Training course "Provisions and practical application of the Rome III Regulation"
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Basic Structure of Rome III Regulation

I. Rome III as a result of enhanced cooperation

The Rome III Regulation on the law applicable to divorce and legal separation has led to a partial unification of international divorce law in the European Union[1]. Pursuant to its Art. 21 para. 2, the regulation applies from 21 June 2012 in the 15 Member States which are currently participating in the enhanced cooperation[2]. The Regulation is binding in Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. The technique of enhanced cooperation made it possible to by-pass the veto of other Member States.
EU countries that are not participating in this initiative will continue to apply their own national conflict-of-laws rules. Further Member States which wish to participate may do so in accordance with the second or third subparagraph of Art. 331 para. 1 of the Treaty on the Functioning of the European Union.
After the entry into force of the Rome III Regulation, the national Latvian conflict-of-laws rule in the Civil Code is no longer applicable.

II. Scope of Application

1. Divorce and legal separation

a) Divorce

The scope of application of the Regulation is limited. The Rome III Regulation applies only to divorce and legal separation (Art. 1 para. 1). A divorce terminates an existing marriage.
The Rome III Regulation speaks only of "spouses". This means that there is a preliminary question whether there has been a valid marriage. This has to be answered by the law applicable to the entering of the marriage, this being determined by national conflict of laws rules.
It is assumed that same-sex marriages are included in the scope of the Regulation[3] (see the reservation in Art. 13). Registered partners are excluded. The dissolution of registered partnerships does not fall within the scope of application.

b) Legal separation

A legal separation removes the obligation to cohabit with the other spouse without dissolving the marriage. Such a legal separation exists in some jurisdictions (France, Italy, Poland). The same conflict-of-law rules apply to legal separation and to divorce, since legal separation is in

[1] 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, OJ EU 2010 L 343/10.
[2] For the purposes of the Rome III Regulation "participating Member State" means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation by virtue of Decision 2010/405/EU, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331 para. 1 of the Treaty on the Functioning of the European Union (Article 3 para. 1).
[3] *Gruber*, Scheidung auf Europäisch - die Rom III-Verordnung, IPRax 2012, 381, 382 with references.

many cases a prerequisite for divorce. The participating Member States that recognise legal separation apply the same conflict-of-law rules to divorce and legal separation. Annulment of marriage is (contrary to Brussels II*bis*) excluded by Art. 1 para. 2 lit. c.

c) Court proceedings

In most countries, divorce is decided by a court, and that court's judgment dissolves the marriage. However, the Rome III Regulation clarifies that the term "court" covers all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of the Regulation (Art. 3 para. 2). Therefore, other authorities are covered, for example, a notary (Latvia) or a civil registry office (Portugal).

There is not yet a uniform approach/as to non-judicial divorces. In several jurisdictions a divorce is possible through an agreement of the parties (e.g. Japan). Some jurisdictions provide for divorce solely on the informal acts of one party to a marriage. An example for a unilateral repudiation is particularly talaq according to Islamic law. There are attempts in several Islamic States to change or at least mitigate the unilateral character of repudiation by introducing some kind of proceedings. This may affect the attitude to resort to the public policy defence against such repudiation. Legal literature is split as to the question whether the Rome III Regulation can be applied[4]. One has to admit that the Regulation is constructed mainly for court proceedings and not for the unilateral acts of a spouse. However, an application of the Regulation seems to be possible.

2. Conflict of laws

The Rome III Regulation is to apply in situations involving a conflict of laws (Art. 1 para. 1). Situations involving a conflict of laws are not defined in the Regulation itself. However, Recital 6 of the Proposal explains that these are 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[5]. Foreign or different places of habitual residence and/or foreign nationalities will be the most frequent cases of "international couples". It has been argued that it is not necessary that such a situation exist already at the moment when the spouses make their choice of law[6].

3. Excluded matters

Certain matters are specifically excluded from the scope of application of the Rome III Regulation (Art. 1 para. 2). The Regulation does not apply to the enumerated matters, even if they arise solely as a preliminary question within the context of divorce or legal separation proceedings or concern the consequences of a divorce or separation. Art. 1 para. 2 lit. a Rome III Regulation excludes the legal capacity of natural persons.

Also excluded from its scope are the existence, validity or recognition of a marriage (Art. 1 para. 2 lit. b). These are preliminary questions which have to be answered by national conflict-of-laws rules.

