The law applicable to divorce and legal separation (Rome III)

EUROPEAN COMMISSION
DG Justice and Consumers
Unit A1 – Civil Justice

Disclaimer: These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

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Background

- Union had adopted Regulation No 2201/2003 - the Brussels IIa Regulation, which includes rules on:
  - jurisdiction on (i) matrimonial matters and (ii) parental responsibility matters
  - recognition and enforcement on (i) matrimonial matters and (ii) parental responsibility matters
- Rules on the law applicable to parental responsibility matters are contained in the 1996 Hague Convention on child protection
- Outstanding: rules on the law applicable to matrimonial matters (divorce and legal separation)
- Problem: jurisdiction grounds for matrimonial matters in BXL IIa are not hierarchical => rush to court (forum shopping)

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Adoption process

- 2006: COM proposal to amend Brussels IIa Regulation to introduce rules on the law applicable to matrimonial matters
- Family law measures require a special legislative procedure: Council acts by unanimity and EP is consulted
- June 2008: Council concluded that no EU-wide unanimity could be reached within a reasonable period of time
- 2010: 14 MS requested enhanced cooperation: BE, BG, DE, ES, FR, IT, LV, LU, HU, MT, AT, PT, RO, SI (9 MS is the minimum required by Treaties)
- 20 December 2010: adoption of Regulation No 1259/2010 (Rome III Regulation). First case ever of enhanced cooperation
- Regulation applicable as from 21 June 2012
- 3 MS subsequently join the enhanced cooperation: LT (2012), EL (2014), EE (2016)

Impact

- Any MS can join enhanced cooperation at any time
- No negative impact for non-participating MS:
  - non-participating MS will continue to apply their national rules of private international law to divorce and legal separation
  - application of Regulations will not depend on nationality of citizens
  - agreements concluded (i) between MS and third countries and (ii) between participating and non-participating MS, not affected

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Scope

- Regulation applies to situations involving:
  - a conflict of laws
  - a divorce or legal separation
- Regulation does not apply to private divorce (C-372/16 *Sahyouni*)
- Certain civil-law aspects linked to a couple's marriage or legal separation excluded, such as:
  - legal capacity of spouses
  - existence, validity or recognition of marriage
  - the annulment of a marriage
  - the name of spouses
  - property regime of marriage
  - parental responsibility matters
  - maintenance
  - succession

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Applicable law

- Substantive law governing divorce and legal separation remains national (e.g. causes, conditions)
- Universal applicable law: law applicable can be the law of a MS or a third country
- Choice of law: spouses can agree to choose (in writing) the law of:
  - country of current habitual residence of spouses at the time the agreement is concluded, or
  - country of last habitual residence of spouses if one still lives there at the time the agreement is concluded, or
  - country of nationality of either spouse at the time the agreement is concluded, or
  - the Member State where the court is located
- Agreement on choice of law must generally be made at the latest at the time the court is seised

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Applicable law

- If no law is chosen, applicable law, in hierarchical order, of:
  - country of current habitual residence of spouses at the time court is seized,
  - country of last habitual residence of spouses if one still lives there at the time court is seized,
  - country of nationality of both spouses at the time court is seized,
  - the Member State where the court is located
- Court not obliged to rule on divorce if MS does not consider the marriage valid
- Where foreign applicable law does not allow divorce or applies different conditions to divorce for spouses on grounds of sex, the law of the MS where the court is located will apply
- Authority may refuse to apply a provision of foreign applicable law contrary to its MS' public policy