

Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

Regulation n°1259/2010 of 20 December 2010, which applies to legal proceedings instituted and to agreements concluded on or after 21 June 2012, is the result of closer cooperation between fourteen States¹ on the law applicable to divorce and legal separation.

The Rome III Regulation places a special emphasis on the spouses' wishes, since they can now choose the law applicable to their divorce in their marriage contract. The Regulation also lays down connecting factors for designating the law applicable to the divorce if no choice is made.

1. Scope of the Rome III Regulation

1.1. Time application

Article 21 of the Rome III Regulation states that it applies from 21 June 2012.

- **Judicial matters: Article 18(1)** states that the Regulation applies to legal proceedings instituted and to agreements entered into on or after 21 June 2012.
- **With regard to choice of law: Article 18(2)** specifies that an agreement on the choice of law applicable to divorce concluded before that date also takes effect insofar as it complies with the provisions relating to consent and the substantive and formal validity of Articles 6 and 7 of the Regulation.

1.2. Spatial application

As the Member States were unable to reach unanimous agreement on the proposed regulation, it was adopted by enhanced cooperation between fourteen Member States.

Consequently, the Regulation is only binding in its entirety and directly applicable in the participating Member States.

Article 4 of the Regulation provides for its universal application, so that the law designated by the Regulation or by the parties applies to the divorce even if it is not the law of a participating Member State.

1.3. Hardware application

Article 1^{er} of the Regulation states that it applies "*in situations involving a conflict of laws, to divorce and legal separation*". **Recital 10** of the Regulation states that the Regulation should apply only to the dissolution or loosening of the matrimonial bond. It also specifies that the law designated by the conflict-of-laws rules applies to divorce and legal separation.

Article 2 of the Regulation excludes a number of areas to which the Rome III Regulation does not apply:

- Legal capacity of natural persons ;
- The existence, validity or recognition of a marriage ;
- The annulment of a marriage ;

¹ Recital 6: Belgium; Bulgaria; Germany; France; Spain; Italy; Latvia; Luxembourg; Hungary; Malta; Austria; Portugal; Romania and Slovenia

- The name of the spouses ;
 - The property effects of marriage ;
 - Parental responsibility ;
 - Maintenance obligations ;
 - Trusts and estates.
- **CJEU 20 December 2017 C-372/16 Sahyouni** - No application of the Rome III Regulation to French diversionary divorce. The Court of Justice has clarified that the Rome III Regulation applies only to divorces granted either by a state court or by a public authority or under its supervision, which, for the CJEU, is not the case of the DCM between lawyers recorded in the notary's minute book.

Article 19 sets out the relationship between the Regulation and other international conventions:

- **§1** - The Regulation shall not affect international conventions to which the participating Member States were parties at the time of adoption of the Regulation and which govern conflicts of law in matters of divorce and legal separation;
 - **§2** - The Rules shall prevail, as between the participating Member States, over agreements concluded exclusively between two or more of them insofar as they concern matters governed by the Rules.
- *Office of the judge and Rome III Regulation* - It follows from the judgment in **Civ 1^{re} , 26 May 1999 no. 97-16.684 Belaïd** that in matters of unavailable rights, the judge is obliged to apply the conflict of laws rule of his own motion. Consequently, in matters of divorce and legal separation, this principle, which should apply to the Rome III Regulation, requires the court to raise the conflict rule of its own motion. This raises the question of the durability of the qualification of unavailable rights in divorce matters, especially as **Civ 1^{re} , 11 March 2009 no. 08-13.431** was able to rule that the divorce application itself is unavailable but that the application concerning only the amount of the compensatory allowance is not.

2. Content of the Rome III Regulation

2.1. Choice of law

2.1.1. Limitation of the laws applicable to divorce (Article 5)

Although the Rome III Regulation introduces a *professio juris* mechanism in divorce matters, the spouses may only choose a law with which they have a close connection or which has a connection with the forum (**recital 16**).

Article 5 of the Regulation therefore provides an exhaustive list of the laws which may be designated by the spouses and which have a special connection with them:

- a) the law of the State of habitual residence of the spouses at the time the agreement is concluded; or
- b) the law of the State of the last habitual residence of the spouses, provided that one of them still resides there at the time the agreement is concluded; or
- c) the law of the State of nationality of one of the spouses at the time the agreement is concluded; or
- d) The law of the forum.