Art. 1 para. 2 lit. c Rome III Regulation excludes from its scope of application the annulment of a marriage. Insofar, national conflict-of-laws rules apply.

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[4] Pro *Helms*, Reform des internationalen Scheidungsrechts durch die Rom III-Verordnung, FamRZ 2011, 1765, 1766; *Basedow*, European Divorce Law - Comments on the Rome III Regulation, in: Confronting the Frontiers of Family and Succession Law - Liber Amicorum Pintens I (2012) 135, 146 f .– Contra *Gruber* IPRax 2012, 381, 383.

[5] Sufficient if only in the past, during the marriage, *Boele-Woelki*, For better or for worse; the Europeanization of International Divorse Law, Yearbook of Private International Law 12 (2010), 1, 13.

[6] *Gruber* IPRax 2012, 381, 384.

The names of the spouses do not fall within the scope of application of the Rome III Regulation (Art. 1 para. 2 lit. d).
The property consequences of the marriage do not fall within the scope of application of the Regulation (Art. 1 para. 2 lit. e). There is a separate Commission proposal in this regard. However, at present the national conflict-of-law rules apply.
Parental responsibility is not covered by the Rome III Regulation (Art. 1 para. 2 lit. f). Generally the Hague Child Protection Convention 1996 applies.
Maintenance obligations fall outside the scope of the Rome III Regulation (Art. 1 para. 2 lit. g). The Maintenance Regulation covers in conjunction with the Hague Protocol of 2007 cross-border maintenance applications arising from family relationships.
Trusts or successions remain outside the scope of application of Rome III (Art. 1 para. 2 lit. h).

4. Date of application

According to Art. 21, the Regulation applies from 21 June 2012. It is, however, not clear what this means in relation to divorce proceedings. It has been submitted that the 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[7]. A contractual choice of law made before this date may have become validated when Rome III came into force[8].

5. Universal application

The application of the Rome III Regulation is universal (Art. 4), i.e. it is possible for its uniform conflict-of-laws rules to designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union (Rec. 12). Universality is a firmly-rooted principle of the law concerning European conflict of laws. Example: Under certain circumstances Latvian spouses may choose Norwegian divorce law.

III. Jurisdiction and Relation with Brussels II*bis*

The question which court is competent is not covered by Rome III. The Council Regulation 2201/2003, the so-called Brussels II*bis* Regulation, provides for rules on jurisdiction and on recognition and enforcement of judgments in matrimonial matters, but the applicable law is determined according to the domestic or European conflict of laws rules. The Rome III Regulation will not affect the application of the Brussels II*bis* Regulation (Art. 2 Rome III). Irrespective of whether the national court issuing the divorce decree applies the Rome III Regulation or not, its decision will be recognised in accordance with the Brussels II*bis* Regulation. One ground for the introduction of harmonised conflict-of-law rules was that this should greatly reduce the risk of a "rush to court", since any court seised in one of the participating Member States would apply the law designated on the basis of common rules. However, due to the restricted number of participating States this effect can only be partly achieved.

IV. Choice by the parties

1. In General

[7] *Basedow* Liber Amicorum Pintens I 135, 138.
[8] *Basedow* Liber Amicorum Pintens I 135, 138.

The regulation allows choice of the law applicable to divorce and legal separation by the parties and follows in this respect an approach which is new for most of the Member States. The Regulation seeks to afford the spouses greater flexibility by allowing them to choose the law applicable to divorce and legal separation. It is intended that the spouses may come to an agreement in cases of divorce by mutual consent. This will act as a strong incentive for the couples concerned to deal in advance with the consequences of possible marital breakdown, and it aims to encourage amicable divorce. Party autonomy is, however, not unrestricted – there must be a "substantial connection" of the spouses with the State in question. The choice by the parties is limited to the laws which are listed in Art. 5: 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 the State of nationality of either spouse or 4) the law of the forum (Art. 5).

2. Which law(s) can be chosen?

a) Common habitual residence

aa) Habitual residence

The first of the eligible laws is the law of the habitual residence. The spouses may choose the law of the State where they are habitually resident at the time the agreement is concluded (Art. 5 lit. a).

bb) Definition of habitual residence

To establish habitual residence, case law from other Regulations suggests that someone must be physically present in that country on a voluntary basis, for a settled purpose, and with a settled intention to remain there for a significant period of time. EU law on this point demonstrates that one must focus on a person's centre of interest[9]. For the purposes of Rome III a person can only have one habitual residence.

