



Tieslietu ministrija

Basic Structure of Rome III Regulation

Training course "Provisions and practical application of Rome III Regulation"
Riga – 29-30 November 2012

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Project No JUST/2010/JCIV/AG/0011-30-CE-0421092/00-75 „Developments in the field of cross-border family matters within EU: maintenance obligations and law applicable to divorce“

I. Rome III as a result of enhanced cooperation

Participating States: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ EU 2010 L 343/10

Enhanced cooperation based on

Art. 20 Treaty on the European Union

Art. 331 para. 1 Treaty on the Functioning of the European Union

II. Scope of Application

Limited scope of application

1. Divorce and legal separation, Art. 1

a) Divorce

Divorce terminates the marriage.

Preliminary question whether there has been a valid marriage.

To be answered by the law applicable to the entering of the marriage, which is to be determined by national conflict-of-laws rules.

Same-sex couples are included in the Regulation

b) Legal separation

Legal separation removes the obligation to cohabit with the other spouse without dissolving the marriage.

Exists in some jurisdictions (e.g. France, Italy, Poland).

c) Court proceedings, Art. 3 para. 2

“Court” covers all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of Rome
Therefore other authorities are covered.

Notaries (e.g. Latvia), civil registration offices (e.g. Portugal)

Other non-judicial divorces:

Agreement (e.g. Japan)

Unilateral repudiation? Talaq according to Muslim law

2. Conflict of laws, Art. 1 para. 1

Situations in which there are aspects of the case which take it outside the domestic social life of one country and which may involve several legal systems. Foreign or different places of habitual residence and/or foreign nationalities

3. Excluded matters, Art. 1 para. 2

- Legal capacity of natural persons
- Existence, validity or recognition of a marriage
- Name of the spouses
- Property consequences of the marriage
- Parental responsibility
- Maintenance obligations : Maintenance Regulation in conjunction with the Hague Protocol of 2007
- Trusts or successions

4. Date of application, Art. 21

Application from 21 June 2012

Regulation should apply whenever the last hearing of the case is on or after 21 June, even if the judgment is promulgated at a later date .

A contractual choice of law made before 21 June 2012 may become validated when Rome III comes into force (?).

5. Universal application, Art. 4

The application of the Rome III Regulation is universal, i.e. it is possible for its uniform conflict-of-laws rules to designate

- the law of a participating Member State (e.g. Austria, Lithuania),
- the law of a non-participating Member State (e.g. The Netherlands, United Kingdom),
- the law of a State which is not a member of the European Union (e.g. Ukraine).

Example: Latvian spouses may choose Ukrainian divorce law.

III. Jurisdiction and Relation with Brussels *Ibis*

Question which court is competent is not covered by Rome III.

The Rome III Regulation **does** not affect the application of the Brussels *Ibis* Regulation (Art. 2 Rome III).

IV. Choice by the parties

1. In General

Limited party autonomy

“Substantial connection” with the State in question required.

Art. 5 allows the parties to choose :

- 1) the law of the State where the spouses are habitually resident,
- 2) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there,
- 3) the law of State of nationality of either spouse or
- 4) law of the forum.

2. Which law(s) can be chosen?

a) Common habitual residence, Art. 5 lit. a

➤ Habitual residence

The spouses may choose the law of the State where they are habitually resident at the time the agreement is concluded.

➤ Definition of habitual residence

A person's habitual residence is the place where the person has established on a fixed basis the permanent or habitual centre of his interests, with all the relevant factors being taken into account.

Overall assessment of all the factual circumstances necessary.

The party's intention forms part of the overall assessment.

Habitual residence is more than mere temporary presence, but there is no period of time required.

➤ Critical cases

For professional or economic reasons a spouse goes abroad to live and work, perhaps for a long time, but maintains a close and stable connection with his State of origin.

In such a case, the spouse could, depending on the circumstances of the case, be considered to still have his habitual residence in his State of origin in which the centre of interests of his family and his social life are located (cf. Rec 24 Succession Reg.)

b) Last habitual residence, Art. 5 lit. b

The spouses may choose the law of the State where they were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded.

c) State of nationality of either spouse, Art. 5 lit.c

The spouses may also choose the law of the State of nationality of either spouse at the time the agreement is concluded.

Question of multiple nationality not clear.

