

Rome III and Parties' Choice

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Introduction

The Rome III Regulation¹ allows parties to choose the law applicable to their divorce. This possibility will be the focus of this paper.

Before the Regulation entered into force,² the option for parties to choose the applicable law already existed in Belgium,³ Germany and the Netherlands.⁴ Some of the other countries have conflict of law rules, determining the law to be applied to the divorce by taking into consideration factors such as nationality, domicile or habitual residence. Other countries systematically apply the *lex fori*.⁵ Legal systems that apply the *lex fori* generally do so because they favour a liberal approach to divorce, i.e. granting divorce easily.

However, saying that choice was only possible in three EU Member States does not give the full picture. The Brussels IIbis Regulation⁶ allows parties to bring proceedings to various courts. Having this choice means parties have the option of submitting their divorce petitions to various legal systems, either because the court would apply the *lex fori*, or because they know which connecting factors the court would use to determine the applicable law.

The purpose of this paper is to analyse the rule on choice of law by the parties. I will do this by asking first why choice is permitted, then looking at what the parties can choose and when they can make their choice. Next the issues of material and formal validity will be addressed. There are a number of exceptions to choice, as well as potential hurdles and confusing issues, and I will discuss these as well.

1 Why choice?

Adding choice as a possible connecting factor is testimony of a compromise between the different approaches and different connecting factors.

As explained above, spouses already had a certain degree of choice, but this choice was uncoordinated. The choice now permitted by the Rome III Regulation is clearer and parties can see directly what the possibilities are in the participating Member States. However, uncoordinated choice still remains in the courts of non-participating Member States. Let us take the example of two spouses of French nationality living in France. The husband moves to England for a lucrative job opportunity in London. If relational difficulties ensue and the

wife wants to institute divorce proceedings, she can do this in France (the place of the last common habitual residence) or in England (the place of the habitual residence of the defendant).⁷ French courts would use conflict of law rules to determine the applicable law. The result would be that French law is applicable, on the basis of the common nationality of the spouses.⁸ English courts would apply the *lex fori*, thus English law. Thus, the wife could strategically choose the law that would regulate her divorce.

In any event, the legislator specially wanted to allow more flexibility.⁹ The new flexibility is for a choice made jointly by the spouses; it is a choice coordinated by the law, rather than the previous uncoordinated options that spouses could use.

According to the legislator, the possibility of choice would also bring greater legal certainty.¹⁰ This legal certainty lies in the fact that spouses know beforehand which law will regulate their divorce, but it also lies in the potential to ensure recognition. Spouses can, for instance, opt for the application of the law of a State to which they might later want to return, or the law of a State with which they have a particular connection, for instance, due to their nationality. Applying that law assures them that there will be less trouble having the divorce recognised and it should not be necessary to divorce a second time in the other State.

Choice as a connecting factor is well accepted in the spheres of contract law. However, it is creeping into other spheres of law, such as family law, but also more recently into the law of succession. Muir Watt, critical of this development, states: 'Philosophically, the shift from obligation to empowerment can be described in Foucault-ien terms as a move to a neo-liberal model of private governance.'¹¹

One should not forget the Rome III Regulation's rather turbulent coming into existence. Initially the Commission proposed altering the jurisdiction rules of the Brussels IIbis Regulation and, at the same time, in the same instrument, enact rules on applicable law.¹² Since the initial proposal did not meet the required muster in the Council (where measures on family law have to be adopted by unanimity), the proposal was dropped. When some Member States took the route of enhanced cooperation, only the matter of applicable law could be included. This is because it would obviously make no sense at all to amend a Regulation by way of enhanced cooperation: there would then be two different versions of the same instrument in force and that would not be at all beneficial for legal certainty, or for any other goals that the European Commission wanted to achieve.

In any event, the initial proposal contained the option that spouses would also be able to choose the forum where they wanted their divorce to be pronounced. This choice was also limited, although not in exactly the same way as the choice of law provision.¹³ Thus we see that the European legislator has deliberately opted for choice, even though it was criticised by some.¹⁴

It is remarkable that the possibility of choice has become the first rule on applicable law. Not only methodologically, but also principally, this is interesting. The legislator apparently wants to encourage spouses to make their own choices .