Common habitual residence means only that the spouses have their habitual residences in the same State. There need not be, however, a single home. Habitual residence at different places within the same State is sufficient[10].

cc) Critical cases

Nevertheless, the concept of habitual residence has some drawbacks (cf. paper on Brussels II*bis*). It may be difficult to determine where a person has his habitual residence if he is constantly on the move and has no real or continuing connection with any of the countries through which he passes. Also the question how long a person's residence must persist before it may be described as "habitual" may give rise to considerable doubt in certain cases. However, there is no required time period. In some cases a person may acquire a habitual residence immediately after he arrives in the country in which he wishes to permanently reside.

There are, however, many cases going in the opposite direction. For example, where 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, the spouse could, depending on the circumstances of the case, still be considered to have his habitual residence in his State of origin in which the centre of interests of his family and social life is located (cf. Rec 24 Succession Reg.)

[9] See ECJ 22 December 2010 - Case C-497/10 PPU – Mercredi v Chaffe, FamRZ 2011, 617 annotation Henrich = IPRax 2012, 340 annotation K. Siehr, 316.

[10] *Basedow* Liber Amicorum Pintens I 135, 143 f.

b) Last habitual residence

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 (Art. 5 lit. b). The place of the last common habitual residence of the parties preserves continuity and protects the interests of the spouse who remains at the former common residence.

c) State of nationality of either spouse

Absent a common residence, the spouses may also choose the law of the State of nationality of either spouse at the time the agreement is concluded (Art. 5 lit. c).

The question of multiple nationality is not addressed directly.

Example: The husband has German nationality. The wife possesses German and Latvian nationality. The spouses live in Latvia. Are they allowed to choose German law?

There is a puzzling Recital 22 which states that where the Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, but in full observance of the general principles of the European Union. This could be understood as a reference to national conflict-of-laws rules, according to which the nationality of the forum generally has priority. However, one of the general principles of European law is non-discrimination. Therefore, one has to assume that the closest connection of the person should prevail. This result is doubtful because the European Court has decided that the efficiency of a nationality is not pertinent in respect of jurisdiction[11]. Therefore legal literature is split as to whether the law of a non-effective nationality is possible[12] or whether this is not allowed[13]. The main arguments for the first opinion are free movement of persons and party autonomy, the main argument for the second opinion is the lack of a required close connection.

There are no provisions dealing with stateless persons. It is argued, however, that they should also be given the possibility of a choice of law. In accord with the rules of the Convention relating to the Status of Stateless Persons of 1954, such persons would then be empowered to choose the law of their "domicile", which is to be interpreted as habitual residence.[14]. The same applies to refugees in the sense of the Geneva Convention relating to the Status of Refugees 1951[15].

d) Law of the forum

Another alternative for a choice of the applicable law is the law of the forum (Art. 5 lit. d). This leads to the application of the same law as relates to both jurisdiction and the substance of the case. The jurisdiction may be based on Art. 3 ff. Brussels II*bis* or a national provision. For this possibility there is, however, the precondition that the choice is allowed by the law of the forum. Therefore a national implementing act is necessary.

Despite the fact that the wording is not totally clear it is assumed that the choice can also be made before instituting the proceedings[16]. It is an open question whether a designation of a specific country and/or a specific legal order is necessary. According to the most liberal view the spouses may elect the law of an undetermined future forum as being applicable to an eventual divorce[17]. It is argued that the wording of the Regulation does not contain a

[11] See ECJ 16 July 2009 - Case C-168/08 - Hadadi v Mesko, [2009] ECR. I-6871.
[12] In this sense *Helms* FamRZ 2011, 1765, 1770 f; *Basedow* Liber Amicorum Pintens I 135, 140 f.
[13] In this sense *Gruber* IPRax 2012, 381, 385 f.
[14] *Gruber* IPRax 2012, 381, 386.
[15] *Gruber* IPRax 2012, 381, 386.
[16] *Basedow* Liber Amicorum Pintens I 135, 142; *Gruber* IPRax 2012, 381, 386.
[17] *Basedow* Liber Amicorum Pintens I 135, 142 f. – Contra *Gruber* IPRax 2012, 381, 386.

restriction and that such a broad interpretation is an appropriate solution in the interest of the parties.

