

# **Brussels IIa and Rome III Regulations in cross-border divorce and separation cases**

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- European e-Justice Portal:  
<https://e-justice.europa.eu/home.do>
- On family matters:  
[https://e-justice.europa.eu/content\\_family\\_matters-44-en.do](https://e-justice.europa.eu/content_family_matters-44-en.do)
- European Judicial Network (EJN) in civil and commercial matters:  
[https://e-justice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do?init=true](https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do?init=true)
- EU law:  
<http://eur-lex.europa.eu>
- EU case law:  
<http://curia.europa.eu>
- HCCH (Hague Conference on Private International Law)  
<https://www.hcch.net/en/home>

# I. General overview

## I.1) EU legal instruments in family matters

- a) Overview of the EU PIL instruments governing selected aspects of family law
- b) The interplay with the international legal instruments
- c) What is next: the Brussels IIa Recast proposal

# **I.1.a) Overview of the EU PIL instruments governing selected aspects of family law**

## **Scope of application**

### **of the EU Regulations in family matters**

## Reg. 2201/2003 (Brussels IIa) of 27.11.2003

- Repealing Reg. 1347/2000 (Brussels II)
- concerning **jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility**
- it applies since 1 March 2005
- binding on all EU MS (including the UK and Ireland) with the **exception of Denmark**

## **Art. 1(1)**

**Civil matters relating to:**

- a) divorce, legal separation or marriage annulment;**
- b) attribution, exercise, delegation, restriction or termination of parental responsibility**

## Reg. 4/2009 (Maintenance) of 18.12.2008

- Concerning **jurisdiction, applicable law, recognition and enforcement of decisions and cooperation** in matters relating to maintenance obligations (complete PIL instrument)
- entry into force: 30 January 2009
- it applies since 18 June 2011
- binding on all EU MS (including the UK and Ireland) with the **exception of Denmark** (which has nonetheless implemented the contents of this Reg. to the extent that it amends Reg. 44/2001)

## Art. 1

Maintenance obligations arising from

- **a family relationship**
- **parentage**
- **marriage**
- **affinity**



broad notion

## **Reg. 1259/2010 (Rome III) of 20.12.2010**

- **Enhanced cooperation in the area of the law applicable to divorce and legal separation**
- **17 MS** participating
  - originally, 14 MS (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia)
  - 3 MS joined at a later stage (Lithuania, Greece, Estonia)
- it applies since 21 June 2012

## **Reg. 650/2012 (Succession) of 4.7.2012**

- Concerning **jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments** in matters of succession, and the creation of a **European Certificate of Succession** (complete PIL instrument)
- it applies to deaths on or after 17 August 2015
- UK, Ireland and Denmark opted out

## Art. 1

- **Succession to the estates of deceased persons** (not revenue, customs or administrative matters)
- **exclusions:** status of natural persons and family relationships; legal capacity; disappearance, absence or presumed death; property regimes; maintenance obligations (other than those arising from death); formal validity of dispositions of property upon death made orally; property rights; company law; trusts; nature of rights *in rem*; recording in a register of rights in immovable or movable property

# Reg. 2016/1103 (Matrimonial property) of 24.6.2016

- **Enhanced cooperation** in the area of **jurisdiction, applicable law** and the **recognition and enforcement of decisions** in matters of matrimonial property regimes (complete PIL instrument)
- it applies since 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part (info at <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32016R1104>)

## Art. 1

- **Matrimonial property regimes** (not revenue, customs or administrative matters)
- **exclusions:** legal capacity of spouses; existence, validity or recognition of marriage; maintenance obligations; succession to the estate of a deceased spouse; social security; entitlement to transfer or adjustment between spouses of rights to retirement or disability pension; nature of rights *in rem* relating to a property; recording in a register of rights in immovable or movable property

# Reg. 2016/1104 (Registered partnerships) of 24.6.2016

- **Enhanced cooperation** in the area of **jurisdiction, applicable law** and the **recognition and enforcement of decisions** in matters of the property consequences of registered partnerships (complete PIL instrument)
- it applies since 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part (info at <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32016R1104>)

## Art. 1

- **Property consequences of registered partnerships** (not revenue, customs or administrative matters)
- **exclusions:** legal capacity of partners; existence, validity or recognition of registered partnerships; maintenance obligations; succession to the estate of a deceased partner; social security; entitlement to transfer or adjustment between partners of rights to retirement or disability pension; nature of rights *in rem* relating to a property; recording in a register of rights in immovable or movable property

# **I.1.b) The interplay with the international legal instruments**

# 1980 Hague Convention (Child abduction)

- entered into force on 1 December 1983
- **in force in 100 States** (all EU MS)
- most recently: most recently: Tunisia since 1.10.2017, Cuba 1.12.2018, Guyana 1.5.2019, Barbados 1.10.2019)
- interplay with **BIIa Reg.** with regard to child abduction (the Reg. **complements** the 1980 Hague Conv. **in intra-EU cases**)

# 1996 Hague Convention (Child protection)

- entered into force on 1 January 2002
- **in force in 49 States** (all EU MS)
- most recently: most recently: Cuba since 1.12.2017, Honduras 1.8.2018, Fiji 1.4.2019, Paraguay 1.7.2019; only signatory States: USA, Canada, Argentina)
- only signatory States: USA, Canada, Argentina
- Brazil is not a Contracting State
- interplay with **BIIa Reg.** with regard to the **applicable law to parental responsibility matters** (not governed by the Reg.)