2 What can parties choose?

a) The possibilities

Parties have a wide range to choose from:

1. The law of their common habitual residence at the time of the choice.
2. The law of the last common habitual residence, if one of the spouses still resides there at the time of the choice.
3. The law of the nationality of either of the spouses at the time of the choice.
4. The forum law.¹⁵

Let us now analyse these possible choices in more depth.

b) Habitual residence

The first and second points refer to habitual residence. It should be noted that the reference is to a habitual residence in the same State, and not a common habitual residence; this means that even if the spouses live separated, but still in the same State, they can choose the law of this State.

Habitual residence is a factual consideration and it is not always easy to determine.¹⁶ The concept must receive an autonomous and uniform interpretation.¹⁷

The European Court of Justice has elaborated on the concept “habitual residence”, but not yet in the context of divorce. In a case concerning an expatriation allowance for a European Commission official, the Court stated that

“the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account.”¹⁸

This judgment follows the line that the European Court of Justice has already drawn in earlier cases on matters of social security.¹⁹ The question that this case law has raised, is the relation between the intention of the person concerned and objective factors such as the actual residence and the duration of that residence.²⁰ The Court has not resolved this issue.

There are two Court of Justice judgments that attempt to fill in the term “habitual residence for purposes of the Brussels IIbis Regulation, but both cases concerned children, which amounts to a very particular situation.²¹ The Court ruled that its definition in other branches of EU law could not simply be applied to children, but that the habitual residence of a child

“must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.”²²

The Court added a number of factors: *“the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at*

school, linguistic knowledge and the family and social relationships of the child in that State".²³

For adults the question remains what the relation is between these objective factors and the subjective intention of one or both spouses. What is for example the habitual residence of people who spend equal amounts of time in two countries? And what if one of the spouses lives in a different country during the week and comes 'home' only at weekends? Must the fact that spouses have the intention of living together outweigh the factor of time spent in a place?

It is important to note that the choice must be for the law of the State where the spouses were habitually resident. Thus the reference is to a common habitual residence. In line with other instruments, and on the basis of a literal interpretation this means a habitual residence in the same State, but not necessarily living together, in the same house.

Where spouses live in the same State, but in areas with different legal systems, this might be problematic. The Regulation contains a rule for States with more than one legal system. This provision states that "*any reference to habitual residence in that State meaning in this case the State of which the law has been chosen shall be construed as referring to habitual residence in a territorial unit*"²⁴

This of course provides no solution if the spouses have their habitual residence in different territorial units and choose the law of the State or the law of either of the territorial units. The only logical conclusion for such a situation is that where spouses live in different territorial units of a State with more than one legal system, they do not have a common habitual residence and can therefore not choose this law.

If the spouses have their habitual residence in a State with more than one legal system and the division between these systems is not territorially determined, the internal rules of that State determine which legal system applies.²⁵ This is, for example, the situation if the spouses habitually reside in a State that applies different personal and divorce laws according to the religions of the persons concerned. If no such rules are at hand, the law of the closest connection is applicable. Interestingly, no reference is made here to the possibility of spouses choosing the applicable (religious) law. However, it is submitted that in determining the closest connection, sufficient weight should be attributed to the subjective element, namely the question of which legal system the spouses feel most closely connected to, and thus the legal system that they would choose. The fact that the Regulation requires the habitual residence of both spouses to be in the same State indicates a policy approach which only allows choices involving the legal systems of States with which the spouses' relationship has a close connection. However, the choice is in fact not as limited as it seems (see below).

c) Nationality

The choice of nationality, on the other hand, is not limited to a common nationality. This may lead to choosing a legal system that has a link with one of the spouses but not with the marriage.

In this case, if the nationality refers to a State with more than one legal system, the Regulation provides the following:

*"any reference to nationality shall refer to 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."*²⁶

This provision is useful for a situation in which the parties have chosen a law: either the internal rules will decide their choice, or their choice must be clear from the beginning, for instance, choosing the law of England and Wales rather than the law of the United Kingdom.²⁷

When the division of the legal systems is based not on territory, but on some other element (such as religion), the same provision as discussed above applies. A problem that is arising more and more frequently is that of dual nationality. For the first time in EU private international law, the Regulation contains an explicit rule, in Consideration 22, for this situation. However, *explicit* unfortunately does not mean *clear*.

