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THE EUROPEAN UNION**

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NOTE

from : Presidency
to : Committee on Civil Law Matters (Rome III)
No. prev. doc. : 17021/06 JUSTCIV 291 + ADD 1 - 16
No. Cion prop. : 11818/06 JUSTCIV 174
Subject : Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

Delegations will find herewith the text as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome III) and the comments made by delegations (see 17021/06 JUSTCIV 291 + ADD 1 - 16).

Proposal for a
COUNCIL REGULATION
amending Regulation (EC) No 2201/2003 as regards jurisdiction **as well as** introducing rules
concerning applicable law in matters **of divorce and legal separation**

[...]

Article 1

Regulation (EC) No 2201/2003 is amended as follows:

- (1) the title is replaced by the following:

“Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and (...) matters of parental responsibility as well as applicable law in **matters of divorce and legal separation**”

- (2) the following Article 3a is inserted:

“Article 3a

Choice of court by the parties in proceedings relating to divorce and legal separation

1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided **that, at the time of the conclusion of the agreement**, they have a substantial connection with that Member State by virtue of the fact that

- (a) any of the grounds of jurisdiction listed in Article 3 applies, or

- (b) it is the **Member State** of the spouses' last (...) habitual residence for **at least** three years **provided that that period did not end more than three years before the court was seised**, or
- (c) one of the spouses **has the nationality** of that Member State [or, in the case of the United Kingdom and Ireland, has his or her “domicile” in the territory of one of the latter Member States].¹
2. An agreement conferring jurisdiction **may be concluded at any time, but at the latest at the time the court is seised.**
3. **OPTION 1: Such agreement** shall be expressed in writing and signed by both spouses.

OPTION 2: Such agreement shall be concluded in accordance with the formal requirements of a marriage contract under the law of the place where the agreement was made or under the law designated pursuant to Article 20a.

OPTION 3: Such agreement shall be concluded in accordance with the formal requirements provided for by the law of the place where the agreement was made.

4. **The jurisdiction conferred by agreement shall be exclusive unless the spouses have agreed otherwise.**

¹

DELETED

5. Notwithstanding an agreement conferring exclusive jurisdiction, a court of a Member State referred to in paragraph 1 before which the defendant enters an appearance shall have jurisdiction. This rule shall not apply where an appearance was entered to contest the jurisdiction.”

- (3) In Articles 4 and 5, the terms “Article 3” are replaced by the terms “Articles 3 and 3a [and 7]”.
- (4) Article 6 is deleted;
- (5) Article 7 is replaced by the following:

"Article 7

Subsidiary jurisdiction

Where **neither of the spouses** is habitually resident in the territory of a Member State and **the spouses** do not have a common nationality of a Member State, [or, in the case of the United Kingdom and Ireland do not have their “domicile” within the territory of one of the latter Member States,]¹ the courts of a Member State **have jurisdiction** by virtue of the fact that:

- (a) the spouses had their (...) [previous] [**last**] habitual residence in the territory of that Member State for at least [three] years **provided that that period did not end more than three years before the court was seised**, or

¹ **DELETED**

(b) **either** of the spouses has the nationality of that Member State[, or, in the case of United Kingdom and Ireland, has his or her “domicile” in the territory of one of the latter Member States]¹.”

(6) In Article 12 (1), the terms “Article 3” are replaced by the terms “Articles 3 and 3a”².

(7) The following Chapter IIa is inserted:

“CHAPTER IIa

Applicable law in matters of divorce and legal separation^{3 4}

Article 20a

Choice of law by the parties

1. The spouses may agree to designate the law applicable to divorce and legal separation. The spouses may agree to designate one of the following laws:

(a1) the law of the State where the spouses are habitually resident⁵ at the time of the designation, or

(a) the law of the State where the spouses were last habitually resident insofar as one of them still resides there⁶ **at the time of the designation, or**

1 **DELETED**

2 t should be discussed whether Article 7 should be mentioned.