- **Ruling civ 1^{re} , 26 January 2022 n°20-21.542** - In this case, spouses of Russian, Mexican and Russian nationalities had, by authenticated deed, designated French law as applicable in the event of divorce. The husband contested the application of French law to the divorce on the grounds that the choice of the law of the forum can only be understood as the will of the spouses to subject the divorce to the law of the state of the judge with jurisdiction to hear the divorce on the day of that choice. The Cour de cassation has held that my choice of the law of the forum is valid under point (d) of Article 5 where that law is that of the court subsequently seised of the application for divorce. It must therefore be deduced that this choice is no longer valid when this law is not ultimately that of the court seised.

2.1.2. Choice of law formalities (Articles 6 and 7)

Article 5(2) states that the choice of law agreement may be concluded and amended at any time, but at the latest when the case is brought before the court. Nevertheless, if the law of the forum so provides, the spouses may designate the law applicable to the causes of the divorce during the proceedings (procedural agreement) (§3).

- **Civ 1^{re} , 6 May 1997 n°95-15.309 Sté Hannover international** - Procedural agreement is not permitted under French law for rights which are not freely available to the parties.

Recital 18 of the Regulation states that "*the informed choice of both spouses is an essential principle of this Regulation*". **Articles 6 and 7** therefore lay down conditions relating to consent and the substantive validity of the choice of law agreement.

In accordance with **Article 7** of the Regulation, the agreement must be in writing, dated and signed by both spouses. The text provides that electronic transmission, which enables the agreement to be recorded durably, is deemed to be in writing.

In certain cases provided for in **Article 7**, additional formalities may apply, in particular if :

- If the law of the participating Member State in which both spouses have their habitual residence at the time the agreement is concluded so provides ;
- If, at the time the agreement is concluded, the spouses have their habitual residence in different participating Member States and the laws of those States provide for different formal rules, in that case the agreement is valid if it satisfies the conditions laid down by the law of one of those States;
- If, at the time the agreement is concluded, only one of the spouses has his or her habitual residence in a participating Member State and if that State provides for additional formal rules.

Article 6(1) states that the validity of an agreement or clause is subject to the law that would be applicable under the Regulation if the agreement or clause were valid. However, in order to establish his or her lack of consent, a spouse may rely on the provisions of the law of the State in which he or she has his or her habitual residence at the time the court is seised if the circumstances indicate that it would not be reasonable to determine the effect of that spouse's conduct in accordance with the law referred to in §1 (§2).

2.2. No choice of law

2.2.1. Attachment criteria (article 8)

In the absence of a choice of law by the spouses, **Article 8** of the Regulation provides for several cascading connecting factors:

- a) The law of the State of habitual residence of the spouses at the time the court is seised; or failing that,
- b) The law of the State of the last habitual residence of the spouses, provided that this residence did not end more than one year before the court was seised and that one of the spouses still resides there at the time the court is seised; or failing this,
- c) The law of the State of common nationality of the spouses at the time the court is seised; or failing that,
- d) The law of the forum.

2.2.2. Limitations on the application of the law designated under the regulation

- *Application of the law of the forum (Article 10)*

Article 10 provides that where the law applicable by virtue of a choice of law by the spouses or the connecting factors in Article 8 does not provide for divorce or does not grant one of the spouses, by reason of his or her sex, equal access to divorce or legal separation, the law of the forum shall apply.

- **CJEU 16 July 2020 C-249/19** - In this case, Italian law was applicable, by virtue of Article 8 of the Regulation, to Romanian spouses residing in Italy. However, Italian law only allowed divorce after a legal separation of 3 years, so it was stricter than Romanian law. The Court of Justice clarified that the derogation in Article 10 in cases where the applicable law "does not provide for divorce" refers only to situations where the applicable foreign law does not provide for divorce in any form.

- *International public policy (article 12)*

Article 12 provides that a law designated under the Regulation may be disregarded only if its application would be manifestly incompatible with the public policy of the forum.