The rule states that

“Where this 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, in full observance of the general principles of the European Union.” Author’s emphasis²⁸

So apart from being a compromise, what does this actually mean? In the first place, it seems to mean that the traditional way in which States deal with multiple nationality, may still be used: this is either preference for the forum nationality if it is one of the nationalities, or preference for the nationality of the closest connection.²⁹

However, Consideration 22 adds an important nuance: respect for EU law. The European Court of Justice has ruled on the matter a few times. The *Garcia Avello* case concerned the names of children with dual nationality (Belgian and Spanish).³⁰ The Court ruled that the Belgian authorities were not permitted to only take account of the Belgian nationality, ignoring the Spanish nationality on the basis that preference was given to the forum nationality; if the parents wished the Spanish nationality to be taken into account with a view to the application of Spanish law on the name of the children, the authorities had to allow this. Effectively this means that the individuals concerned were permitted to choose between their two nationalities and that the rule that the forum nationality receives preference could not always be used in the EU context. The Court’s reasoning was based on the non-discrimination principle and on EU citizenship.

Another judgment on dual nationality and its application in family law is *Hadadi*.³¹ This case concerned the application of the Brussels *Ibis* Regulation in case of dual nationality. Both spouses had dual nationality, namely French and Hungarian. The Brussels *Ibis* Regulation grants jurisdiction over divorce matters to the court of the State of which both spouses have nationality.³² The question arose whether both nationalities counted, and spouses could therefore decide whether to institute the divorce proceedings in France or Hungary, or whether the conflict between the two nationalities had to be resolved first. The European Court of Justice ruled that both nationalities bore equal weight, in other words spouses who have more than one common nationality have an available divorce forum in the countries of both those nationalities. As the Brussels *Ibis* Regulation already offers a number of alternative forums, dual nationality will simply add another available forum.

The Court stated that

“there is nothing in the wording of Article 3(1)(b) to suggest that only the

'effective' nationality can be taken into account in applying that provision. Article 3(1)(b), inasmuch as it makes nationality a ground of jurisdiction, endorses a link that is unambiguous and easy to apply. It does not provide for any other criterion relating to nationality such as, for example, how effective it is.³³ The Court adds that "the need to check the links between the spouses and their respective nationalities would make verification of jurisdiction more onerous and thus be at odds with the objective of facilitating the application of Regulation No 2201/2003 by the use of a simple and unambiguous connecting factor."³⁴

Of course one cannot merely transpose the reasoning in a case on jurisdiction to an issue of applicable law.³⁵ However, when speaking of applicable law, one should distinguish between choice and the connecting factors in the absence of choice. The arguments of the European Court of Justice about an unambiguous provision that does not require an effectiveness test are equally relevant for situations in which parties are allowed a choice of law.

Moreover, Consideration 22 uses the words "connecting factor". In cases where parties choose the law of their nationality, arguably the connecting factor is not the nationality in itself, but the choice. Moreover, because the connecting factor is choice, it is not essential that only one nationality can be considered. It should be up to individuals to use the nationalities they have. Therefore, Consideration 22 should be construed in such a way that it does not apply to the rule on choice. In sum, if there is no conflict, don't solve it.³⁶ Thus, when there is not a conflict between the two nationalities, both should be considered as equally important. There is no conflict here as their nationalities only offer a choice. Whether the spouses choose one or the other nationality really does not cause any problem. The choice should therefore be elaborated in this manner.

Reference should be made at this point to the Proposal for a Regulation on Matrimonial Property.³⁷ This Proposal, like the Rome III Regulation, contains a limited option for spouses to choose the applicable law and contains connecting factors for situations in which the spouses do not exercise their choice. In the absence of choice, the first connecting factor is the spouses' first habitual residence after their marriage. Where no common habitual residence exists, the law of the common nationality of the spouses applies. However, if the spouses have more than one common nationality, this connecting factor cannot be used.³⁸ This exclusion of the use of nationality in the case of dual nationality is not present in the provision on choice. Therefore, one could argue that the European legislator is making an important distinction here: where the spouses choose a law on the basis of nationality, it is not limited to only one nationality. Where a connecting factor is nationality, however, only one nationality can count.

d) Lex fori

The last element of choice is the law of forum (*lex fori*). At first sight, this looks like a compromise, especially in countries that always apply the *lex fori* to divorces. The option of choosing the *lex fori* combines efficiency and cost-effectiveness. This is so because if a court can apply its own law, less is demanded of lawyers and judges who know their own law best.