# 2007 Hague Protocol (law applicable to maintenance obligations)

- entered into force on 1 August 2013
- **in force in 30 States** (all EU MS, except the UK and Denmark, plus Serbia, Kazakhstan and Brazil)
- only signatory State: Ukraine
- interplay with **Maintenance Reg.** with regard to the **law applicable to maintenance obligations** (Art. 15 of the Reg. directly refers to the Protocol)

# I.1.c) What is next: the Brussels IIa Recast proposal

**Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction**

<https://eur-lex.europa.eu/eli/reg/2019/1111/oj>

# Overall framework

When addressing a cross-border family dispute  
intra EU countries:

	jurisdiction	applicable law	recognition and enforcement
<b>matrimonial matters</b>	Brussels IIa	Rome III	Brussels IIa
<b>maintenance</b>	Reg. 4/2009	Reg. 4/2009 + 2007 Hague Protocol	Reg. 4/2009 (+ 2007 HP)
<b>succession</b>	Reg. 650/2012	Reg. 650/2012	Reg. 650/2012
<b>property regimes</b>	Reg. 2016/1103-1104	Reg. 2016/1103-1104	Reg. 2016/1103-1104

## **2) EU family law instruments ‘in action’**

The autonomous concepts under EU law

# Introduction

- existing diversity among substantive national legislations
- harmonisation
  - **interpretation** of the CJEU (preliminary ruling pursuant to Art. 267 TFEU and possible urgent procedure),
  - **terminology**, i.e. through a number of common definitions, PIL and procedural rules given for the purposes of application of these legal instruments

# 1) COURT (Art. 2 BIIa, Art. 2 Maint., Art. 2 RIII, Art. 3 Succ.)

- all authorities in the MS with jurisdiction in the matters falling within the scope of each Reg.
- broad definition

- CJEU, 20.12.2017, C-372/16, *Sahyouni*

Divorce resulting from a **unilateral declaration** made by one of the spouses **before a religious court** in Syria (private divorce): is it a **divorce decision for the purposes of Rome III Reg.?**

- **NO**
  - Reg. covers **only** divorces pronounced
    - **by a national court** or
    - **by a public authority, or under its supervision** (coherence with the notion of “judgment” under BIIa Reg.)

## 2) **JUDGMENT** or **DECISION** (Art. 2 BIIa, Art. 2 Maint., Art. 3 Succ.)

- any decision on the matters falling within the scope of each Reg., given by a court of a MS, whatever the decision may be called (e.g. order, decree, judgment, etc.)
- broad definition

### 3) **LIS PENDENS** (Art. 19 BIIa, Art. 12 Maint., Art. 17 Succ.)

- when proceedings regarding the **same parties** and the **same cause of action** are brought before **courts of different MS**, the **court second seised** (or any other than the court first seised) shall **of its own motion stay** its proceedings until such time as the jurisdiction of the court first seised is established
- when jurisdiction of the court first seised is **established**, the other **declines** its jurisdiction

- **Art. 19 BIIa** covers also the so-called **false *lis pendens***
  - ***Separation***
  - ***divorce***

## 4) **SEISING OF A COURT** (Art. 16 BIIa, Art. 9 Maint., Art. 14 Succ.)

**2 instances**, depending on the **domestic rules of civil procedure**

- a) lodging of the document instituting the proceedings with the court, or
- b) receipt of the document by the authority responsible for service (in case of service before lodging)

**In both cases:** the **applicant** has been “**active**” (i.e. taking the steps to have service effected on the respondent or have the document lodged with the court)

- Interaction with **Regulation No 1393/2007**, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (**service of documents**)

- CJEU, 22.6.2016, C-173/16, *M.H. v M.H.*

**“is lodged with the court”**

=

**time when that document is lodged with  
the court concerned, even if under  
national law lodging that document does  
not in itself immediately initiate  
proceedings**

- **Uniform notions used as grounds of jurisdiction and/or connecting factors** for the operation of the PIL rules
- also these uniform notions have been further clarified by the CJEU under various perspectives, thus developing a broad record of cases to refer to in many factual situations

## HABITUAL RESIDENCE (HR)

- **BIIa:** ground of jurisdiction in matrimonial and parental responsibility matters
- **Maint.:** ground of jurisdiction, and by reference to the 2007 Hague Protocol, also as a connecting factor to determine the applicable law
- **RIII:** connecting factor for a choice of law, as well as in the absence of a choice
- **Succ.:** general ground of jurisdiction and general connecting factor

