GROUPE EUROPEEN DE DROIT INTERNATIONAL PRIVE
EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW

Proposal for a Regulation on jurisdiction, applicable law and recognition of judgments and decrees with regard to divorce and legal separation

Overview

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The European Group for Private International Law (GEDIP), as it has previously done in matters of Succession, Matrimonial Regimes and Maintenance, now seeks to promote debate on a document relating to all the international dimensions of divorce.

The text has been strongly influenced by the Rome III and Brussels IIa Regulations; certain provisions specifically relating to divorce have been replicated and others amended where reform was considered appropriate.

The adoption of the Recast Brussels IIa Regulation by Regulation 2019/1111 in no way diminishes the relevance of the GEDIP proposal. First, the text seeks to bring within a single instrument for the first time all the rules pertaining to jurisdiction, applicable law and recognition in matters of divorce. Second, and of greater significance, the text includes significant refinements of the rules within the Brussels IIa Regulation, (revision of the direct jurisdiction rules, provision for decisions delivered in third States) as well as the Recast Regulation 2019/1111 (recognition of divorce agreements).

This report highlights the main reforms embodied within the GEDIP proposal.

Scope of Application

Three points should be highlighted.

First, the text explicitly provides for the inclusion within its scope of marriages between persons of the same sex. These undoubtedly fall with the category of "marriage" and therefore their dissolution into that of "divorce". Notwithstanding the political difficulties that may arise from this inclusion, the Group was of the view that it was unacceptable to exclude same-sex divorces. On the other hand the text makes clear where appropriate that it does not apply to the dissolution of partnerships.

Second, nullity actions are excluded. Here there is a difference between Regulations 2201/2003 and 2019/1111 (which include nullity actions) and Regulation 1259/2010 (which does not). The autonomous characterisation and, consequently, the specificity of the conflict of laws rules, as well as of actions for nullity themselves (which frequently involve the intervention of state bodies) have led to a preference for a complete exclusion, despite the importance of this issue which is currently undergoing a complete renewal. It goes without saying that even if marriage annulment has been excluded from the text, for reasons of consistency, the Group does not intend to question the principle, which is part of the acquis communautaire, of the desirability of uniform rules of jurisdiction applicable to these proceedings.

This exclusion poses a particular difficulty in terms of preliminary questions. Article 1(3) (based on Article 2(2) and (3) of the Hague Choice of Court Convention) thus makes it possible not to completely exclude an application for a declaration of nullity of marriage arising merely as a

preliminary question, although such an application were it to be an object of the proceedings would be formally excluded from the scope of the instrument.

Finally, provision is made for the recognition of "non-judicial" divorces in Chapter 5. These are defined in Article 3(2) as including all divorces obtained without the assistance of a court within the meaning of Article 3(1).

Jurisdiction

The chapter on jurisdiction has been significantly amended compared to Regulations 2201/2003 and 2019/1111.

First, the provision on general jurisdiction now provides for a cascading hierarchy of grounds. The objective here is to combat the fragmentation of litigation which is permitted by the current Brussels II bis Regulation, even after its recast. As well as introducing a hierarchy, the importance of nationality as a basis of jurisdiction is reduced.

Second, provision is now made for prorogation. The approach adopted allows for limited party autonomy , which may be exercised at any time, but whose effects may exceptionally be ruled out by the judge if the clause proves manifestly unreasonable with regard to a party.

Article 6 aims to address the question where a prorogation clause designates the court of a non-member State. Its objective is to strike a balance between the effectiveness of the clause and the jurisdiction of the courts of the European Union. Article 6(2) aims to prevent a "domestic" dispute from being "internationalized" by a clause conferring jurisdiction on a third State

Extensive discussion took place on the possible introduction of a rule of "residual jurisdiction", which would provide for exceptional jurisdiction in favour of courts of the nationality of one or more spouses - comparable to Article 6 of Regulation 4/2009 on maintenance (Art. 6) - unless there is a clause conferring jurisdiction in favour of a third State. This particular rule of jurisdiction would have been a form of "privilege for European citizens".