As already mentioned, one should bear in mind that these rules were initially drawn up in an amendment to the Brussels IIbis Regulation. This amendment contained the option of forum choice as well, and the legislator wanted to enable parties to align their court and law choices.

By permitting a choice for the *lex fori*, the legislator still enables such alignment. Moreover, it can be said that allowing such choice might be in line with the expectation of the parties: non-lawyers might consider it normal that a court applies its own law.

But what is the extent of this provision? It essentially means that parties can choose the legal systems of any of the States whose courts may have jurisdiction under Article 3 of the Brussels Ibis Regulation. This means that another possible choice should be added to the ones already discussed: the habitual residence of one of the parties. This could, in the words of the Brussels Ibis Regulation be the habitual residence of the respondent, the habitual residence of the applicant if he or she has resided in that State for at least one year, or the habitual residence of one of the parties in the case of a joint application. Thus, the parties can agree to institute their proceedings at the court of the habitual residence of one of them and choose the law of that State.

The limitation that does exist here is that the *lex fori*, and thus the elaborated choices, can only be that of one of the participating Member States, or of another State that would accept choice of law for divorce.

3 When can parties choose?

The Regulation provides that the parties may choose the applicable law at any time up to when the court is seized. Of course this means that a choice may also be modified at any time.³⁹

Interestingly, if the *lex fori* allows later choice, this is permitted. Belgium, for instance, allows choice up until the first appearance. This allows the parties more flexibility. The spouses must make the choice “in accordance with the law of the forum.”⁴⁰ The question arises whether this means that the formal requirements, which are discussed below, should not be determined by the Regulation at all, but only by the law of the forum. For instance, if a choice at the first hearing is permitted without the requirement that this be in writing, is this still permissible under the Regulation? Probably it is. This can place a different task upon judges of some participating States. These judges must verify whether the parties want to make a choice at the time of the first hearing.

The Regulation has been criticised for allowing choice at a very early stage.⁴¹ The parties may choose the law of their habitual residence at the time. It is possible that by the time the divorce gets to court, years later, the parties have lost all significant connection with the State whose law was chosen. The choice nevertheless remains valid. The Regulation therefore inadvertently allows for the choice of a law which has no connection with the parties, despite the words of Consideration 16: “*Spouses should be able to choose the law of a country with which they have a special connection or the law of the forum...*”

The Regulation does not provide any limit to how early the choice can be made. It is possible to make such choice even in a pre-nuptial agreement. Some would argue that the reference to “spouses” making a choice presumes that they are already married. To read such a limitation in the wording seems incorrect. If the spouses make a choice in a pre-nuptial agreement, they should be bound by it. If they do not become “spouses”, because after the pre-nuptial agreement the marriage is never concluded, the entire agreement, including the choice of law applicable to divorce, simply loses its effect.

4 Material validity

The material validity of the choice of law agreement is determined by the chosen law.⁴² This is a pragmatic solution and one also taken by the Rome I

Regulation.⁴³

However, the Regulation expresses a concern that the choice must be an informed choice.⁴⁴ There is also a concern in the Regulation that the equal rights of spouses must be protected.⁴⁵ Whether the safeguards in the Regulation are sufficient remains to be seen. There is an important job for lawyers and also for judges. The Regulation explicitly states that judges “*should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.*”⁴⁶ How exactly judges should do this is not entirely clear.

The Regulation contains some form of protection by providing that a spouse may rely on the law of his or her habitual residence to indicate a lack of consent.⁴⁷ This provision, also taken from the Rome I Regulation,⁴⁸ is meant to protect a weaker party: such a person should not be cajoled into something he or she is not aware of under the law he or she knows. It also protects people who have been given (maybe non-specialised) legal advice in the country where they live. As these solutions are the same as the ones under the Rome I Regulation, practitioners can rely on the practice under that instrument.

