

Applicable law: introduction to Regulation Rome III

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- national divorce rules vary significantly

https://e-justice.europa.eu/content_divorce-45-lt.do?init=true

- rules on jurisdiction in divorce enable *forum shopping*
 - spouses do rush to a court to:
 - assure application of more favourable regime
 - block the other spouse in application before other member state court (*lis pendens*)
 - take advantage of applicable law – in many MS only lex fori applies
 - assure jurisdiction for property separation - in some systems jurisdiction would lean on divorce jurisdiction
- Huge proportion of international divorce justifies EU legislative action
 - 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

Purpose of Rome III

- respect for national divorce rules
 - not to harmonise substantive law
 - not to oblige participating MS to recognize a union contracted as a marriage for the purposes of pronouncing a divorce or a legal separation
 - not to oblige a MS whose law does not provide for divorce to pronounce a divorce by virtue of the application of this Regulation
 - not relevant any more as Malta introduced divorce into substantive law
 - balance amongs various formal union achieved by Article 13
 - „nothing in the Regulation obliges the courts of a participating member state whose law does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.”
- MS not recognizing same sex marriage are not obliged to divorce such even though they were validly contracted in some member states

Scope of application

TEMPORAL	GEOGRAPHICAL	MATERIAL
<p>-applies to legal proceedings instituted from 21 June 2012</p>	<p>-Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia, Greece</p> <p>Croatia?</p> <p>Poland?</p>	<p>- law applicable to divorce and legal separation</p> <hr/> <p>Not applicable to:</p> <ul style="list-style-type: none"> -Annulment -Preliminary issues as: capacity to marry or the existence, validity or recognition of a marriage <p>.....</p>

..... Scope of application

		<p>..... not applicable to:</p> <p>Ancillary matters as:</p> <ul style="list-style-type: none">- name of the spouses,- property consequences of the marriage,- parental responsibility,- maintenance obligations,- trusts or successions arising in connection to divorce or legal separation

APPLICABLE LAW RULES

limited choice of law

- Party autonomy gains primary position
- Area of choices - restricted to:
 - ✓ the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
 - ✓ 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
 - ✓ the law of the State of nationality of either spouse at the time the agreement is concluded; or
 - ✓ the law of the forum.

„habitual residence”

- analysis done to the objective circumstances + subjective elements
- «Europautonomous» interpretation
- CJEU case law on habitual residence relates other areas of law
 - ✓ But it can be applied in matrimonial matters
- C-452/93 Pedro Magdalena Fernandez, 15.9.1994
 - „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” (para. 22)

dual nationality

- dual nationality – solved by national law
- general EU principles
 - ✓ principle of non discrimination on the grounds of nationality
 - ✓ C-I48/02 - Carlos Garcia Avello v Belgian State

limited choice of law

- Time of designation restricted:
 - ✓ agreement designating the applicable law may be concluded and modified at any time, *but* at the latest at the time the court is seized
 - ✓ agreement may be concluded any time during the course of the proceeding *but only* if the law of the forum so provides and under the condition set out in that law

material validity of choice of law agreement

- Judged by the law which would govern it under the Regulation if the agreement or term were valid
- Relates to questions
 - existence and validity of an agreement on choice of law
 - existence and validity of any term thereof
- Exceptionally law of the country of habitual residence of a spouse at the time the court is seized is applied
 - If that spouse claims that he/she did not consent and it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law governing the agreement.
- But, judge must make sure that choice was informed!

formal validity of choice of law agreement

- agreement shall be expressed in writing, dated and signed by both spouses
 - any communication by electronic means is equivalent to writing if it provides a durable record of the agreement
- Additional requirements to such agreements must be fulfilled, prescribed by:
 - ✓ Law of the member state in which the spouses have their habitual residence at the time the agreement are also applicable
 - ✓ If no common habitual residence exist, agreement shall be formally valid if it satisfies the requirements of either of law of habitual residence of any of the spouse
 - ✓ If only one of the spouses is habitually resident in a participating member state at the time the agreement is concluded and that state lays down additional formal requirements for this type of agreement, those requirements shall apply

default rules

- if no choice is made or choice is not valid, law applicable is:
 - ✓ where the spouses are habitually resident at the time the court is seized; or, failing that
 - ✓ where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that
 - ✓ of which both spouses are nationals at the time the court is seized; or, failing that
 - ✓ where the court is seized.

GENERAL PIL QUESTIONS

universal nature: law designated applies regardless if it is the law of a participating member state or not

content of foreign law

- proof of the foreign law depends on national rules:
 - some member states - ex officio application
 - some member states – foreign law pleaded / proved by the parties
- supported by EJN, EJA

renvoi excluded

- reference is to the law of a State - other than its rules of private international law

public policy

- classic public policy clause
 - law designated by virtue of the Regulation may be refused only if such application is *manifestly incompatible* with the public policy of the forum
- positive public policy – rules of immediate application
 - law of the forum shall apply if the law applicable pursuant to 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
 - First preliminary ruling C-281/15 Soha Sahyouni v Raja Mamisch – no jurisdiction of CJEU
 - new application to a same case - C-372/16