

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

Meeting in Katowice —15 September 2019

CHAPTER I. Scope and definitions

Article 1: Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation, irrespective of the sex of the spouses.
2. This Regulation shall not apply to the following matters:
 - (a) the legal capacity of natural persons;
 - (b) the existence, validity, recognition or annulment of a marriage;
 - (c) the dissolution of a partnership;
 - (d) the names of the spouses;
 - (e) the property effects of the marriage;
 - (f) parental responsibility;
 - (g) maintenance obligations;
 - (h) trusts and succession.
3. Notwithstanding paragraph 2, a dispute shall not be excluded from the scope of the Regulation where a matter excluded under that paragraph arises only as a preliminary question, in particular as a defence or as a counterclaim.

Article 2: Relationship with Regulations (EC/EU) No 4/2009, 650/2012 and 2016/1103

This Regulation shall not affect the application of Regulations (EC/EU) No 4/2009, 650/2012 and 2016/1103.

Article 3: Definitions

1. For the purposes of this Regulation, "court" shall include any judicial authority, as well as any other authority or legal professional person competent in matters of divorce or legal separation who exercises judicial functions or acts under the delegation of powers of or under the supervision of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to their impartiality and the right of all parties to be heard, and that, in accordance with the law of the State in which they exercise their functions, the decisions they render:
 - (a) are subject to appeal to or review by a judicial authority; and

(b) have a force and effect equivalent to a decision given by a judicial authority in the same matter.

2. For the purposes of this Regulation, "non-judicial divorce" shall include all divorces obtained without the assistance of a court within the meaning of Article 3(1).

CHAPTER II. Jurisdiction

Article 4: General jurisdiction

In matters relating to divorce or legal separation, jurisdiction shall lie with the courts of the Member State in whose territory, at the date proceedings are commenced:

1. In the event of a joint application, either of the spouses is habitually resident.
2. In other cases:
 - (a) the spouses are habitually resident; or, failing that,
 - (b) the spouses were last habitually resident, insofar as one of them still resides there; or, failing that
 - (c) the respondent is habitually resident; or, failing that
 - (d) the applicant is habitually resident if he or she has resided there for at least one year immediately before the application was made, or is a national of a Member State.

Article 5: Choice of a court of a Member State

1. The spouses may agree that the court of the habitual residence of either one of them, or of the nationality of one of them, shall have exclusive jurisdiction to hear their divorce. Such a choice may be made at any time.
2. The agreement shall be in writing, dated and signed by the parties. Any transmission by electronic means which makes it possible to record the agreement permanently shall be considered to be in written form.
3. The court seised shall not give effect to the agreement if its application would result in manifestly unfair or unreasonable consequences for either party.

Article 6: Choice of a court of a third State

1. The court of a Member State seised of a request falling within its jurisdiction under this Regulation and in respect of which the parties have agreed that one or more courts of a third State shall have exclusive jurisdiction by an agreement meeting the conditions laid down in Article 5 shall not hear the dispute until the designated court has decided not to exercise jurisdiction.

It shall stay its proceedings until such time as the designated court has been seised or, after having been seised, has declined jurisdiction. It shall decline jurisdiction where the

designated court has given a judgment capable of recognition under the law of the State of the court seised.

However, it may hear the dispute if it appears that:

- (a) The designated court will not decide within a reasonable time; or
- (b) The designated court will give a judgment which cannot be recognised under the law of the State of the court seised; or
- (c) The agreement would produce manifestly unfair or unreasonable consequences for either party.

2. The choice by the parties of a court of a third State shall have no effect where all the other elements of the dispute are located at the time of that choice in a single Member State.

Article 7: Counterclaim

The court before which proceedings are pending on the basis of Article 4 or Article 5 shall also have jurisdiction to examine a counterclaim, insofar as that counterclaim falls within the scope of this Regulation.

Article 8: Conversion of legal separation into divorce

Without prejudice to Article 4 or Article 5, the court of a Member State which has given a decision granting a legal separation shall also have jurisdiction to convert that legal separation into a divorce, if the law of that Member State so provides.

Article 9: forum of necessity

Where no court of a Member State has jurisdiction pursuant to Articles 4, 5, 6 and 7, the courts of a Member State may, exceptionally, rule on the divorce or legal separation if proceedings cannot reasonably be brought or are not possible in a third State with which the case has a substantial connection.

The case must have a sufficient link with the Member State of the court seised.

Article 10: Transfer of jurisdiction

By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State with which the spouses have a special connection is better placed to hear the matter in whole or in part:

- (a) stay the proceedings and invite the parties to bring an application before the court of that other Member State in accordance with Articles 4 to 8; or,
- (b) request a court of another Member State to exercise its jurisdiction in accordance with Articles 4 to 8.

Article 11: Seising of a court

A court shall be deemed to be seised, including in cases where preliminary conciliation or mediation is mandatory:

- (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have service effected on the respondent; or
- (b) if the document has to be served before being lodged with the court, at the time when it is received by the first authority responsible for service, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have the document lodged with the court.