5 Formal validity

The Rome III Regulation requires the choice to be written, dated and signed by both spouses.⁴⁹ An electronic form is also considered writing, as long as there is a durable record. For example, if the spouses agree in an email on an applicable law, this will be valid.

If a participating State prescribes extra form requirements, these may be imposed.⁵⁰ If both spouses are habitually resident in the same participating Member State, the extra form requirements of this State must be respected. If they are habitually resident in two different participating Member States, the rules of one of these Member States must be respected. If only one spouse is habitually resident in a participating Member State, the rules of this Member State must be respected. If neither of the spouses habitually resides in a participating Member State, no extra form requirements are taken into consideration.

There is thus a clear differentiation depending on whether the spouses live in a participating Member State or not. The reason for this differentiation seems practical rather than principled: it is more difficult to determine extra requirements of the laws of third States, while participating States have to inform the Commission of their requirements.⁵¹

By imposing these formal requirements, the European Union legislator’s intention is to protect the parties and to make sure that their choice is informed. However, it remains to be seen whether the safeguards will be sufficient.

It is interesting to note that party autonomy in private international law is developing simultaneously in two opposite directions. On the one hand, parties are getting more freedom to choose the applicable law in domains such as divorce, matrimonial property⁵² and succession.⁵³ On the other hand, in the domain of contract law, where it has long been accepted that parties have a right to choose the law applicable to their contract, there is an increasing trend to protect weaker parties, such as consumers.⁵⁴ Ironically, as the law stands today, the protection afforded to consumers is greater than that afforded to divorcing spouses, where relationships can be complex and manipulation and even verbal, psychological or physical violence are not excluded.

6 Exceptions to choice

In addition to choice being limited, the Regulation also provides for certain exceptions. The general exceptions that the Regulation provides also apply in cases in which the parties chose the applicable law.

a) A fundamental right to divorce

In the first place, Article 10 states that if the applicable law makes no provision for divorce, the *lex fori* applies. The use of this rule is mandatory: it is not up to the discretion of the judge whether or not to apply the exception. Thus all the judges of the participating States are obliged to grant spouses (from whichever State and irrespective of the choice they made) access to divorce. It is unlikely that this provision will have much practical use: most legal systems in the world recognise the right to divorce. It is also highly unlikely that spouses will purposely choose a legal system that makes divorce impossible. However, Henricot gives the example where the spouses choose the law of a country where issues of personal status and divorce are governed by various religious laws.⁵⁵ If the internal connecting factors point to canon law, which renders divorce impossible, this law may not be applied.

The exception also comes into play when the chosen legal system does not grant the spouses equal access to divorce. This exception becomes relevant when the chosen legal system contains forms of divorce, such as that in Islamic law, in which the husband has the exclusive right to initiate the divorce. In such cases, the judge *must* (no discretion allowed) apply the forum law.

In verifying the foreign divorce law, the judge must take the entire foreign legal system into consideration. Take for example Moroccan family law, which offers a form of divorce to which both spouses have equal access, namely the *chiquaq*.⁵⁶ The judge would therefore have to apply Moroccan divorce law if the parties chose this law, and cannot use the exception of Article 10 on the basis that Moroccan law also contains the *talaq*, a form of divorce which requires the husband to take the initiative. The European judge can use the provisions on the *chiquaq* and thus apply Moroccan law. This argument is reinforced by the fact that Moroccan law also contains the *tamlík*, a clause according to which a man can grant his wife the right to divorce. Moroccan law thus recognises equality between the spouses.

However, if the only form of divorce that the foreign law permits is *talaq*, the judge would invoke the Article 10 exception.

If the chosen law falls in the ambit of Article 10, it is not clear whether the judge must first use Article 8 of the Regulation to find the law that would have been applicable in the absence of choice, or whether the judge must immediately revert to the forum law.

The provision on no equal access seems to particularly refer to men and women. It is not plausible to apply it to same-sex divorces because same-sex partners do not have the same access to divorce. In fact, the issue here is on the validity of the marriage and this is a different question for which the Regulation contains different provisions (see below).