**BUT in none of them the notion is defined  
(except in Recital 23 of the Succ. Reg.)**

## Case law on habitual residence

- a) CJEU, 15.9.1994, case C-452/93, *Pedro Magdalena Fernandez* (expatriation allowance)
- b) CJEU, 2.4.2009, case C-523/07, *A*, (HR of a child)
- c) CJEU, 15-2-2017, case C-499/15, *W and V v Z* (HR of a child)
- d) CJEU, 28.6.2018, case C-512/17, *HR v KO* (child's HR between the MS of (dual) nationality and the MS of residence)
- e) CJEU, 22.12.2010, case C-497/10 PPU, *Mercredi* (HR of an infant)
- f) CJEU, 8-6-2017, case C-111/17 PPU, *OL v PQ* (HR of an infant born in a MS other than that where the parents were habitually resident)
- g) CJEU, 9.10.2014, case C-376/14 PPU, *C v M* (HR of a child in an abduction case)

# Which are the relevant factual elements? (case-by-case approach)

- duration, conditions and grounds for the stay on the territory of a given MS
- nationality
- enrolment in school
- linguistic knowledge
- family and social relationships
- Parents' willness

## II. Selected topics

### 1) Brussels Ia Regulation

- a) Scope of application in matrimonial matters
- b) Jurisdiction in matrimonial matters

## II.1.a) Scope of application in matrimonial matters

### Exclusions

- decisions that **deny the claim** for divorce, legal separation or marriage annulment (i.e. negative decisions)
- **property consequences** of the marriage (governed by Reg. 2016/1103)

- **non-traditional partnerships**

BUT **no definition** of marriage in the Reg.:  
autonomous interpretation or rather a formal  
concept of marriage defined by national  
substantive law? The Reg. applies to same-sex  
marriages only in those MS that recognize them

- **fault-based claims** in proceedings for legal  
separation or divorce

## II.1.b) Jurisdiction in matrimonial matters

To determine the MS whose courts can hear the case, and also the territorial competence within that MS

### Art. 3 BIIa

- **7 ALTERNATIVE grounds of jurisdiction** based on either the **habitual residence** (lett. a) or the **common nationality** of the parties (lett. b)
- reference to the same grounds of jurisdiction is made under Art. 4 (counterclaim) and Art. 5 (conversion of legal separation into divorce)

## Art. 3 BIIa - grounds

### Competent courts of the MS

#### (a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of that MS

#### (b) of the nationality of both spouses

## 2 main connecting factors in matrimonial matters

- a) habitual residence
- b) Nationality

- CJEU, 7.7.1990, C-469/90, *Micheletti*  
(freedom of establishment)
- CJEU, 16.7.2009, C-168/08, *Hadadi* (dual nationality common to both spouses)

## ***Forum shopping***

Art. 3 + Art. 19 (*lis pendens*)

- **favour** towards the spouse who **first brings an action** before the court
- **wide margin of discretion** in choosing the court having jurisdiction on the case
- an example:  
what if a party **manipulates (or omits) factual elements** in order to support the existence of **habitual residence in a more ‘favourable’ forum State?**  
Particularly relevant when in the MS of habitual residence divorce/legal separation proceedings are time-consuming or very expensive

## **Exclusive nature of jurisdiction – Art. 6 BIIa**

## **Residual jurisdiction – Art. 7 BIIa**

CJEU, 29.11.2007, C-68/07, *Sundelind Lopez*

- BIIa Reg. applies **also to nationals of non-MS** whose **links** with the territory of a **MS** are **sufficiently close**
- the courts of a MS **cannot base** their jurisdiction to **on their national law**, if the courts of **another MS** have **jurisdiction under Art. 3 BIIa**

## II. Selected topics

### 2) Rome III Regulation

- a) Scope of application
- b) Applicable law regime: choice of law or default
- c) General provisions

## II.2.a) Scope of application

### Objectives

- enhancing the **adjustability** of the EU PIL system by introducing a (limited) party autonomy
- promoting **legal certainty and predictability**
- **preventing** “rush to court” and “forum shopping” strategies of the spouses against one another

BUT this objective is only partially fulfilled, among those MS that participate in the enhanced cooperation

## Issues on the scope of application

- It applies **only to divorce and legal separation**, not to marriage annulment
- **no definition of marriage**
- competence of MS
- what about the **dissolution of registered partnerships?**

## Universal application – Art. 4

- Under the Reg., it is possible to designate the law of
  - a **participating MS**
  - a **non-participating MS**
  - a **non-EU MS** (third country)
- Rome III Reg. provides a **system of uniform conflict-of-laws rules**  
BUT it does not harmonise national substantive laws in matrimonial matters

## II.2.b) Applicable law regime choice of law

### Basic principle: informed choice (Recital 18)

- choice to be exercised without prejudice to the rights of, and equal opportunities for, the two spouses
- judges in the participating MS 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

## Art. 5 Rome III

Designation by the spouses of:

