaction with Reg. 1393/2007 on service of documents)

# 1a. Common provisions on jurisdiction

## Art. 19(1) BIa: *lis pendens*

Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall **of its own motion stay** its proceedings until such time as the jurisdiction of the court first seised is established

-> **1<sup>st</sup> in time rule (chronological)**

-> only **intra-EU** cases

## 1a. Common provisions on jurisdiction

### Art. 19(1) BIa: *lis pendens*

It also covers a different situation, so-called **false *lis pendens***

- this happens in case of **concurrent separation and divorce disputes brought before courts of different MS** (the two proceedings do not possess, strictly speaking, the same cause of action, but only involve the same parties)
- this situation is **frequent between Italy and those countries that do not require a fixed period of legal separation before a judgment of divorce** (e.g. the UK, Romania)

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

### Facts

- French nationals, married in France in 1997 and habitually resident in the UK with their 3 children from 2000 to 2010
- in 2010 the husband left the family home
- 30-3-2011: the **husband** files for **legal separation** before the Tribunal of Nanterre (**France**)
- in France, the separation petition shall **lapse** after the expiry of a **30-month time-limit**

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

- 24-5-2011: the **wife** files for **divorce** in the **UK**
- 7-11-2011: the **High Court of Justice** (England and Wales), Family Division, **declines jurisdiction** on the basis of Art. 19 BIIa (*lis pendens* with France)
- 17-12-2012: the **husband** files for **divorce** in **France**, but the court held the petition as **inadmissible**, pending the separation proceedings

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

- 13-6-2014: the **wife** again files for **divorce** in the UK, attempting (unsuccessfully) to ensure that the petition would take effect on 17-6-2014 one minute past midnight
- **16-6-2014, at midnight:** **lapse** of the separation proceedings initiated in France
- **17-6-2014**
  - **8.20 local time:** the husband files for **divorce** in France
  - **7.20 local time: impossible** at this time to bring an action before a **UK court**

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

Referral for preliminary ruling from the High Court of Justice

- in a situation where the proceedings before the court first seised in the first MS (France) **expired after** the second court in the second MS (the UK) was seised, is the jurisdiction of the court first seised to be regarded as **not being established**?
- are these elements relevant?
  - the first set of proceedings (separation) expired very shortly before a third set of proceedings (divorce) was brought before a court of the first MS (France)
  - lack of diligence of the applicant
  - time difference between the MS (France/UK)

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

Decision of the Court

- at midnight on 17-6-2014, since the proceedings before the French court first seised had **lapsed**, **only** the UK **court** (seised on 13-6-2014) **remained seised** of a dispute falling within one of the areas referred to in Art. 19(1) BIa
- the commencement on 17-6-2014 of divorce proceedings before a French court was subsequent to the commencement of the proceedings brought before that UK court

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

Decision of the Court

- ***lis pendens* no longer exists** as from the date the **first set of proceedings had lapsed** (at midnight of 17-6-2014), and the **jurisdiction of the French court must, therefore, be regarded as not being established**
- the **conduct of the applicant** in the first proceedings, notably any lack of diligence on his part, is **not relevant**
- the **time difference is not in any event capable of frustrating the application of the rules of *lis pendens* in Art. 19**

# 1a. Common provisions on jurisdiction

## EU case law on *lis pendens*

Court of Justice, 6-10-2015, case C-489/14, A v B

Para. 33

- “in matrimonial matters applications brought before the courts of different MS are not required to have the same cause of action”
- “while the proceedings must involve the same parties, they may have a different cause of action, provided that they concern judicial separation, divorce or marriage annulment”

Para. 34

- “in order for the jurisdiction of the court first seised to be established within the meaning of Art. 19(1) BIa, it is **sufficient** that the court first seised has **not declined jurisdiction** of its own motion and that **none of the parties** has **contested** that jurisdiction before or up to the time at which a position is adopted which is regarded in national law as being the first defence on the substance submitted before that court”