In this sense, the European legislator has created a fundamental right to divorce.⁵⁷

b) Escape for the forum in some situations

The next exception to choice is contained in Article 13. This provision has two distinct parts. The first is that the courts of a Member State whose law does not provide for divorce, will not be obliged to pronounce the divorce. This part of the provision calls for little comment, as all of the participating Member States now

recognise divorce.

The second part of the provision is that if the law of a participating Member State (i.e. forum law) does not deem the marriage valid, there is no obligation on participating States to pronounce a divorce. This is similar to the same-sex conundrum. The provision is not really necessary, since Article 1 already determines that the validity of marriage is a matter that falls outside the scope of the Regulation. This exception does not refer to the chosen law, but the forum. Thus, if same-sex spouses choose Dutch law for their divorce, this would pose absolutely no problem if they institute the divorce proceedings in Belgium (a participating Member State). However, if they institute the proceedings in France, the French court might refuse to pronounce the divorce, despite the parties' choice, if the French court considers the marriage invalid.

c) Public policy

Finally, the Regulation contains a customary public policy exception.⁵⁸ This catch-all exception refers to equal rights, procedural elements etc.

7 Potential hurdles / confusion

a) Only State law

The way in which the rules are formulated makes clear that only the law of a State can be chosen.

However, parties can choose a State law that is based on religious law, or the law of a State which refers matters of personal status and divorce to different religious laws. Depending on the religion of the person, this law can apply through choice. The extent to which this is the case is closely linked to the question of how dual nationality will be treated, since many European citizens have dual nationality, and often also the nationality of a country where religious law is part of the law (such as Algeria or Morocco).

b) Finding the content of foreign law

It is not always easy to find the content of foreign law. Even in countries like Germany and the Netherlands, with well-established institutions or research entities which can assist, judges have expressed how difficult it can be to find, not only black-letter foreign law, but also the correct interpretation of that law, and moreover to do so in a timely manner.⁵⁹

One of the European Commission's responses to the lack of information is the Civil Justice Network which provides free online information.⁶⁰ However, the available information is not always adequate and up to date. Moreover, the website only contains information about EU legal systems while the Rome III Regulation may require judges to apply the law of a third State.⁶¹

c) Links to other fields of law

After all of this, we should not forget that the extent of the choice of the law applicable to divorce, is in fact very limited. The areas of law where the stakes are much higher, such as maintenance and matrimonial property, are separate. On maintenance, the European Union's recent Regulation allows a limited choice as well. These rules are different and different laws can be applicable. To know whether the law applicable to matrimonial property is permitted, at this stage we still have to turn to the national laws of all the Member States.⁶²

Also the issues of parental responsibility and which names the spouses will carry after the divorce, are separate questions, independent of the law applicable to the divorce.

A last link that deserves our attention is the one to mediation. The Regulation refers to courts and judges. It is clearly made for divorces pronounced by courts. And of course divorces have to be pronounced by court. However, national legislators try to promote mediation before the divorce, in order for parties to settle matters relating to the children, the family home, other aspects of matrimonial property and maintenance. These matters, as already stated, are independent of the grounds for divorce. However, in some legal systems the requirement to attempt to reach an agreement before the divorce is pronounced, is obligatory.

Therefore, in the end all these aspects of the law are closely related and a good lawyer should go about the whole divorce process carefully.

8 Conclusion

In its attempts to harmonise private international law, the European legislator is leading the way to using choice as a connecting factor. Parties in various branches of the law are increasingly being given the opportunity to decide for themselves which law will regulate their affairs. The choice in family matters, however, is not unlimited, but must have a link to the individuals' situation or to their relationship. With this limitation, the European legislator seeks to protect parties. Whether the protection is adequate remains to be seen in practice. Likewise, whether parties will take the opportunity to choose the law that will apply to their divorce also remains to be seen.

Noten

1 Regulation (EC) Nr. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L* 343 of 29 December 2010, p. 10.

2 On 21 June 2012 in fourteen EU Member States: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. The Regulation will be applicable in Lithuania as of 22 May 2014: Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L* 323 of 22 November 2012, pp. 18-19.

3 Recent research in Belgium shows that in the eight years that the provision has been in force, it has hardly been used: see J. Verhellen, *Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk*, Brugge: die Keure, 2012.