3 Further consideration will be given to the problems resulting from the absence of divorce in the substantive law of one Member State.

4 A recital should indicate that the scope of the applicable law covers only divorce and legal separation as such, but not the consequences relating to property, maintenance and other issues.

5 Note for the translators: See Article 3(a), 1st indent, of Regulation 2201/2003.

6 Note for the translators: See Article 3(a), 2nd indent, of Regulation 2201/2003.

- (b) the law of the State of the nationality¹ of either spouse [or, in the case of United Kingdom and Ireland, of the “domicile” of either spouse,]² **at the time of the designation, or**
- (c) [the law of the State **where** the spouses **were habitually resident** for a **continuous period of at least five years, or**]³
- (d) the law of the **forum**.⁴

2. **An agreement designating the applicable law may be concluded at any time, but at the latest at the time the court is seised.**

3. **OPTION 1: Such agreement** shall be expressed in writing and signed by both spouses.

OPTION 2: Such agreement shall be concluded in accordance with the formal requirements of a marriage contract under the law of the place where the agreement was made or under the law designated pursuant to paragraph 1.

OPTION 3: Such agreement shall be concluded in accordance with the formal requirements provided for by the law of the place where the agreement was made.

¹ Note for the translators: See Article 3(b) of Regulation 2201/2003.

² It should be examined whether this provision needs to be extended to “domicile” in cases of other countries using a similar concept, or whether an explanation to this effect in a recital would be sufficient.

³ The Presidency would wish to discuss in the Committee whether this provision is necessary.

⁴ Note of the Presidency: It is understood that *lex fori* would only apply if the court seised has jurisdiction under the Regulation.

Article 20b

Applicable law in the absence of choice by the parties

1. In the absence of a choice pursuant to Article 20a, 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**¹ or, failing that,
 - (b) where the spouse **were last habitually resident** insofar as one of them still resides there² **at the time the court is seised** or, failing that,
 - (c) of **the nationality of** both spouses (...) [, or, in the case of United Kingdom and Ireland, **of the “domicile” of both spouses,**]³ **at the time the court is seised** or, failing that,
 - (d) where the **court is seised**.

2. **Where the law applicable pursuant to paragraph 1 (a), (b) or (c) does not provide for divorce, the law of the forum shall apply.**

¹ Note for the translators: See Article 3(a), 1st indent, of Regulation 2201/2003.

² Note for the translators: See Article 3(a), 2nd indent, of Regulation 2201/2003.

³ See footnote on Article 20a(1)(b).

Article 20c

*Application of foreign law*¹

(deleted)

Article 20c1

Universal application

The law designated by this Regulation shall be applied whether or not it is the law of a Member State.²

Article 20d

Exclusion of renvoi

The application of a law designated under this Regulation means the application of the rules (...) **in force in that country** other than its rules of private international law.³

Article 20e

Public policy

The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy (**ordre public**) of the forum."⁴

¹ The Presidency suggests to move this provision to a recital that reads as follows: "Where a law of another Member State is applicable, the court may, in particular, make use of the European Judicial Network in civil and commercial matters to be informed of its contents."

² Note for the translators: See Article 3 of 9751/7/06.

³ Note for the translators: See Article 15 of the 1980 Rome Convention (*mutatis mutandis*).

⁴ Note for the translators: See Article 26 of 9751/7/06.

Article 1a
Transitional provisions

1. **The provisions of this Regulation shall apply to legal proceedings instituted, and to agreements referred to in Articles 3a and 20a concluded after its date of application in accordance with Article 2.**

2. **However, an agreement referred to in Articles 3a and 20a concluded in accordance with the national law of a Member State before the date of application in accordance with Article 2 shall also be given effect, provided that it fulfils the conditions set out in Articles 3a and 20a.**

Article 2
Entry into force

This Regulation shall enter into force on **the** twentieth day following (...) its publication in the *Official Journal of the European Union*.

It shall apply from [1 March 2008].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the Council
The President
[...]