- a) the law of the State where the spouses are **habitually resident** at the **time the agreement is concluded**; **or**
- b) the law of the State where the spouses were **last habitually resident**, in so far as **one of them still resides there** at the **time the agreement is concluded**; **or**
- c) the law of the **State of nationality of either spouse** at the time the agreement is concluded; **or**
- d) the **law of the *forum***

## Choice of law under Rome III Reg.

Set of **4 ALTERNATIVE criteria** to determine the applicable law

- no hierarchy
- the spouses may agree on the application of either of these criteria
- the connecting factors must exist at the time of the agreement is concluded

## Conclusion and modification of the agreement – Art. 5(2)

- at any time, but **at the latest at the time the court is seised, but**
- yet **also during the proceedings**, if it allowed under the law of the forum
- the existence of an actual agreement is not required, it is also possible that **each party** requests the **application of the same law** in its respective court documents
- **deadline** for a **valid choice-of-law agreement** to be reached **during the proceedings**: it depends on the **domestic rules of civil procedure of each MS**

## Art. 6

### Existence and validity of the agreement

- determined by the **law which would govern it under this Reg.** if the agreement or term were valid

### Non consent of one of the spouses

- determined **also** by the **law of the country in which he/she has his/her habitual residence** at the time the court is seised

## Formal validity of the agreement – Art. 7

- **in writing, dated and signed by both spouses**
- equivalent to writing = any communication by **electronic means** which provides a durable record of the agreement (including e-mails; and what about text messages?)
- date: the **date of the last signature** in case the spouses did not sign the agreement at the same time
- signature of the spouses: difficulties in case of communication by electronic means
- all the **additional requirements** under the law of the common habitual residence of the spouses at the time of the agreement

## II.2.b) Applicable law regime

### Default applicable law – Art 8 Rome III

In the **absence of a choice** pursuant to Art. 5, 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 seized; 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 seized, in so far as **one of the spouses still resides** in that State at the time the court is seized; or, **failing that**
- c) of which **both spouses are nationals** at the time the court is seized; or, **failing that**
- d) where the **court is seized**

## Default applicable law

### List of **SUCCESSIVE** connecting factors

- hierarchy
- the application of the first factor excludes the following ones, and so on until the residual criterion of the law of the *forum*
- otherwise, the effectiveness of the Reg. would have been undermined

## II.2.c) General provisions

### Art. 10

If the **law applicable** determined by Arts. 5-8

- makes **no provision for divorce**, or
- does **not grant** one of the spouses **equal access to divorce or legal separation** on grounds of their sex, the **law of the *forum*** applies (avoid discrimination)

### Art. 11

**Exclusion of *renvoi*** (only substantial law, not rules on private international law), in order to preserve the effectiveness of the actual choice of law

## Art. 12

Refusal of the application of a law determined by the Reg. only if such application is **manifestly incompatible** with the **public policy of the *forum***

## Art. 13

The court is **not obliged to pronounce a divorce** by virtue of the application of the Reg. where **its national law**

- does **not provide for divorce**, or
- does **not deem the marriage** in question **valid** for the purposes of divorce proceedings

# Summarising conclusions

## Matrimonial matters (separation/divorce/annulment)

- Jurisdiction: alternative grounds, no choice
- Applicable law: (limited) choice or default law

## **Brussels IIa and Rome III Regulations in cross-border divorce and separation cases**

### **Case study 1**

#### **FACTS**

Amaya, a woman of Iranian and Italian nationality, and Hamid, a man of Iranian and Hungarian nationality, got married in 2010 in Hungary, and they have been habitually residing in Budapest since the marriage.

Amaya works for an international humanitarian organization and is very committed to her job. Indeed, in early 2017 she enthusiastically accepted a promotion that required her to travel to Milan (Italy) on a regular basis, also spending several weeks there before returning to Hungary. Hamid works as financial consultant in an important Hungarian bank, and since his wife's job promotion, he regularly visited her in Italy during her long stays there.

They do not share any children, but have the dog Jack, who has been living with them for many years. The dog was registered in Hungary, where Amaya and Hamid also had an insurance policy for him, and was assisted by a Hungarian veterinarian.

In 2008, when they were engaged, the couple concluded a prenuptial agreement before a Hungarian notary, whereby they agreed on practical arrangements in case of separation/divorce and waived all reciprocal obligations provided by statutory law.

Since Amaya's job promotion in early 2017, she has spent progressively longer periods in Italy, to the extent that the couple was considering the possibility of a permanent relocation in Milan. With this idea in mind, in early 2018 they concluded, by means of an authentic instrument, a further agreement designating Italian law as applicable to their separation/divorce and all legal consequences deriving from it. According to this agreement, all previous arrangements between them shall have no effect.

As from spring 2018, however, Amaya has been entirely dedicated to her job, and has not travelled back to Hungary ever since. Also the dog Jack has been staying with her in Milan.

Amaya and Hamid did not survive the long-distance relationship, which took a toll on both of them.