4 See House of Lords (European Union Committee) 52nd Report of Session 2005-2006, "Rome III – Choice of Law in Divorce" (HL Paper 272, 2007), available on <www.parliament.the-stationery-office.com/pa/ld200506/ldselect/ldcom/272/272.pdf>, p. 6.

5 HL Paper 272, 6: the countries that apply the *lex fori* are Cyprus, Denmark, Finland, Ireland, Sweden and the United Kingdom.

6 Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, *OJ L* 338 of 23 December 2003, 1.

7 Art. 3(1) of the Brussels *Ibis* Regulation.

8 According to French private international law before the entry into force of the Rome III Regulation: see B. Audit and L. d'Avout, *Droit international privé*, 6th edn, Paris: Economica, 2010, p. 591.

9 See Recital no. 15.

10 Recital no. 15.

11 H. Muir Watt, " 'Party Autonomy' in international contracts: from the makings of a myth to requirements of global governance", 2010 *ERCL* pp. 1-34 on pp. 9-10. (<www.columbia.edu/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf>)

12 For an interesting discussion on the legitimacy of the initial proposal, see A. Fiorini, "Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?" *International Journal of Law, Policy and the Family* 2008, pp. 178-205.

13 Spouses had the choice: any of the courts that would have jurisdiction on the basis of the rules of Art. 3 Brussels *Ibis*; the court of their last common habitual residence for more than three years, if this was not more than three years before the institution of proceedings; the court of the State of the nationality of one of the spouses (or the domicile of one of them in the case of the UK and Ireland, if these States were to participate in the Regulation).

14 See for instance Muir Watt " 'Party Autonomy' in international contracts: from the makings of a myth to requirements of global governance", *ERCL* 2010, pp. 1-34 on pp. 9-10. (<http://www.columbia.edu/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf>); K. Boele-Woelki, "For better or for worse: the Europeanization of international Divorce Law" *Yearbook of Private International Law* 2010, pp.1-26; M. Fallon, "Le nouveau droit du divorce international selon le règlement Rome III: une évolution tranquille", *RTDF* 2012, no. 2, pp. 291-317 on p. 313. At their Vienna meeting in 2003, the *Groupe européen de droit international privé* (GEDIP), a group of experts in the field, were in favour of a choice of applicable law in divorce, but only at the moment of the institution of proceedings and not before or during the marriage: see M. Fallon, P. Kinsch and C. Kohler (eds), *Le droit international privé européen en construction. Vingt ans de travaux de GEDIP*, Antwerp: Intersentia, 2011, p. 453. U.P. Gruber, "Scheidung auf Europäisch – die Rom III-Verordnung", *IPRAX* 2012 pp. 381-392 on p. 385 writes that a choice made before the proceedings must be carefully made: its validity is dependent on the court where the divorce is brought.

15 Art. 5 Rome III Regulation.

16 See also the European Commission's Practice Guide on the application of the

Brussels IIbis Regulation, stating at 13 that habitual residence is a factual criterion, and referring also to international conventions to support this statement; available on ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_en.pdf. It seems that this factual concept does not require legal residence. See C. Forsyth, “The Domicile of the Illegal Resident” *Journal of Private International Law* 2005, pp. 335-343, discussing both domicile and habitual residence and referring to English case law. The Belgian Code of Private International Law (Act of 16 July 2004, *Moniteur belge* 27 July 2004) explicitly states in Art. 4 that habitual residence does not require the residence to be legal.

17 ECJ case C-523/07, A [2009], ECR I-2805 § 34.

18 ECJ case C-452/93 P, *Magdalena Fernández v. Commissie* [1994], ECR I-4295, §22.

19 See ECJ cases 76/76, *Di Paolo* [1977], ECR 315; C-102/91, *Knoch* [1994], ECR I-4341; C-90/97, *Swaddling* [1999], ECR I-1075; C-372/02, *Adanez-Vega* [2004], ECR I-10761.

20 See R. Lamont, “Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law” *Journal of Private International Law* 2007, pp. 261-281.

21 ECJ cases C-523/07, A [2009], ECR I-2805 and C-497/10PPU, *Mercredi v. Chaffe* [2010], ECR I-14309.

22 Judgment in A, § 37-38.

23 Judgment in A, § 39.

24 Art. 14(b) Rome III Regulation.

25 Art. 15 Rome III Regulation.

26 Art. 14(c) Rome III Regulation.

27 Parties can choose the legal system of a non-participating State due to the universal application of the Regulation in participating States.