2. Consent and material validity

The existence and validity of an agreement on choice of law or of any term thereof is to be determined by the law which would govern it under the Regulation if the agreement or term were valid (Art. 6 para. 1). This refers only to the internal provisions of the chosen law. Whether the conflict-of-law rules of that jurisdiction allow the parties to choose the law applicable to their divorce is irrelevant since there is no renvoi[18].
Example: Spouses chose English law which does not allow a choice of law by the parties. The agreement is nevertheless valid.
There is an additional rule which is a replica of Art. 10 para. 2 Rome I Regulation and which deals with cases of implied consent. A spouse, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1 (Art. 6 para. 2). This seems to be of not much importance since there is a requirement that the choice has to be at least in writing. Originally it was planned to introduce special safeguards to ensure that spouses are aware of the consequences of their choice and to protect the weaker spouse.

3. Time of choice

An 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). The date of seising is to be determined in the same way as under Art. 16 Brussels II*bis*. If the law of the forum so provides, the spouses may also designate the law applicable for 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). For example, such a choice is allowed in the German draft of the law to implement the Regulation.

4. Formal requirements

The Rome III Regulation provides also for formal validity (Art. 7). The agreement referred to in Art. 5 para. 1 and 2 must be 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).
However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down *additional formal requirements* for this type of agreement, those requirements will apply instead (Art. 7 para. 2).
If the spouses are habitually resident *in different participating Member States* at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement will be formally valid if it satisfies the requirements of either of those laws (Art. 7 para. 3).Therefore, if the spouses live in Germany and in Latvia, compliance with the formal requirements of one of these States would suffice.
There is a protective provision for the case that *only one of the spouses* is habitually resident in a participating Member State at the time the agreement is concluded and that

[18] *Basedow* Liber Amicorum Pintens I 135, 143.

State lays down additional formal requirements for this type of agreement. Then also those requirements will apply (Art. 7 para. 4).

V. Applicable law in the absence of choice

1. In general

The Rome III Regulation also sets up criteria to determine the applicable law in cross-border divorces in the case of an absence of choice by the spouses. As in other Regulations and in the Conventions of the Hague Conference on Private International Law, Rome III does not primarily follow the principle of nationality. Instead it uses a cascade of connecting factors. In the absence of a choice, divorce and legal separation will subject to the law of the State: 1) where the spouses are habitually resident at the time the court is seised; or, failing that 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; or, failing that 3) where both spouses are nationals at the time the court is seised; or, failing that 4) where the court is seised (Art. 8).

2. Habitual residence

The law of the State where the spouses are habitually resident at the time the court is seised has primary application (Art. 8 lit. a).
Habitual residence has already been adopted as a connecting factor for jurisdiction in Arts. 3 and 8 of the Brussels II*bis* Regulation

3. Last habitual residence

Another connecting factor is the place 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 (Art. 8 lit. b). The time limit of one year is understandable because the significance of the last habitual residence will decrease over the course of time. On the other hand, it means also that the staying spouse may face a change in the applicable law. Example: A French husband and his Latvian wife live together in Riga until August 2011. Then the husband moves to Paris whereas the wife stays in Riga. If the husband then makes an application in a French court, French law applies.

4. State of nationality of either spouse

Nationality is also a connecting factor. Divorce and legal separation are subject to the law of the State of which both spouses are nationals at the time the court is seised (Art. 8 lit. c). For multiple nationality there is only the explanation in Rec. 22 according to which the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union. Formal nationality is sufficient for jurisdiction, but is "effective nationality" required here[19]? It has been argued that common nationality should only be accepted as a connecting factor if there is an additional element, such as habitual residence, in relation to the State of the second

[19] Cf. *Boele-Woelki* Yb PI L 12 (2010), 1, 18 f.

nationality. The reason for this is that through marriage spouses sometime obtain by operation of law an additional nationality which is not otherwise significant[20].

5. Law of the forum

The forum comes last on the list of connecting factors. The law of the State where the court is seised applies if no other alternatives apply (Art. 8 lit. d). This means in conjunction with the Brussels II*bis* Regulation that the applicant can unilaterally choose the law applicable to the divorce or separation by establishing his or her habitual residence for a minimum duration of twelve months in any participating Member State.