# 1a. Common provisions on jurisdiction

## Italian case law on *lis pendens*

Corte di cassazione, order of 20-6-2017, no. 15183

### Facts

- proceedings on legal separation (and child custody) initiated firstly in Italy and then in Romania
- the Romanian court did not consider the *lis pendens* situation and ruled on the mother's application (final decision)
- the Italian court held the husband's application inadmissible on the grounds of *res judicata*
- appeal before the Italian Supreme Court

# 1a. Common provisions on jurisdiction

## Italian case law on *lis pendens*

Corte di cassazione, order of 20-6-2017, no. 15183

Request for preliminary ruling to the CJEU

- in a case where the *lis pendens* situation has not been started, may the requested court first seised refuse the recognition of the foreign decision on the basis of the procedural public policy (Art. 24 BIIa Reg.)?

(PLS NOTE: Art. 24 of BIIa only recalls Arts. 3 to 14 regarding the prohibition of review of jurisdiction of the court of origin, not Art. 19 on *lis pendens*)

## 1a. Common provisions on jurisdiction

Open issue regarding a *lis pendens* situation with **third States**: which set of rules is applicable?

- could the application of the **grounds of jurisdiction** provided for in the **BIIa Reg.** be **mandatory**? (i.e. the MS court should not decline its jurisdiction whenever it had jurisdiction on the matter pursuant to the relevant rules of said legal instrument)
- **residual application of domestic PIL rules** on *lis pendens*?
- application of **Art. 19 BIIa** also in relation to third-country proceedings?

(an answer could be provided in a pending proceedings before the Italian Supreme Court - case regarding Italy and Switzerland)

## 2. Recognition

### Art. 21 BIIa

- A judgment given in a MS shall be recognised in the other MS **without any special procedure being required**  
(foreign judgments are recognised automatically **until** it has been decided that they cannot be recognised)
- The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a **certificate** using the standard form set out in Annex I of BIIa Reg. (judgments in matrimonial matters), which will need to be **produced for the update of the civil-status record**

## 2. Recognition

### Exclusions

#### 1) religious termination of marriages

unless the decision has been issued by religious authorities regulated under specific **Treaties** between the **Holy See** and Portugal, Italy, Spain and Malta, respectively (**Art. 63 BIIa**) -> in these cases, BIIa Reg. applies only insofar as the religious authority has been vested with jurisdiction by a state action and the religious decision is valid under state law

#### 2) decisions that deny the claim for divorce, legal separation or marriage annulment (i.e. **negative decisions**)

#### 3) decisions that rule on the **termination of registered partnerships**

# What about private termination of marriages (i.e. private divorces)?

## Family ADR in Italy

Art. 6 Decree law  
132/2014:

***“negoziazione assistita”***

i.e. a **negotiation** process between the spouses with the **assistance of a counsel** for each one of them

-> the **public prosecutor** verifies the requirements

Art. 12 Decree law  
132/2014:

**Agreements on personal status** reached between the parties **before the civil registrar**

-> the civil registrar guarantees a “public interference” in the proceedings

**Art. 46 BIa should apply to both** these legal tools  
(the provision has a broad scope of application)

## 2. Recognition

### Open issues

- **Art. 46 BIa:** documents which have been formally drawn up or registered as **authentic instruments** and are enforceable in one MS and also **agreements between the parties** that are enforceable in the MS in which they were concluded are **recognisable and enforceable under the same conditions as judgments**  
-> **authenticity** of the document: requires an **involvement of a public authority** or other authority by the state of origin

## 2. Recognition

### Open issues

- doubts may arise on whether the **rights of defence** are undermined in those cases where the **intention** of the parties is **not subject to any control** by the authority drawing up or registering the document/agreement
- MS set out certain **procedural and substantial requirements** for these kind of agreements in order to prevent this risk