On 10 May 2019, Hamid filed for divorce in Hungary, and the document instituting the proceedings should have been served to Amaya by no later than 25 May. However, she was served only on 10 June 2019, as stated by the stamp on the registered letter received by her.

Meanwhile, on 27 May 2019, Amaya sought for legal advice as she wanted to seise the Italian courts with separation proceedings. After evaluating the factual and legal background, the Italian counsel, on behalf of Amaya, lodged a separation petition against Hamid with the Tribunal of Milan on 3 June 2019. Also, she claimed the custody of the dog Jack.

### Related questions

- 1) Has the Tribunal of Milan jurisdiction over the separation petition filed by Amaya? Which are the relevant legal instrument and provisions?
- 2) Has the Hungarian court jurisdiction over the divorce petition filed by Hamid? Which are the relevant legal instrument and provisions?
- 3) Could there be a situation of *lis pendens* between the two sets of proceedings instituted in Hungary and in Italy, respectively? Which is the court first seised?
- 4) Could the choice-of-law agreement on the separation/divorce concluded between Amaya and Hamid be deemed to be valid? Which is the law applicable to assess its validity? And, in case the agreement should be deemed to be invalid, how would the court assess the applicable law?
- 5) Has the prenuptial agreement previously concluded between Amaya and Hamid any effect on their separation/divorce?
- 6) How could the Tribunal of Milan assess the claim for the custody of the dog Jack?

### LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

Regulation No 1259/2010

National law

## Questions with guidelines

### 1) Has the Tribunal of Milan jurisdiction over the separation petition filed by Amaya? Which are the relevant legal instrument and provisions?

Under Article 3(a), sixth indent, of Regulation 2201/2003 (Brussels IIa), jurisdiction lies with the courts of the Member State in whose territory the applicant is habitually resident if he/she resided there for at least six months immediately before the application was made and is a national of the Member State in question.

In this case, Amaya has both Italian and Iranian nationality and has been living and working in Milan since spring 2018, without travelling back to Hungary. Therefore, it could be successfully argued that her habitual residence has moved to Italy, and this lasted for more than six months before she seised the Tribunal of Milan (i.e. on 3 June 2019).

- The Tribunal of Milan has jurisdiction pursuant to Article 3(a), sixth indent, of Brussels IIa Regulation and can consequently rule on the separation petition filed by Amaya.

### 2) Has the Hungarian court jurisdiction over the divorce petition filed by Hamid? Which are the relevant legal instrument and provisions?

Under Article 3(a), second indent, of Regulation 2201/2003 (Brussels IIa), jurisdiction lies with the courts of the Member State in whose territory the spouses were last habitually resident, insofar as one of them still resides there.

In this case, Amaya and Hamid have been habitually residing in Hungary since the marriage, and did so even after she accepted the job promotion in Italy, insofar as she travelled back and forth between Hungary and Italy and he regularly visited her in Italy.

As from spring 2018, however, it can be argued that Amaya's habitual residence has moved to Milan, while Hamid kept his habitual residence in Budapest. The last habitual residence of the spouses is therefore in Hungary, and Hamid is still resident there.

- The Hungarian court has jurisdiction pursuant to Article 3(a), second indent, of Brussels IIa Regulation and can consequently rule on the divorce petition filed by Hamid.

#### Possible issues to be discussed:

- Suppose that Hamid argues that the Hungarian court should be deemed to have jurisdiction pursuant to Article 3(a), first indent, of Brussels IIa Regulation, claiming that both spouses have their habitual residence in Hungary and presenting as evidence the residence certificates of both Amaya and himself (her residence is, indeed, still registered in Budapest, notwithstanding her recent move to Italy).

On which grounds would the Italian counsel argue that Amaya's habitual residence has changed? Which factual elements may be relevant in this regard?

**3) Could there be a situation of *lis pendens* between the two sets of proceedings instituted in Hungary and in Italy, respectively? Which is the court first seised?**

Both the Tribunal of Milan and the Hungarian court can be deemed to have jurisdiction on the separation and the divorce petition, respectively, on the grounds mentioned above. As a result, and taking into account the broad notion of *lis pendens* between proceedings concerning matrimonial matters (which comprises proceedings relating to divorce, legal separation and marriage annulment according to Article 19(1) of Brussels IIa Regulation), a question of parallel proceedings may indeed arise in this case.

It becomes relevant to establish which is the court first seised. Pursuant to Article 16(a) of Brussels IIa Regulation, a court shall be deemed to be seised at the time when the document instituting the proceedings is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent. In this regard, the fact that Amaya was served with the document instituting the Hungarian proceedings only on 10 June appears relevant, as it took almost one month for the service to Amaya, which was supposed to be effected by no later than 25 May. Therefore, it can be argued that Hamid did not take the necessary steps to have service effected on Amaya, and that the Hungarian court was deemed to be seised only on 10 June (*for similar considerations, see Tribunale di Palmi, 28 January 2013*).

The Tribunal of Milan was seised with the separation proceedings on 3 June, thus becoming the court first seised.