Application of modified national conflict rules?

“Effective nationality” required?

Stateless persons: Application of the Convention relating to the Status of Stateless Persons of 1954: law of the "domicile" ?

Refugees in the sense of the Geneva Convention 1951:
Law of the "domicile" ?

d) Law of the forum, Art. 5 lit. d

Can the choice also be made before instituting the proceedings?

Designation of a specific country and or a specific legal order necessary?

2. Consent and material validity

Existence and validity of an agreement on choice of law:

Law which would govern the agreement under the Regulation if the agreement or term were valid, Art. 6 para. 1

Implied consent: veto by law of habitual residence, Art. 6 para. 2

3. Time of choice

Agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seised (Art. 5 para. 2).

Date of seising to be determined in the same way as under Art. 16 Brussels II*bis*.

If the law of the forum so provides, spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation **is to** be recorded in court in accordance with the law of the forum (Art. 5 para. 3).

Must be determined by national law:

For example, the German draft of the law to implement the Regulation allows such a choice.

4. Formal requirements

Expressed in **writing, dated and signed** by both spouses. Any communication by electronic means which provides a durable record of the agreement **will** be deemed equivalent to **a** writing (Art. 7 para. 1).

Additional formal requirements for this type of agreement - those requirements **will** apply (Art. 7 para. 2).

Spouses are habitually resident in **different participating Member States**: agreement **will** be formally valid if it satisfies the requirements of either of those laws, Art. 7 para. 3.

Only one of the spouses is habitually resident in a participating Member State: additional formal requirements **will** apply , Art. 7 para. 4.

V. Applicable law in the absence of choice

1. In general

Cascade of connecting factors. Divorce and legal separation are to be subject to the law of the State:

- 1) where the spouses are habitually resident;
- 2) 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;
- 3) of which both spouses are nationals;
- 4) where the court is seised (Art. 8).

2. Habitual residence, Art. 8 lit. a

Law of the State where the spouses are habitually resident.

3. Last habitual residence, Art. 8 lit. b

Law of the State where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seised, in so far as one of the spouses still resides in that State

4. State of nationality of either spouse, Art. 8 lit. c

Law of the State of which both spouses are nationals at the time the court is seised.

Multiple nationality: "effective nationality" required?

5. Law of the forum, Art. 8 lit. d

The law of the State where the court is seised applies if no other alternatives apply.

VI. Conversion of legal separation into divorce, Art. 9

The law applicable to divorce will be the law applied to the separation, unless the parties have agreed otherwise.

VII. Application of the law of the forum, Art. 10

Where the applicable law makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on account of their sex, the law of the forum is to apply.

VIII. General Provisions

1. Exclusion of renvoi, Art. 11

No renvoi permitted.

2. Public Policy, Art. 12

Application of foreign law may be refused if such application is manifestly incompatible with the public policy of the forum.

Circumstances of the individual case are decisive

3. Differences in national law, Art. 13

Member States not recognising a same-sex marriage are not required to issue a divorce for such a marriage.

4. States with two or more legal systems

a) Territorial conflicts of laws, Art. 14

- Law in force and habitual residence in the relevant territorial unit are decisive, e.g. England.
- Reference to nationality: territorial unit designated by the law of that State or closest connection.

b) Inter-personal conflicts of laws, Art. 15

- States with inter-personal conflicts of laws (e.g. religion): law designated by the law of that State (e.g. India) or closest connection

IX. Transitional provisions, Art. 18

- Regulation applies only to **legal proceedings** instituted and to **agreements on the choice of applicable law** concluded as **from 21 June 2012**.
- Effect is also to be given to an **agreement on the choice of applicable law** concluded **before 21 June 2012**, provided that it complies with Art. 6 (consent and material validity) and Art. 7 (formal requirements).
- The Rome III Regulation **is** without prejudice to agreements on the choice of applicable law concluded **in accordance with the law of a participating Member State** whose court is **seised** before 21 June 2012 .

X. Relationship with existing international conventions, Art. 19

Existing international conventions with third countries:

Rome III Regulation does not affect the application of international conventions to which one or more participating Member **State is** a party at the time when the Regulation is adopted and which lay down conflict-of-laws rules relating to divorce or separation.

Between participating Member States:

Rome III Regulation takes precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by the Regulation.