## 2. Recognition

### Art. 21(3) BIIa: decisions on recognition

- any interested party may **apply** for a decision that the judgment be or not be recognised
  - grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment (Art. 22 BIIa)
  - procedure set forth in Arts. 28-36 BIIa (= declaration of enforceability)
  - possibility of appeal against the declaration of recognition or non-recognition (Arts. 33-35 BIIa)

## 2. Recognition

### Art. 21(3) Bill: decisions on recognition

- broad notion of **legal standing** (*locus standi*)
  - spouse who applies for a decision that the judgment be recognised
  - spouse who applies for a decision that the judgment not be recognised
  - public prosecutor or other public authorities

## 2. Recognition

### Art. 22 BIa: grounds of non-recognition

- a) if such recognition is **manifestly contrary to the public policy of the MS** in which recognition is sought
- a decision that declares the **divorce without a previous period of legal separation** between the spouses is **not manifestly contrary to public policy** (Corte di cassazione, 25-7-2006, no. 16978)  
-> this regards in particular Italy and those MS that require a prior period of legal separation before the divorce

## 2. Recognition

### Art. 22 BIa: grounds of non-recognition

#### Open issues

- **Narrow concept of public policy (*effet atténué*)**  
e.g. cases of **polygamous marriages**, where the second wife applies before a MS court claiming spousal maintenance. Here the judge is not called to apply a foreign (Islamic) law incompatible with his own legal system (for example by declaring a repudiation), but to recognise the foreign decision in order to protect the rights of the former wife against the man that in their own legal system was lawfully considered her husband

## 2. Recognition

### Art. 22 BIIa: grounds of non-recognition

b) where it was given in **default of appearance**, if the respondent was **not served** with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally

## **2. Recognition**

### **Art. 22 BIa: grounds of non-recognition**

- c) if it is **irreconcilable with a judgment given in proceedings between the same parties in the MS in which recognition is sought**
- d) if it is **irreconcilable with an earlier judgment given in another MS or in a non-MS between the same parties**, provided that the earlier judgment fulfils the conditions necessary for its recognition in the MS in which recognition is sought

## 2. Recognition

### Art. 24 BIa: prohibition of review of jurisdiction of the court of origin

- No review of the jurisdiction of the court of the MS of origin

In this regard, see the recent request for preliminary ruling of the Italian Supreme Court (Corte di cassazione, order of 20-6-2017, no. 15183)

May the jurisdiction of the court of origin be reviewed in a case where the *lis pendens* situation has not been ascertained?

## 2. Recognition

### Art. 25 BIa: differences in applicable law

- No refusal of recognition because the law of the requested MS does not allow divorce, legal separation or marriage annulment on the same facts

## 2. Recognition

### Art. 26 BIa: non-review as to substance

- No review of the substance of the judgment
- **only the court of the MS that issued the decision has jurisdiction** as to its substance

**BUT** where the decision to be recognised does **not sufficiently state** on a certain issue, it is possible for the **court of the place of the parties' habitual residence** to issue a **further decision** “complementing” the first one (i.g. the decision of a Romanian Court on legal status-divorce-without any dec. on maintenance could be “integrated” by a dec. of another MS on this regard)

## 2. Enforcement

### Procedure for a declaration of enforceability (Arts. 28-36 BIa)

- the **competent court** is determined by each MS (see the [list](#) of competent authorities notified to the Commission)
- **local jurisdiction**: place of habitual residence of the person against whom enforcement is sought
- **procedural law** of the MS of enforcement
- the decision may be **appealed** by each party involved

## **2. Enforcement**

### **Procedure for a declaration of enforceability (Arts. 28-36 BIIa)**

- **documents** to be produced by the party seeking or contesting recognition or applying for a declaration of enforceability
  - a) **copy of the judgment**
  - b) **certificate referred to in Art. 39** (issued by the court of the MS of origin upon request of any interested party)