Article 12: Examination as to jurisdiction

Where a court of a Member State is seised of a claim over which it has no jurisdiction as to the substance of the matter under this Regulation and over which a court of another Member State has jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 13: Lis pendens and dependent actions

1. Where applications for divorce or legal separation between the same parties are instituted before courts of different Member States, the court second seised shall of its own motion stay its proceedings until the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In such a case, the party who brought the action before the court second seised may bring the action before the court first seised.

3. Where applications for divorce or legal separation are brought between the same parties before a court of a Member State and a court of a third State, the court of the Member State second seised shall automatically stay the proceedings if the court of the third State is expected to give a decision within a reasonable time which is capable of recognition in that Member State and if the court of the Member State concerned considers that the stay of proceedings is necessary for the proper administration of justice.

Article 14: Provisional and protective measures

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking provisional or protective measures provided for by the law of that Member State with regard to persons or property present in that State, even if, under this Regulation, a court of another Member State has jurisdiction as to the substance.
2. The measures taken pursuant to paragraph 1 shall cease to have effect when the court of the Member State having jurisdiction to hear the case under this Regulation has taken the measures it considers appropriate.

CHAPTER III. Applicable law

Article 15: Universal application

The law designated by this Regulation shall apply whether or not it is the law of a participating Member State.

Article 16: Applicable law in the absence of a choice by the parties

In the absence of a choice pursuant to Article 17, divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses are habitually resident at the time the court is seised; or, failing that,
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that,
- (c) of which both spouses are nationals at the time the court is seised, unless the spouses have more than one common nationality; or, failing that,
- (d) where the court is seised.

Article 17: Choice of applicable law by the parties

1. 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 of a common habitual residence of the spouses during the marriage; or
- (b) the law of the State of nationality of either of the spouses; or
- (c) the law of the forum, including where the forum has jurisdiction by virtue of a choice-of-court agreement under Article 5.

2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and amended at any time, but not later than the time when the court is seised.

3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceedings. In that event, such designation shall be recorded in court in accordance with the law of the forum.

4. In the case of multiple nationalities, the choice provided for in paragraph 1(b) may be made under the law of one of the States of which either spouse is a national.

Article 18: Consent and material validity

1. The existence and validity of an agreement on choice of law or any term thereof, shall be determined by the law which would govern it under this Regulation if the agreement or term were valid.
2. Nevertheless, a spouse, in order to establish that he or she did not consent, may rely upon the law of the country in which he or she has his or her habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law specified in paragraph 1.
3. Unless the parties have been fully informed and are aware of the consequences of their choice at the time of designation, the designated law shall not apply where its application would result in manifestly unfair or unreasonable consequences for either party.

Article 19: Formal validity

1. The agreement referred to in Article 17(1) and (2) shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.
2. However, if the law of the Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply.
3. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.
4. If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

Article 20: Conversion of legal separation into divorce

1. Where legal separation is converted into divorce, the law applicable to divorce shall be the law applied to the legal separation, unless the parties have agreed otherwise in accordance with Article 17.
2. However, if the law applied to the legal separation does not provide for the conversion of legal separation into divorce, Article 16 shall apply, unless the parties have agreed otherwise in accordance with Article 17.

Article 21: Application of the law of the forum

Where the law applicable pursuant to Article 16 or Article 17 makes no provision for divorce, the law of the forum shall apply.

Article 22: Exclusion of renvoi

1. Where this Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law.
2. However, where Article 16 prescribes the application of the law of a third State and the rules of private international law in force in that State refer to the law of a Member State, the latter law may apply.

Article 23: Public policy

Application of a provision of the law designated by virtue of this Regulation may be refused only if such application has an effect which is manifestly incompatible with the public policy of the forum.

Article 24: States with two or more legal systems – territorial conflicts of laws

Where a State comprises several territorial units, each of which has its own system of law or a set of rules concerning matters governed by this Regulation:

- (a) any reference to the law of such State shall be construed, for the purposes of determining the law applicable under this Regulation, as referring to the law in force in the relevant territorial unit;
- (b) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- (c) 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 the absence of choice, to the territorial unit with which the spouse or spouses have the closest connection.

Article 25: States with two or more legal systems – inter-personal conflicts of laws

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons concerning matters governed by this Regulation, any reference to the law of such a State shall be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouse or spouses has or have the closest connection applies.

Article 26: Non-application of the Regulation to internal conflicts of laws

A Member State in which different systems of laws or sets of rules apply to matters governed by this Regulation shall not be required to apply this Regulation to conflicts of laws arising solely between such different systems or sets of rules.

CHAPTER IV. Recognition of decisions

Section 1: Decisions given in a Member State

Article 27: Recognition of a decision given in a Member State

1. A decision given in a Member State shall be recognised in the other Member States without any procedure being required.
2. In particular, and without prejudice to paragraph 3, no procedure shall be required for updating the civil-status records of a Member State on the basis of a decision relating to divorce or legal separation given in another Member State, and against which no further appeal lies under the law of that Member State.
3. Any interested party may apply for a ruling that the decision be or not be recognised.

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a decision is raised as an incidental question in a court of a Member State, that court may determine that matter.