- The Italian counsel can successfully claim that the Tribunal of Milan is the court first seised in the matrimonial proceedings between Amaya and Hamid.

Possible issues to be discussed:

- Suppose that you are required to give legal advice to Hamid: how would you support his defence that he had taken the necessary steps to have service effected on Amaya, so that the Hungarian court could be deemed to be the first seised? (e.g. evidence of means of service, no liability for the delay)

- Suppose that the Hungarian court, notwithstanding the *lis pendens* situation, does not stay the proceedings and hears the divorce case, delivering its decision on the very same day as the Tribunal of Milan (i.e. on 20 November 2019).

Could the Hungarian decision be recognised in Italy? On which ground could the Italian counsel oppose to the recognition?

Case law:

on *lis pendens* between separation and divorce proceedings and on time difference between the Member States, see CJEU, 6 October 2015, Case C-489/14, *A v B*;

on the violation of the *lis pendens* rule as a possible ground of non-recognition, see CJEU, 16 January 2019, Case C-386/17, *Liberato v Grigorescu*.

**4) Could the choice-of-law agreement on the separation/divorce concluded between Amaya and Hamid be deemed to be valid? Which are the rules to assess its validity? And in case the agreement should be deemed to be invalid, how would the court assess the applicable law?**

By means of an authentic instrument, in early 2018 Amaya and Hamid have chosen the Italian law as applicable to their separation/divorce and all legal consequences deriving from it.

a) Choice of law regarding the separation/divorce

The relevant instrument that the Italian court shall consider when assessing the validity of the agreement, and whether the choice of law was validly made, is Regulation 1259/2010 (Rome III).

According to its Article 6(1), the existence and the validity of a choice-of-law agreement shall be determined by the law which would govern it under the Regulation if the agreement were valid. In this case, the chosen law is one of those alternatively provided by Article 5 of Rome III Regulation, and namely the law of the State of nationality of either spouse at the time the agreement was concluded, i.e. the Italian law. This law therefore governs the validity of the choice-of-law agreement, which appears to be valid under this law.

According to Article 7 of Rome III Regulation, for a choice-of-law agreement to be formally valid it is required that it be expressed in writing, dated and signed by both spouses. In this case, the agreement has been concluded by means of an authentic instrument, and therefore appears to possess the formal requirements set out by the mentioned provision.

b) Choice of law regarding all legal consequences deriving from the separation/divorce

Are these aspects covered by Rome III Regulation?

i) *Property regimes*

Taking into account the exclusions from its scope of application set out in Article 1(2), the property consequences of the marriage are not governed by this Regulation. However, neither the Regulation 2016/1103 on property regimes can apply, as its rules concerning the law applicable (Chapter III) have effect only with regard to spouses that have made the choice only on or after 29 January 2019. In this case, however, the designation was made in early 2018.

Assuming that the Tribunal of Milan has jurisdiction over property consequences\*, the relevant instrument that the court shall consider when assessing the choice of law made by Amaya and Hamid appears to be the national law (in the absence of any applicable international legislation), which is the Italian PIL Act (Law 218/1995). Article 30(1) thereof provides that spouses can designate the law of the State of nationality of either of them, or of the State in which either of them resides, as applicable to their patrimonial relationships.

In this case, the spouses have indeed chosen the law of the State of nationality of the wife Amaya, i.e. Italian law. Furthermore, the choice-of-law agreement appears formally valid pursuant to Article 30(2) of the Italian PIL Act, as its validity is subject to the chosen law or the law of the State where the agreement was concluded (i.e. Italian law).

In this case, the agreement concluded in the form of an authentic instrument meets the requirements set out by the Italian Civil Code as regards the formal validity of marriage contracts.

\* The Tribunal of Milan shall assess its jurisdiction on the basis of Regulation 2016/1103. In this case, we assume that the parties have agreed on the Italian jurisdiction at the first hearing. Indeed, they have designated Italian law as applicable and they acknowledge that the Italian court would have been able to properly apply its own law. *These issues will be further deepened in the next training sessions.*

#### ii) *Maintenance*

Maintenance obligations between the spouses do not fall within the scope of application of the Rome III Regulation, pursuant to its Article 1(2). In this regard, the relevant instrument to assess both jurisdiction and applicable law is Regulation 4/2009 (Maintenance), which refers to The Hague Protocol of 2007 as regards the applicable law provisions. *These issues will be further deepened in the next training sessions.*

In conclusion, the Tribunal of Milan shall rule on the separation petition filed by Amaya applying the Italian law chosen by the spouses, which shall govern also the further claims regarding the property consequences and the spousal maintenance.

- Amaya and Hamid have made a valid choice in favour of Italian law to regulate their separation/divorce and all legal consequences deriving from it.

#### Possible issues to be discussed:

- Suppose that the choice-of-law agreement had been concluded by the spouses by means of an exchange of messages on WhatsApp. Then, Amaya followed up with an e-mail summarising the content of the agreement, to which Hamid replied with a text message that simply stated 'OK to your last e-mail'.