# **REGULATION 1259/2010**

## of 20 December 2010

It entered into force on  
30 December 2010

It applies since 21 June 2012

# 1. Scope of application

## Objectives

- enhancing the **adjustability** of the EU PIL system by introducing a (limited) party autonomy
- promoting **legal certainty and predictability**
- **preventing** “rush to court” and “forum shopping” strategies of the spouses against one another -> if the applicable law is determined through the same instrument in all MS, these strategies become indeed pointless

BUT this objective is only partially fulfilled, among those MS that participate in the enhanced cooperation

## 1. Scope of application

- It applies **only** to divorce and legal separation, not to marriage annulment
  - > as the guiding principle in the Reg. is the **party autonomy**, it was deemed inappropriate to entrust the parties with the determination of the law applicable to a fundamental issue such as the validity of the marriage
- **no definition of marriage** provided in Rome III Reg. -> competence of MS

## 1. Scope of application

- Does it apply to the dissolution of registered partnerships?

It depends on national laws

In **Italy**, Art. 32 *quater*, para. 2, 218/1995 law, implementing the new law on registered partnerships, **expands** the scope of application of the **applicable law determined through Rome III Reg.** to the dissolution of registered partnerships

# 1. Scope of application

- Uniform conflict-of-laws rules
- Art. 4: universal application

it should be possible for its uniform conflict-of-laws rules to designate the law of a participating MS, the law of a non-participating MS or the law of a State which is not a member of the EU

- No harmonization of national laws in matrimonial matters
- It applies irrespective of the nature of the court or tribunal seised

## **2. Exclusions**

### **Art. 1(2) of Rome III**

- a) legal capacity of natural persons;
- b) existence, validity or recognition of a marriage;
- c) annulment of a marriage;
- d) name of the spouses;
- e) property consequences of the marriage (**Reg. 2016/1103**);
- f) parental responsibility (**1996 Hague Conv.**);
- g) maintenance obligations (**Reg. 4/2009**);
- h) trusts or successions (**Reg. 650/2012**)

### 3. Relations with BIIa Regulation

- **Whereas 10:** substantive scope and enacting terms of Rome III Reg. should be **consistent** with BIIa Reg.  
YET Rome III does **not apply to marriage annulment**, only to divorce and legal separation
- **Whereas 13:** where applicable, a **court** should be **deemed to be seised** in accordance with BIIa Reg.

# 1. Choice of law

## Basic principle: informed choice (whereas 18)

- each spouse should **know exactly** what are the **legal and social implications** of the choice of applicable law
- without prejudice to the rights of, and equal opportunities for, the two spouses
- judges in the participating MS should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded
  - > it must be ensured that the parties are aware of the implications of the chosen applicable law

# 1. Choice of law

## Art. 5(1) Rome III

Either one of the following laws

- a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
- b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
- c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
- d) the law of the forum (*forum* and *ius* coincide)

# 1. Choice of law

## Art. 5(1) Rome III

Set out **4 ALTERNATIVE criteria** to determine the applicable law

- no hierarchy
- the spouses may agree on the application of either of these criteria
- the connecting factors must exist at the time of the agreement is concluded

# 1. Choice of law

## Art. 5(2) Rome III

### Conclusion and modification of the agreement

- at any time, but **at the latest at the time the court is seised**
- yet **also during the proceedings**, if it allowed under the law of the forum

Italian judges sometimes ask the parties to reach an agreement during the proceedings

e.g. Tribunale di Milano, 11-12-2012

Tribunale di Milano, 10-2-2014

Tribunale di Belluno, 23-12-2014

# 1. Choice of law

## Art. 5(2) Rome III

### Conclusion and modification of the agreement

- the existence of an actual agreement is not required, it is also possible that **each party** requests the **application of the same law** in its **respective court documents**

see Tribunale di Belluno, 23-12-2014

= the wife had chosen Tunisian law as applicable to the divorce petition in the document instituting the proceedings, while the husband appeared before the court only during the investigative phase and agreed to the choice of law already made

# 1. Choice of law

## Art. 5(2) Rome III

### Conclusion and modification of the agreement

- What is the **deadline** for a **valid choice-of-law agreement** to be reached **during the proceedings**?

