

# DIVORCE

## Jurisdiction, recognition and lis pendens

Mirela Župan, professor of private international law  
Faculty of Law, J.J. Strossmayer University of Osijek,  
Croatia



Co-funded by the Justice Programme 2014-2020 of the European Union

# Scope of application

TEMPORAL	GEOGRAPHICAL	MATERIAL
<p>-as of 1.3.2005</p> <p>-for Croatia as of 1.7.2013 (Art 64/I)</p>	<p>-all MS of the EU, except Denmark</p>	<ul style="list-style-type: none"> <li>- divorce</li> <li>- legal separation</li> <li>- marriage annulment</li> <li>- parental <u>responsibility</u></li> </ul> <p>Not applicable to:</p> <ul style="list-style-type: none"> <li>- Grounds for divorce, Fault of the parties to divorce</li> <li>- Property consequences</li> <li>- Maintenance obligations or other ancillary measures(i.e., name, family house...)</li> </ul>

# Scope of application

		<p>....Not applicable to: property consequences of the marriage, inheritance or any other ancillary measures</p> <p>.....Does not deal with religious effects (exception for relations between the Holy See and Portugal, Italy, Spain and Malta, Croatia?)</p>

## Type of decision?

- not confined to court judgments (art. 2/1,2/4)
- applies to any decision pronounced by an authority having jurisdiction in matters falling under the Regulation (e.g. social authorities)
- applies to “authentic instruments”
- applies to agreements between parties
- whatever the judgment may be called, including a decree, order or decision;”

## Type of tribunal?

- whatever the nature of the court or tribunal, . . . .”
- the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article I
  - civil notaries
  - administrative authorities
    - as far as they are acting in family matters covered by this Regulation.

# **FRAMEWORK FOR DIVORCE CASES**

# Grounds of jurisdiction

- seven alternative grounds for jurisdiction based on:
  - ✓ habitual residence of one or both the spouses (a), or
  - ✓ on both spouses' common nationality (b)
- “exclusive” nature of rules: whenever the court of a MS has jurisdiction under Articles 3-5, national rules on jurisdiction cannot be applied
- jurisdiction rules of regulation cannot be derogated
  - by the parties
  - by the court
    - court not confied with jurisdiction must declare of its own motion (ex officio) the lack of jurisdiction
    - regardles of the fact that defendant does not raise any exception (Art. I7)

# Conflicts of jurisdiction

## ✓ Positive conflict

- more than one MS has jurisdiction
- possible due to alternative jurisdiction criteria with no hierarchy
- coordination by *lis pendens rule*
- priority of the proceeding of the court first seised

## ✓ Negative conflict

- no MS has jurisdiction
- jurisdiction determined in each MS by *lex fori* – *residual jurisdiction*
- But: national jurisdiction rules may be applied only if no other MS has jurisdiction according to Art. 3 of the Regulation C-68/07, Sundelind-Lopez Lizazo

## grounds of jurisdiction – common nationality of spouses

- Nationality determines the jurisdiction only if it is common to both spouses
- The court seised applies its own law to determine the alleged status of nationals of the parties (Michelletti case)
- In case of multiple/double common nationality
  - both nationalities are relevant
  - no examination, which one is the „effective nationality”
  - spouses can choose among several courts with potential jurisdiction C-I68/08 Hadadi, 16 July 2009



# grounds of jurisdiction - habitual residence

*several alternatives*

## common habitual residence of the couple

- the habitual residence is not required to be in the same place
- it is sufficient the spouses live within the same State even if in different places

## last common habitual residence

- insofar as one of them still resides there

## habitual residence of respondent

- in application of the common principle «actor sequitur forum rei»

## habitual residence of either of the spouses

- in the event of a **joint application**, if *lex fori* admit it (the only case where the spouses can mutually choose the forum)



## habitual residence of the applicant

- only insofar as the applicant still resides in the last common habitual residence, or
- in case the applicant resided there for at least a year immediately before the application was made
- in case the applicant resided there for at least six months immediately before the application was made AND is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her “domicile” there

# ancillary grounds of jurisdiction

## counterclaim

- court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation

## conversion of legal separation into divorce

- without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides

# judge seised with application for divorce *analyse*:

- I. Do I have jurisdiction pursuant to Arts 3-5 BIIa?
  - ✓ YES: 2. Has another court been seised already with proceedings for divorce, separation or annulment between the same parties (Article I9(I))?
    - ✓ YES: of my own motion I shall stay the proceedings before me until the jurisdiction of the court first seised is established - 3. Is the jurisdiction of the court first seised established (Article I9(3))?
      - ✓ Yes: I decline jurisdiction
      - X No: I can continue to hear the case
  - X - 2. Has a court of another MS jurisdiction according to BIIa (Art. I7)?
    - ✓ Yes: of my own motion I shall declare that I do not have jurisdiction (Art. I7)
    - X No: 3. I can still have jurisdiction according to my national law (“residual jurisdiction”)

## Common rules on jurisdiction matrimonial matters / parental responsibility

- when a court is deemed to be seised (art. 16)
- examination as to jurisdiction (art. 17)
- examination as to admissibility (art. 18)
- **lis pendens** (art. 19)
- provisional including protective measures (art. 20)

# *LIS PENDENS* or what happens if matrimonial proceedings are brought in two Member States?

Article I9 (I) covers two situations:

- ✓ proceedings relating to the same subject-matter and cause of action are brought before courts of different MS, and
- ✓ proceedings which do not relate to the same cause of action, but which are actions connected to the same matrimonial ties but are brought before courts of different MS (ex: there's *lis pendes* if divorce is asked in MS A and separation in MS B)

- once a court has been seised pursuant to Art. 3 and declared itself competent, courts of other MS must dismiss any subsequent application
- when the jurisdiction of the first court seised is established, 2nd court shall decline jurisdiction in favour of the first

### CJEU on *lis pendens*

- ✓ C-296/10, Purrucker v Pérez, 9.11.2010.
- ✓ C-489/14, A v B., 6.9.2015.

# Recognition of divorce judgements

- Principle of mutual trust –free circulation of judgements
- grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment
  - recognition is manifestly contrary to the public policy of the MS in which recognition is sought;
  - 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;
  - irreconcilability with a judgment given in proceedings between the same parties in the MS in which recognition is sought; or earlier judgment given in another MS or in a non-MS if such judgement fulfils the conditions necessary for its recognition



## ✓ CJEU on recognition

- Can the interested party seek non-recognition of a judicial decision if application for recognition was not previously submitted? (C-195/08 PPU, *Rinau v Rinau*)
- Are provisions on recognition and enforcement applicable to enforcement of temporary measures? (C-256/09 *Purrucker v. Perez*)
- Can the court of recognitions question the conditions of issuing the document referred to in Annex of BIIbis?
- Can the court of jurisdiction oppose an enforcement of a judgements based on a faulse/non-existent jurisdiction which was marked by a MS of origin in a certificate (C-491/10 *Agiurre Zarraga v. Pelz*)