Could this agreement be deemed to meet the formal requirements set out in Article 7 of Rome III Regulation? Was there a communication by electronic means which provides a durable record of the agreement?

In the event that this agreement could not be deemed to be formally valid, how would the Tribunal of Milan determine the law applicable to the separation petition? What does Rome III Regulation provide in the case of the absence of a choice?

According to Article 8 of the Regulation, it appears that the separation should be governed to the law of the State of which both spouses are nationals at the time the court is seised, i.e. the Iranian law (letter c of the provision).

And now suppose that the Iranian law allows the husband to exercise the right of repudiation of his wife. Could the application of this law be refused by the Tribunal of Milan? If so, on which ground?

- Suppose that the Hungarian court, which is also hearing the divorce petition filed by Hamid, is required to assess the choice-of-law agreement concluded by the spouses. With regard to the property consequences of the marriage, what does the Hungarian PIL Act provide?

According to Section 28 thereof, the spouses may choose the law of the State of which one of the spouses is a national as applicable to their property relations. In this case, Italian law appears to be validly chosen.

**5) Has the prenuptial agreement previously concluded between Amaya and Hamid any effect in their separation/divorce?**

The prenuptial agreement of 2008 concluded before a Hungarian notary provided practical arrangements in case of separation/divorce, thereby waiving all reciprocal obligations under statutory law.

However, the valid choice-of-law agreement of 2018 provided that all previous arrangements between them shall have no effect.

As a result, the prenuptial agreement is superseded by the choice-of-law agreement of 2018 designating Italian law as the law applicable to the separation/divorce and all related consequences. The Tribunal of Milan shall thus rule on the separation petition according to the Italian law chosen by Amaya and Hamid in their second agreement.

- The prenuptial agreement concluded between Amaya and Hamid shall not have effect in the separation proceedings before the Tribunal of Milan.

Possible issues to be discussed

Suppose that the choice-of-law agreement of 2018 did not contain any express reference to all previous arrangements between the spouses. In this case, could the prenuptial agreement have any effect on the separation/divorce between Amaya and Hamid? In particular:

a) should the law designated by the choice-of-law agreement (i.e. the Italian law) be applied also to assess the validity of the prenuptial agreement?

In this case, in the Italian legal order prenuptial agreements are considered void, as they would allow the parties to decide on the rights deriving from the *status* of spouse in advance of the possible separation/divorce proceedings. Therefore, the Tribunal of Milan should rule for the invalidity of the prenuptial agreement in application of the Italian law chosen by the subsequent agreement concluded between Amaya and Hamid;

b) would the choice-of-law agreement supersede the previous prenuptial agreement concluded between Amaya and Hamid, and therefore would the law designated as

applicable (i.e. the Italian law) be considered as governing, on a substantive level, the separation between Amaya and Hamid?

In this case, the prenuptial agreement should be deemed to have no effect in the separation proceedings, given that the valid choice of law made by the spouses has indeed designated the Italian substantive law to govern the separation/divorce and all related consequences.

**6) How could the Tribunal of Milan assess the claim for the custody of the dog Jack?**

In purely internal situations, Italian case law has occasionally applied the Civil Code provisions governing the custody of children, by way of analogy, to claims related to the custody of pets (e.g. *Tribunale di Roma, 15 March 2016, no. 5322, in a case of separation by mutual consent; Tribunale di Sciacca, decree of 19 February 2019*).

Following this approach, in the cross-border case at issue, the relevant legal instruments to rule on the claim for the custody of the dog Jack could be found in the Brussels Ila Regulation (jurisdiction), and the 1996 Hague Convention (applicable law).

Where could the habitual residence of the dog Jack be located? Has the Tribunal of Milan jurisdiction by virtue of Article 8 of Brussels Ila Regulation?

Possible issues to be discussed

Do you agree with the approach taken by the Italian case law in comparing the PIL regime applicable to the custody of children to the issue of the custody of pets? Which elements would you consider to support this view?

## **Brussels IIa and Rome III Regulations in cross-border divorce and separation cases**

### **Case study 2**

#### **FACTS**

In June 2009 Alma meets Giorgio in Portofino where both are on vacation and soon fall in love with each other. Alma is British and works in Milan as an employee in a pharmaceutical company; Giorgio is an Italian and French businessman active in the luxury hotels and living in Genoa.

On 22 April 2010 they appear before a notary in Brighton (UK), Alma's hometown, to sign a prenuptial written agreement whereby they attribute exclusive jurisdiction over their divorce to UK courts, and agree on the application of English law. In the same document they reciprocally waive all maintenance rights eventually provided for by any other applicable law. On 29 April 2010 they get married on the island of Wright.