It depends on the **domestic rules of civil procedure of each MS**

e.g. **in Italy**: it is commonly accepted that the choice of law can be made until the time by which the parties are allowed under the Civil Procedural Code to specify and amend points of law that constitute the cause of action of the respective applications (see Tribunale di Belluno, 23-12-2014)

# **1. Choice of law**

## **Art. 6 Rome III**

- **Existence and validity of the agreement**  
determined by the **law which would govern it under this Reg.** if the agreement or term were valid
- **Non-consent of one of the spouses**  
determined **also** by the **law of the country in which he has his habitual residence** at the time the court is seized

# 1. Choice of law

## Art. 7 Rome III

### Formal validity of the agreement

- **in writing, dated and signed by both spouses**
- equivalent to writing = any communication by **electronic means** which provides a durable record of the agreement (including e-mails; and what about text messages?)

e.g. Tribunale di Pordenone, 14-10-2014

the choice of law was agreed upon by e-mail between an Italian national and a US national

# 1. Choice of law

## Art. 7 Rome III

### Formal validity of the agreement

- date: the **date of the last signature** in case the spouses did not sign the agreement at the same time
- signature of the spouses: difficulties in case of communication by electronic means
- all the **additional requirements** under the law of the common habitual residence of the spouses at the time of the agreement

# 1. Choice of law

## Art. 7 Rome III

### Formal validity of the agreement

#### Extreme cases

- 1) Choice of law made in the **parties' court documents**

It is **not** an actual agreement (in the narrow sense), and furthermore it **lacks** the requirements envisaged in Art. 7

- 2) At a **hearing during the proceedings**

It is advisable to **have the parties sign the minutes** of the hearing

## 2. In the absence of an agreement

### Art. 8 Rome III

The applicable law shall be the law of the State

- a) where the spouses are habitually resident at the time the court is seised; or, failing that
- b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that
- c) of which both spouses are nationals at the time the court is seised; or, failing that
- d) where the court is seised

## 2. In the absence of an agreement

### Art. 8 Rome III

#### List of **SUCCESSIVE** connecting factors

- hierarchy
- the application of the first factor excludes the following ones, and so on until the residual criteria of the law of the forum
- otherwise, the effectiveness of the Reg. would have been undermined

### **3. General provisions on national laws**

#### **Art. 10 Rome III**

If the **applicable law** determined by Arts. 5-8

- makes **no provision for divorce**, or
- does **not grant one of the spouses equal access to divorce or legal separation** on grounds of their sex,

the **law of the forum** applies (avoid discrimination)

#### **Art. 11 Rome III**

**Exclusion of renvoi** (only substantial law, not rules on private international law), in order to preserve the effectiveness of the actual choice of law

### **3. General provisions on national laws**

#### **Art. 12 Rome III**

Refusal of the application of a law determined by the Reg. only if such application is **manifestly incompatible with the public policy of the forum**

#### **Art. 13 Rome III**

The court is **not obliged to pronounce a divorce** by virtue of the application of the Reg. where **its national law**

- does **not provide for divorce**, or
- does **not deem the marriage in question valid** for the purposes of divorce proceedings

### 3. General provisions on national laws

#### EU case law on Rome III

Request for a preliminary ruling from the Oberlandesgericht München (Germany) lodged on 6 July 2016, case C-372/16, Sahyouni

Regarding Art. 10

- 1) what if the **divorce** determined on the basis of Rome III Reg. is, on account of the **other spouse's sex, subject to procedural and substantive conditions** different from those applicable to access for the first spouse?

### **3. General provisions on national laws**

#### **EU case law on Rome III**

##### **Regarding Art. 10**

2) does the applicability of that rule depend on whether the application of the foreign law, which is discriminatory in the abstract, also discriminates in the particular case in question?

If the answer is affirmative, what if the spouse, discriminated against, consents to the divorce?