

# European Civil Procedure in Family Law Matters

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# Poll question 1

**Have you had experience in your practice with international family law cases?**

1) Yes

2) No

# Poll question 2

**Have you had experience with any of the following cases?**

- 1) Divorce disputes
- 2) Maintenance disputes
- 3) Disputes over children (custody, visitation)
- 4) Disputes over the property of the couples (spouses, registered partners)

# Setting the scene: key aspects of the EU acquis in family matters

Questions that a judge needs to ask herself when dealing with international family law cases:

- **What type of a dispute is it?**

- 1) Do I have jurisdiction?
- 2) What is the applicable law?
- 3) Can I recognize/enforce a foreign judgment?
- 4) Can I cooperate with the authorities in other states?

# Harmonised EU family law (and Hague instruments)

## **Family law instruments:**

1. Divorce (2201/2003 [replaced soon by 2019/111] and 1259/2010)
2. Parental responsibility (2201/2003, HC 1996)
3. Maintenance (4/2009, HC 2007, HP 2007, Lugano II)
4. Matrimonial property (2016/1103)
5. Registered partnerships (2016/1104)
6. \*Succession (650/2012)

# Harmonised EU family law

## **Instruments on cooperation that the judge can use in family law cases:**

1. Taking of evidence (1206/2001, HC 1970)
2. Serving documents (1393/2007, HC 1965)

## **European Judicial Atlas in civil matters**

<https://e-justice.europa.eu/home.do?plang=en&action=home>

# Relationship between different instruments

- **International conventions:**
  - Conventions of your MS with 3<sup>rd</sup> States
  - HC conventions
- **EU Regulations**
- **National law**
  - Provisions on jurisdiction, applicable law, recognition/enforcement and cooperation

# Relationship between different instruments – example of a divorce

- **Divorce case:** jurisdiction, applicable law, recognition?

## **International conventions:**

- Conventions of your MS with 3<sup>rd</sup> States
- No HC dealing with divorce
- **EU Regulations:**
  - Brussels II *bis* Regulation 2201/2003
  - Rome III Regulation 1259/2010
- **National law**
  - Provisions on jurisdiction, applicable law, recognition/enforcement



# ILLUSTRATIVE CASE 1



**Guinevere**

(French national living in Paris)

**Lancelot**

(Latvian national living in Riga)

# ILLUSTRATIVE CASE 2



**Guinevere**

(French national living in Paris)

**Artur**

(Russian national living in Moscow)



# Discussion



# Cross-border divorce within the EU

A) Jurisdiction rules in the Brussels II a Regulation (BRIIbis)

B) *Lis pendens* rules

C) Applicable law (Rome III)

# A) Jurisdiction rules in the Brussels II a Regulation (BRIIbis)

## Scope of application of the regulation

- Material scope of application
- Territorial scope of application
- Temporal scope of application
  - (No 2201/2003...)
  - But special transitional rules for the recognition and enforcement of judgments
- Personal scope of application
- Relationship with other instruments

# Jurisdiction: Relationship between Different Instruments

## 1) Does my jurisdiction come from an international convention concluded with a 3<sup>rd</sup> State?

- **Yes:** court proceeds with the case under the convention
- **No:** then ➤

## 2) Does my jurisdiction come from the BRIIbis?

- **Yes:** court proceeds with the case under the BRIIbis
- **No** (and if no other court in the EU has jurisdiction under BRIIbis (Art 7, C-68/07), **only then** ➤

# Jurisdiction: Relationship between Different Instruments

## **3) Does my jurisdiction come from national law?**

- NB! BRIBis Art 6 does not allow to go to national law, if the defendant:
  - has a HR in the EU
  - is a national of the EU
  - **What happens in these cases?**

# BRIBis: Jurisdictional rules (Arts 3-5)

- **General jurisdiction (Art 3):**
- Various grounds (e.g. HR of the defendant, joint HR, applicant's HR for certain time period etc)
- **Special cases (Arts 4-5):**
- Counterclaim – to the same court (Art 4)
  - What is a counterclaim in a divorce case?
- Conversion of legal separation into divorce – to the same court (Art 5)

**Art 6: prohibition to go to national law**

**Art 7: rule that 'if no other court has jurisdiction under national law'**



# BRIBis: Jurisdictional rules (Arts 16-20)

## Other questions covered by the BRIBis:

- Obligation to determine jurisdiction (Art 17)
- Obligation to stay the proceedings until it is sure that the defendant has received the relevant documents (Art 18)
- The time that the court is deemed to be seized (Art 16)
  - Why is it relevant?