Article 28: Grounds for non-recognition of a decision given in a Member State

A decision relating to a divorce or legal separation shall not be recognised:

- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
- (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence, unless it is determined that the respondent has accepted the decision unequivocally;
- (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or
- (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 29: Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 29(a) may not be applied to the rules of jurisdiction set out in Articles 3 to 8.

Article 30: Differences in applicable laws

The recognition of a decision may not be refused because the law of the Member State in which recognition is sought would not allow divorce or legal separation on the same facts.

Article 31: Non-review as to substance

Under no circumstances may a decision be reviewed as to its substance.

Article 32: Stay of proceedings

1. A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.
2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

Article 33: Documents

1. A party seeking or contesting recognition shall produce:
 - (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
 - (b) the certificate referred to in Article 35.
2. In addition, in the case of a judgment given in default, the party seeking recognition or requesting the issue of a declaration of enforceability must produce:
 - (a) the original or a certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or
 - (b) any document indicating that the defendant has accepted the decision unequivocally.

Article 34: Absence of documents

1. If the documents referred to in Article 34(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.
2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 35: Certificate concerning decisions in matrimonial matters

The court of a Member State of origin shall, at the request of any interested party, issue a certificate using a model form.

Section 2. Decisions given in a third State

Article 36: Recognition of decisions given in a third State

1. A decision given in a third State shall be recognised in the Member States without any procedure being required.
2. In particular, and without prejudice to paragraph 3, no procedure shall be required for updating the civil-status records of a Member State on the basis of a decision relating to divorce or legal separation given in a third State, and against which no further appeal lies under the law of that third State.
3. Any interested party may apply for a decision that the decision be or not be recognised.

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a decision is raised as an incidental question in a court of a Member State, that court may determine that matter.

Article 37: Grounds for non-recognition of a decision given in a third State

1. A decision relating to a divorce or legal separation given in a third State shall not be recognised:
 - (a) if the court of the State of origin has declared itself competent in the absence of a sufficient link between the State of origin and the dispute, unless the party opposing recognition has accepted the jurisdiction of the court of the State of origin;
 - (b) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
 - (c) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence, unless it is determined that the respondent has accepted the decision unequivocally;
 - (d) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought;
 - (e) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought; or
 - (f) if it is still subject to ordinary appeal in the State of origin.

2. A decision on divorce or legal separation given in a third State need not be recognised if the application was made in the State of origin after an application for divorce or legal separation between the same parties had been brought before the courts of a Member State.

Article 38: Non-review as to substance

Under no circumstances may a decision be reviewed as to its substance.

Article 39: Documents

1. A party seeking recognition of a decision rendered in a third State must produce:
 - (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity; and
 - (b) in the case of a decision rendered by default, the original or a certified copy of the document attesting that the document instituting the proceedings or an equivalent document was served on the defaulting party;
 - (c) any document necessary to establish that the decision is not subject to ordinary appeal in the State of origin, that it has been served on the party against whom it has been pronounced and that it is enforceable in that State.
2. A certified translation of the documents shall be produced if the court or competent authority so requires, ex officio or at the request of a party.

CHAPTER V. Acts received by a court and non-judicial divorces

Article 40: Recognition of authentic instruments and divorce agreements

Documents formally drawn up or registered as authentic instruments and agreements on divorce which are received by a foreign court within the meaning of Article 3(1) shall be recognised under the same conditions as decisions.

Article 41: Consensual divorces

1. The consensual dissolution of a marriage, obtained without the assistance of a court within the meaning of Article 3(1), shall have effect in the territory of a Member State if it has been concluded and registered in accordance with the law of the State of nationality or habitual residence of either spouse at the time of dissolution.
2. A consensual divorce will not be given effect:
 - (a) if such effect is manifestly contrary to public policy in the requested Member State. In particular, effectiveness will be refused if it appears that before the conclusion of the agreement, one of the spouses was not properly informed of the effects of the agreement or if his or her consent was not entirely free;
 - (b) if the agreement is irreconcilable with a judgment given or an agreement concluded between the same parties in the requested Member State; or

- (c) if the agreement is irreconcilable with a previous decision or agreement given in another Member State or in a third State in a case between the same parties, provided that the first decision or agreement fulfils the conditions necessary for its effectiveness in the requested Member State.

Article 42: Unilateral divorces

1. The dissolution of a marriage based solely on a unilateral declaration and obtained without the assistance of a court within the meaning of Article 3(1) shall have effect in the territory of a Member State only if it has been obtained in a State whose law so permits, is in accordance with the applicable law designated pursuant to Chapter III and has been accepted with certainty by the other spouse or if, despite the lack of acceptance by the other spouse, its recognition is not contrary to public policy in the forum.
2. A unilateral divorce will not be given effect:
 - (a) if the unilateral declaration is irreconcilable with a judgment given or an agreement concluded between the same parties in the requested Member State; or
 - (b) if the unilateral declaration is irreconcilable with a previous decision or agreement given in another Member State or in a third State in a case between the same parties, provided that the first decision or agreement fulfils the conditions necessary for its recognition in the requested Member State.