VI. Conversion of legal separation into divorce

In the interest of continuity, a change of applicable law remains without consequences. Where legal separation is converted into divorce, the law applicable to divorce is to be the law applied to the separation, unless the parties have agreed otherwise in accordance with Art. 5 Rome III Regulation (Art. 9 para. 1). However, if the law applied to the legal separation does not provide for the conversion of legal separation into divorce, Art. 8 on the applicable law in the absence of choice will apply, unless the parties have agreed otherwise in accordance with Art. 5 (Art. 9 para. 2).

VII. Application of the law of the forum

Where the law applicable pursuant to Art. 5 or Art. 8 of the Rome III Regulation 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 (Art. 10). After the introduction of divorce in Malta, the first alternative can only apply in very rare cases as for the Philippines. It is not clear if Art. 10 excludes the application of discriminatory divorce laws (mainly religious laws) without any exception. One possibility is to restrict the application of the provision to cases of discrimination in concreto[21].

VIII. General Provisions

1. Exclusion of renvoi

Where the Rome III Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law (Art. 11).

2. Public Policy

Application of a provision of the law designated by virtue of the Rome III Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum (Art. 12). As in other cases, the result to which the application leads to under the circumstances of the individual case is decisive.

3. Differences in national law

[20] See *Basedow* Liber Amicorum Pintens I 135, 146.
[21] Cf. *Basedow* Liber Amicorum Pintens I 135, 149.

Nothing in the Rome III Regulation obliges the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of the Regulation (Art. 13). With the introduction of divorce in Malta, the first scenario is no longer of any practical relevance. The second alternative allows Member States not recognising a same-sex marriage to not grant a divorce for such a marriage. It is disputed whether a Member State like Germany, which does provide for registered partnerships but not for full same-sex marriages, should renounce the exception[22].

4. States with two or more legal systems

a) Territorial conflicts of laws

The Rome III Regulation deals also with States with two or more legal systems. The first alternative are States which comprise several territorial units, each of which has its own system of law or a set of rules concerning matters governed by the Rome III Regulation (Art. 14). Examples of multi-jurisdictional States are Australia (provinces), the United Kingdom (England, Scotland) and the United States of America (States).

Any reference to the law of a State in the Rome III Regulation is, for the purposes of determining the law applicable under the Regulation, to be construed as referring to the law in force in the relevant territorial unit (Art. 14 lit. a).

Any reference to habitual residence in that State in the Rome III Regulation is to be construed as referring to habitual residence in a territorial unit (Art. 14 lit. b)

Any reference to nationality will indicate the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection (Art. 14 lit. c).

b) Inter-personal conflicts of laws

Other cases of States with two or more legal systems are those with inter-personal conflicts of laws (Art. 15). In many States of the world the applicable law is determined by the religion of the parties, for example in India (Christian, Hindu or Muslim law).

In relation to such a State which has two or more systems of law or sets of rules applicable to different categories of persons concerning matters governed by the Rome III Regulation, any reference to the law of such a State is to be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouse or spouses has or have the closest connection applies. The closest connection may be based particularly on habitual residence or religion.

IX. Transitional provisions

- The Rome III Regulation applies only to legal proceedings instituted and to agreements of the kind referred to in Art. 5 concluded as **from 21 June 2012** (Art. 18 para. 1).
- However, effect is also to be given to an agreement on the choice of the applicable law concluded **before 21 June 2012**, provided that the agreement complies with Art. 6 (consent and material validity) and Art. 7 (formal requirements).

[22] In this sense *Gruber* IPRax 2012, 381, 391.

- The Rome III Regulation is without prejudice to agreements on the choice of the applicable law concluded **in accordance with the law of a participating Member State** whose court is seised before 21 June 2012 (Art. 18 para. 2). Such a choice of law was, for example, already possible under German private international law.

X. Relationship with existing international conventions

Existing international conventions with third countries:
The Rome III Regulation respects existing international conventions with third countries. Without prejudice to the obligations of the participating Member States pursuant to Art. 351 of the Treaty on the Functioning of the European Union, the Rome III Regulation does not affect the application of international conventions to which one or more participating Member States are party at the time when the Regulation was adopted or when the decision pursuant to the second or third subparagraph of Art. 331 para. 1 of the Treaty on the Functioning of the European Union is adopted and which lay down conflict-of-laws rules relating to divorce or separation (Art. 19 para. 1). These are particularly Hague conventions on dissolution of marriage.
Between participating Member States:
However, the Rome III Regulation takes precedence, as between participating Member States, over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by the Regulation (Art. 19 para. 2). These are particularly bilateral Latvian agreements with other participating Member States.