# BRIBis: Jurisdictional rules (Arts 16-20)

## Other questions covered by the BRIBis:

- *Lis pendens* rules (Art 19(1))
  - proceedings 'relating' to D/LS/MA
  - between 'the same parties'
- Jurisdiction to take provisional measures (Art 20)
  - What could be provisional measures in a divorce case?

# Possible reasons for racing to the courts in divorce cases

- Surprise effect
- Applicable law
- Rules on the recognition and enforcement
- Inconveniences relating to the costs, translations, travelling
- Anything else?



# Discussion



# C) Applicable law (Rome III)

## Divorce, Legal Separation, Marriage Annulment

### **Jurisdiction**

- Brussels II *bis* Regulation 2201/2003 (or '**Brussels IIa**')
  - To be replaced by the Brussels II bis (Recast) Regulation 2019/1111 (1 August 2022)

### **Applicable law**

- Rome III Regulation 1215/2010 (only divorce and legal separation)

### **Recognition and enforcement of judgments**

- See ↑(Jurisdiction)

### **International service of documents/taking of evidence**

+ International Conventions

# Applicable Law: Relationship between Different Instruments

**1) Is the applicable law determined under an international convention concluded with a 3<sup>rd</sup> State?**

- Yes: For example your MS-s bilateral treaties
- No, then ➤



# Applicable Law: Relationship between Different Instruments

## 2) Is the applicable law determined under the RIII?

- Is my MS bound by the RIII?
  - Au, Bel, Bul, Est, Fra, Ger, Gre, Hun, Ita, Lat, Lit, Lux, Mal, Por, Rom, Slov, Spa
- RIII deals only with applicable law to divorce and legal separation (vs marriage annulment)
- Applies only in legal proceedings instituted after 21 June 2012/agreements after that date (Art 18)
- No, then ➤

# Applicable Law: Relationship between Different Instruments

## **3) Determine applicable law under your national law**

- When should a judge refer to national law to determine applicable law?



# Applicable law – Rome III

- **RIII determines applicable law to:**

- 1) Divorce

- 2) Legal Separation

vs Marriage Annulment (BRIBis)

# Rome III – scheme

## 1) Have the parties agreed on the applicable law? (Art 5)

- Only the laws listed in Art 5(1) can be chosen ➤
- Choice has to be generally made before the court is seized (or later, if MS allows)
- Choice is valid if:
  - Materially valid – generally, the governing law (Art 6)
  - Formally valid – in writing, signed and dated + additional requirements of the MS where concluded (Art 7)

## 2) If the parties have not agreed (Art 4)

- Law referred to in Art 8 ➤

# Rome III – laws that can be chosen (Art 5)

Law of the state:

- of the court or
- where (at the time of the agreement is concluded):
  - the spouses both have their HR,
  - the spouses both had their last HR, if one of them still resides there,
  - which nationality either of the spouses hold

Parties can choose any of the above ('or...')

# Rome III – applicable law in the absence of choice (Art 8)

Law of the state:

- where the spouses are habitually resident at the time the court is seized
- where the spouses were last habitually resident, if one of the spouses still resides there and the common residence did not end more than 1 year before the court was seized
- of common nationality of the spouses
- of the court

This is a cascade! ('failing that...')

# Rome III: other rules

- Special rule for converting legal separation into divorce (Art 9)
- Access to divorce (Art 10)
- PP (Art 12)
- No *renvoi* (Art 11)



## Poll question 3

**Do the courts in your MS have the power to declare couples legally separated (does your MS recognise legal separation as a separate institute from divorce)?**

- 1) Yes
- 2) No

# Poll question 4

**What do you think, why is marriage annulment not included in the RIII?**

- 1) Too complicated rules
- 2) Nobody annuls marriages
- 3) MS-s could not agree on the rules



# Discussion