28 This Consideration is similar to Consideration 41 of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ L* 201 of 27 July 2012, 107.

29 This is also the approach taken by the Hague Convention of 1930, See also S. Bariatti, “Multiple nationalities and EU private international law. Many questions and some tentative answers”, *Yearbook of Private International Law* 2011, pp. 1-19; T. Kruger and J. Verhellen, “Dual nationality = double trouble?”, *Journal of Private International Law* 2011, pp. 601-626; J. Basedow, “Le rattachement à la nationalité et les conflits de nationalité en droit de l’Union

européenne” *Revue critique de droit international privé* 2010, pp. 427-456; J. Basedow, “Das Staatsangehörigkeitsprinzip in der Europäischen Union” *IPRax* 2011, pp. 109-116.

30 ECJ case C-148/02, *Garcia Avello* [2005], ECR I-11613.

31 ECJ case C-168/08, *Hadadi v. Mesko* [2009], ECR, I-6871

32 Art. 3(1)b) of the Brussels IIbis Regulation.

33 *Hadadi* judgment § 51.

34 *Hadadi* judgment § 55.

35 See also K. Boele-Woelki, “For better or for worse: the Europeanization of international Divorce Law” *Yearbook of Private International Law* 2010, pp. 1-26 on p. 18.

36 T. Kruger and J. Verhellen, “Dual nationality = double trouble?” *Journal of Private International Law* 2011, pp. 601-626.

37 See Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final, available at <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF>.

38 Art. 7 of the Proposed Regulation.

39 Art. 5(2) Rome III Regulation.

40 Art. 5(3) Rome III Regulation.

41 See P. Hammje, “Le nouveau règlement (UE) n° 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps”, *Rev.crit.DIP* 2011, pp. 291-338 on pp. 308-309, who writes that an early choice can make a divorce international even though it is purely internal at the moment of the proceedings. This author also points out that in this sense the Rome III Regulation goes even further than the Rome I Regulation (Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations, *OJ L* 177 of 31 July 2007, 6).

42 Art. 6(1) Rome III Regulation.

43 Art. 10(1) Rome I Regulation.

44 See Considerations 18 and 19.

45 Consideration 19

46 Consideration 18.

47 Art. 6(2) Rome III Regulation.

48 Art. & 02) Rome I Regulation.

49 Art. 7(1) Rome III Regulation.

50 Art. 7(2) and (3) Rome III Regulation. According to Art. 17, participating States have to inform the European Commission of such form requirements.

51 The Commission will collect the responses by the Member States and make this information available on the website of the European Civil Justice Network. However, the information has not yet been published.

52 See Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final, available at <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF>. Art. 7 of the Proposed Regulation.

53 See Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ L* 201 of 27 July 2012, 107.

54 See for example Art. 6 of the Rome I Regulation on the law applicable to consumer contracts and Art. 15-17 of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), *OJ L* 12 of 16 January 2012, 1 on jurisdiction over consumer contracts.

55 C. Henricot, "Droit applicable au divorce international : mise en application du règlement 'Rome III' ", *Journal des tribunaux* 2012, pp. 557-563 on 561.

56 Art. 97 of the Moroccan Family Code. See also M.-Cl. Foblets and M. Loukili, "Mariage et divorce dans le nouveau Code marocain de la famille: Quelles implications pour les Marocains en Europe?", *Revue Critique de Droit International Privé* 2006, pp. 521-555 on p. 549.

57 *Ibid* on p. 561.

58 Art. 12 Rome III Regulation.

59 Information obtained at a judges seminar organised in Brussels in December 2011 by RELIGARE, an EU-funded FP7 project.

60 <ec.europa.eu/civiljustice/index_en.htm>.

61 See HL Paper 272, 7 and K. Boele-Woelki, "For better or for worse: the Europeanization of international Divorce Law" *Yearbook of Private International Law* 2010, pp. 1-26 on p. 17.

62 There is a proposal at EU level on matrimonial property: Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes,

COM(2011) 126 final, available at <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF>.

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