Finally, this solution was excluded, in favour of a specific ground of jurisdiction found in Article 4(2)(d). The effect of this rule is that, if no court has jurisdiction on the basis of the habitual residence of the spouses (a and b) or the defendant (c), the European citizen who establishes his habitual residence in a Member State may bring an action before the courts of that State, without waiting for the one-year period required for other applicants.

This is a privilege of EU citizenship, but it differs greatly from a ground of jurisdiction based on nationality alone. First, jurisdiction requires the dual condition of habitual residence in a Member State and nationality. It also differs from the current Article 3 of Regulation 2019/1111 as it does not require the applicant to have the nationality of the State of residence and, above all, it is only available in the absence of the defendant's habitual residence in the Union. The use of the forum of the applicant's nationality is therefore much more strictly regulated.

Finally, other innovations are more ad hoc. In this respect, it should be noted in particular that a forum of necessity has been introduced (Art. 9), it being understood that the nationality of either spouse is likely to constitute the link with the forum seized in case of necessity.

It is also necessary to mention the existence in Article 10 of a rule on the transfer of jurisdiction inspired by Article 15 of Regulation 2201/2003, now Article 12 of Regulation 2019/1111, and of a reinforced rule on lis pendens in the event of proceedings before the courts of a third State, with, in addition, a requirement of "reasonable time" (Article 13). This last rule, partly based on the current Article 33 of Regulation 1215/2012, is intended to take into account the existence of proceedings in third countries, in particular as a result of the introduction of provisions on the recognition of judgments given in them (Articles 36 et seq.).

Applicable Law

The amendments introduced with respect to applicable law are less far reaching. In particular, Articles 16 and 17 of the proposal largely replicate Articles 5 and 8 of Regulation 1259/2010, but have been placed together for reasons of simplicity.

However, some changes have been introduced. The first is a limitation on freedom of choice, (Art. 18(3)), whereby the law designated by the parties will not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties. This wording is directly inspired by Article 8(5) of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations.

The second, which was ultimately adopted, is that of a possible renvoi from the law of a third State to that of a Member State (Art. 22(2)).

The third, more substantial change, concerns public policy. It was decided to move away from the wording of Articles 12, and especially 13, of Regulation 1259/2010, the latter having been abandoned. Article 23 returns to the traditional solution with regard to public policy.

Recognition of Decisions

The chapter on recognition is quite similar to the Regulations currently in force insofar as judgments given in another Member State are concerned.

Other changes are more significant.

The first is the inclusion of judgments given in third countries. There are two main reasons for this inclusion. On the one hand, GEDIP is generally in favour of the establishment of a common system for the recognition of judgments given in third countries. The solution had been proposed in civil and commercial matters at the sessions in Padua (2009) and Copenhagen (2010). The proposed text is based on the texts adopted at these sessions. On the other hand, it seemed impossible for the members of the group to try to organise a system for the circulation of non-judicial decisions in divorce matters without taking into account third States. These two reasons have therefore led to the introduction of a regime for the recognition of foreign decisions.

This regime is modelled on that for decisions given in Member States, albeit with some important differences, namely: the maintenance of a review of the jurisdiction of the court of origin (Article 37(a)); and the inclusion of a right of non-recognition in the event that the application has been brought before a foreign court while a case (not yet completed) was already pending in a Member State (Article 37(2)).

In all cases, the public-policy exception is maintained (Arts. 28 and 37). The traditional formulations have been repeated here, specifying that, as in the context of other regulations, such as the Brussels Ia Regulation, the clarifications relating to the conduct of the procedure (Article 28(b) and 37(1)(c)) in no way prevent a more general review of procedural public policy, incorporating in particular the fundamental requirements of Article 6 ECHR.

The second, and more significant change, consists in the drafting a specific legal regime for non-judicial divorces. This is found in the new chapter 5.

