



Council Regulation(EU) N° 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

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General issues

- .increase of mixed and delocalized marriages
- .2005: 170,000 divorces between spouses with different nationality.
- .Couples at high risk because of cultural differences.
- .Difficulties .differences among countries on how they understand and how to get to the divorce.
- .Failure of the Hague Conference,
- .Complement to Regulation 2201/2003
- .Difficult process



Countries bound

• From the beginning

- Germany, Austria,
- Belgium, Bulgaria,
- Slovenia, Spain,
- France, Hungary, Italy, Latvia, Luxembourg,
- Malta, Portugal, Romania

• From 22/May/2014

- Lithuania (Decision 2012/714/UE)



MATERIAL SCOPE

Art. 1: situations involving a conflict of laws regarding divorce and legal separation.

NOT INCLUDED (*even if it is a preliminary question*)

- the legal capacity of natural person.
- the existence, validity or recognition of a marriage.
- the annulment of a marriage.
- the name of the spouses.
- the property consequences of the marriage
- parental responsibility,
- maintenance obligation.
- trust and succession



MATERIAL SCOPE-II

- UNIVERSAL APPLICATION:
 - *art.4 The law designated by this R. shall apply wheather or not it is the law of a participating MS*
 - ***IT IS included:****in the terms of applicable law*
 - *-grounds for divorce and legal separation.*
 - *-effects produced by the filing of the claim.*
 - *-effects of reconciliation.*
 - *-conversion of legal separation into divorce.*
 - *-need or not of regulatory agreement*
 - *-if it the dissolution of the economic regime should take place or not*



Spacial scope

- Art. 3 The R. is applied in the participating MS
- This article defines what is to be understood as “*participating MS*”:
 - - *States which participate in enhanced cooperation*
 - - *Those States that may participate in the future (art. 331 Treaty on the Functioning of EU)*



TEMPORAL SCOPE

•Art.21

- The R. entered into force the day after its publication in the Official Journal of the EU.
- It is being applied from 21.June.2012 with the exception of art.17(from 21,June.2011).
- Therefore only proceedings instituted and agreements regarding applicable law concluded from 21.June.2012



SYSTEMATIC SCOPE: RELATIONSHIP WITH EXISTING INTERNATIONAL CONVENTIONS

- Shall not affect IC between MMSS and other States.
- Precedence in relations between MMSS
- The R. doesn't bind those MMSS where the divorce or the marriage is not valid (art.13)



DESIGNATION OF APPLICABLE LAW

• 1) CHOICE OF APPLICABLE LAW BY THE PARTIES:

- - prevalence of the autonomy of the conflictual will. -
improvement of legal certainty
- - solution according the multicultural character of our society.

• 2) IN THE ABSCENSE OF CHOICE: different forums in cascade



CHOICE BY THE PARTIES-I

•ART.5.

• **The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:**

• *a) The law of the State where the spouses ARE habitually resident at the time the agreement is concluded.*

• *b) the law of the State where the spouse WERE last habitually resident, in so far as one of them still resides there at the time the agreement is concluded.*

• *c) the law of the State of nationality of either spouse at the time the agreement is concluded.*

• *d) lex forum*



CHOICE BY THE PARTIES-II TIME OF THE AGREEMENT

- The agreement may be concluded and modified at any time ,but at the latest at the time the Court is seized.
- Even,during the course of the proceeding
- (only when lex forum provides so)



CHOICE BY THE PARTIES-III

VALIDITY OF THE AGREEMENT

• MATERIAL

- The existence and validity of an agreement shall be determined by the law which would govern it under this R if the agreement were valid
- Exception. law of the State of hab. resid. the spouse who is asking there is not a valid consent under some circumstances. (art. 6,2)

• FORMAL

- In writing, signed and dated by both
- Electronic means are valid.
- Additional requirements in certain cases



APPLICABLE LAW IN THE ABSCENSE OF A CHOICE BY THE PARTIES

- Cascade forums:

- 1) habitual residence at the time the court is seized

- 2) last habitual residence provided that

- 2.1. the period of residence did not end more than one year before the Courts was seized.

- 2.2. At least one of the spouses resides in that State

- 3) The common nationality at the time the Court is seized.

- 4) lex forum



CONVERSION OF LEGAL SEPARATION INTO DIVORCE

• Art.9

- In this case the applicable law shall be the law applied to the legal separation
 - Unless the parties have agreed otherwise in accordance with art. 5
- If the law applied to the legal separation does not provide for the conversion of legal separation into divorce art. 8 shall be applied ,unless parties have agreed otherwise in accordance with art. 5



PROBLEMS WITH THE APPLICATION OF THE CONFLICT RULE

- **1) The Law makes no provision for divorce or does not grant equal access**
 - Shall be applied *lex forum*
- **2) Versus Public policy**
 - May be refused
- **3) Renvoi**
 - applicable law under this R. never means national private international law



ADDITIONAL PROBLEMS-I

- Differences in national law
- art.13
- The R. does not oblige those States that.
 - 1) domestic law does not provide for divorce
 - (Malta before the legislative amendment)
 - 2) domestic law does not deem the marriage in question valid for the purposes of divorce proceeding to pronounce a divorce by virtue of the application of this R.



ADDITIONAL PROBLEMS-II

• STATES WITH TWO OR MORE LEGAL SYSTEMS-CONFLICT OF LAWS

- **Art.14** As far as there are inside the EU some states with different domestic law concerning matters governed by this R.
 - 1) Any reference to the law of such State shall be understood as a reference to the law in force in the relevant territorial unit.
 - 2) Any reference to habitual residence in that state shall be construed as referring to habitual residence in a territorial unit
 - 3) reference to nationality shall be referred to....(in cascade)
 - -the territorial unit designated by the law of the State
 - -chosen by the parties
 - -they have the closest connection



- Many thanks,
- Muchas gracias