Non-judicial divorces

This is without doubt the most important innovation of the GEDIP text.

The formulation evolved considerably during the discussions. The starting point was of course the wording proposed by the *Sahyouni* judgment: divorces obtained (preferred to "pronounced") without the assistance of a court or public authority (ECJ, 20 December 2017, Case C-372/16, *Sahyouni*). It is this distinction between judicial divorces and other divorces, the very definition of which has evolved to give it greater precision, which has given rise to the definitions in Article 3 and the recognition regime in Articles 40 et seq.

The dividing line is now between authorities exercising "judicial functions" within the meaning of Article 3(1) (the wording of which is directly inspired by Article 3(2) of Regulation 2016/1103 on matrimonial property regimes) and others. The former are based on the method applying to the recognition of situations and the latter, at least in part, on the conflict of laws method. This is reflected in Articles 40, 41 and 42. It should be stressed that the divorces referred to are both divorces obtained in Member States and those obtained in third countries.

It should also be pointed out that the new Brussels IIa recast Regulation 2019/1111 provides for rules from which the present draft in part deviates. The solution adopted by the European legislator is very liberal (Art. 2 (1), (2) and (3) on the definition of the court, the authentic instrument and, above all, the "agreement" in divorce matters, combined with Arts 64 to 68 of the Regulation), but it only "applies" to consensual divorces "whose courts have jurisdiction under Chapter II" (Art. 64). The GEDIP solution is more inclusive, in that it applies to all divorces, but also a little stricter, in that its recognition regime is less liberal.

Article 40 refers to "judicial" divorces which are based on an authentic instrument or an agreement. Provided that the divorce has been the subject of judicial intervention within the meaning of Article 3(1), which presupposes in particular that it has an effect equivalent to that of a decision under the law of the State of origin, such divorces follow the system applicable to court judgments.

Other forms of divorce resulting from an act or agreement which do not satisfy the conditions of Article 3(1) (and referred to in Article 3(2)) are by contrast not purely and simply assimilated to authentic instruments. They are subject to additional controls, namely compliance with the applicable law, as well as public policy and irreconcilability with judgments or agreements between the same parties.

Such divorces may be a contract or a consensual act registered by an administrative authority (such as the registrar or a notary in several Member States, including in Latvia or Denmark, but also the new French consensual divorce). Purely consensual divorces must have been concluded in accordance with the law of nationality or the law of a spouse's residence in order to be effective in the territory of a Member State. The solution adopted seeks to retain the connecting factors of the legal option, while being more flexible, in particular in that it accepts that the law of the habitual residence of a single party may alone be relied upon.

They must also not be contrary to public policy or irreconcilable with a decision or other agreement. The wording of the rules on irreconcilability is adapted from the traditional rules, in particular the new Article 68 of Regulation 2019/1111. The wording is intended to reflect the possible divergence between an agreement and a decision or other agreement.

The treatment of unilateral divorces (such as the talaq in Islamic law) is more rigorous. In order to be recognised such divorces must meet two conditions. First, the divorce must have been pronounced in accordance with the applicable lawdesignated by the Regulation and, secondly, it must have been pronounced in a State whose law allows this method of divorce. This dual verification makes it possible both to monitor the law applied (including, under Art. 23, its conformity with public policy) and to ensure that such a purely unilateral divorce has not been pronounced in a State that would not admit it (for example a talaq pronounced in Switzerland or Australia).

Ordinarily, purely unilateral divorces must have been unequivocally accepted by the other party in order to be recognised. One possible exception, envisaged by the final clause of Art 42(1), is where there has been the passage of a relatively long period of time since the pronouncement of the dissolution. The reality of family life could in such a case lead to the conclusion that this divorce pronounced in accordance with the applicable law is valid in Europe. . On the other hand, this criterion may help to assess the recognition of such a divorce pronounced at a time when one of the spouses was residing in a country that does not have this form of dissolution of the marriage.

Finally, the rules relating to irreconcilable decisions are the same as those in Article 41.