Soon after their honeymoon in Nassau (Bahamas) they move to live together in a big apartment in Genoa and Alma resigns from her job in Milan to follow her husband. Family life with Giorgio is all but boring. In order to take care of his businesses, in fact, he travels a lot and is abroad for long periods. In particular, during summer they usually spend some months, from mid May to September, in Mallorca (Spain), where Giorgio owns two hotels. After that time, they go back to Genoa, where he maintains his main office and have his parents, waiting for the winter season. Winter means French Alps, where the couple usually spends several months, from November to mid-April, supervising the activities of the hotels he owns in Chamonix. Once the winter season is over, the couple returns to Genoa again for almost a month.

Alma travels and works with Giorgio for years. In October 2016 she discovers to be pregnant with their first child. Soon afterwards, in order to protect their future child, they send an e-mail (jointly signed) to their family lawyer to ask him to draft a new agreement, replacing the prenuptial one, to confer jurisdiction on any dispute arising from their family relation to Italian courts, and to apply Italian law.

After the birth of little Megan, in June 2017, Alma starts spending more time in Brighton, where she has a quieter life and enjoys her parents' support. She now tends not to go around that much with Giorgio and also asks him to limit his future engagements abroad to shorter periods. She talks about relocating to UK with the baby. Giorgio however refuses to change his life and to reduce his stays abroad, as he fears that not being 'on-site' will harm his businesses.

Alma is now in Genoa very little, although she does join Giorgio in Mallorca, which she has always enjoyed, and in Chamonix, for the whole winter season. However, in December 2018 she decides to stay in the UK for Christmas holidays, but Giorgio does not join them. Notwithstanding their continuing arguments, on 20 February 2019, Alma decides to make Giorgio a surprise and flies to Chamonix to celebrate his birthday together. This turns out to be a bad idea. When she arrives to her destination she finds Giorgio with another woman, whom he is dating for some months.

Shocked with anger and shame, Alma flies immediately back to Brighton, where she seeks for legal advice in order to obtain:

- divorce from his husband,
- assignment of the family house in Genoa,
- a monthly sum for her needs,
- maintenance for little Megan,
- compensation for moral damages suffered as a consequence of her husband adultery.

After evaluating the factual and legal background, her lawyer lodges a divorce petition against Giorgio before the *High Court, Family Division*, in London on 2 May 2019, claiming also a monthly sum for her needs, together with the assignment of the family house in Genoa and moral damages suffered as a consequence of her husband behaviour.

On 20 May 2019 on his arrival to UK, Giorgio is served with Alma's application together with the decree fixing the first hearing before the Court on 10 June 2019.

On that day he appears in court with the assistance of a British lawyer to object UK jurisdiction and to state that, in any case, proceedings for separation are already pending in Italy, before the *Tribunale di Genova*, seised by him with a petition for separation filed by his lawyer with the Italian court on 30 April 2019 and served on Alma on 25 May 2019. The first hearing is scheduled for the 12 July.

At the first hearing before the High Court in London on 10 June 2019, the Judge orders the parties to provide the court with a pleading specifically concerning jurisdiction and applicable law issues due within the 15 July 2019.

Please consider that starting on 1<sup>st</sup> May 2019, UK is no longer a Member State of the EU. Brexit has taken place without a Withdrawal Agreement. On the 6<sup>th</sup> March 2019 the UK Government has enacted guidelines through the *The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019*. A copy thereof is attached ([Annex 1](#)).

## Related questions

*Trainees are required to plead, respectively, in favour of Alma's or Giorgio's case considering the following questions.*

- 1) How does Brexit affect the case? Do Italian courts apply EU Regulations in regard of a UK citizen, who is (possibly) habitually resident in Italy? Do UK courts apply EU Regulations?
- 2) Which courts have jurisdiction to hear the claim for marriage dissolution? Which are the relevant legal instrument and provisions?
- 3) Which courts have jurisdiction over the assignment of marital home? Which are the relevant legal instrument and provisions?

- 4) Which courts have jurisdiction over the claim for compensation for moral damages suffered as a consequence of adultery committed by her husband? Which are the relevant legal instrument and provisions?
- 5) Is there any situation of lis pendens between the two sets of proceedings instituted in the UK and in Italy? Which is the court first seised?
- 6) Assume that we are before the Italian court, because it is the court first seised and shall rule on the separation claim.

Can the 2010 prenuptial agreement on choice-of-law on the separation/divorce be deemed to be valid? Which is the law applicable to assess its validity? And in case the agreement is invalid, how would the court assess the applicable law?

Can the common written request made via e-mail by the spouses in 2016 to their family lawyer be sufficient to qualify as a valid choice of law agreement? Under which law? In the negative, can the spouses agree on the law applicable to separation/divorce also after proceedings are commenced?

- 7) Alma wants to ask for the fault-based separation against the husband.

Which courts have jurisdiction over the issue concerning the husband's fault as a basis for separation? Which are the relevant legal instrument and provisions?

<b>LEGAL INSTRUMENT(S) TO BE APPLIED</b>
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Regulation No. 2201/2003

Regulation No. 1259/2010

National law

**Annex 1**

\* \* \*

STATUTORY INSTRUMENTS

**2019 No. 519**

**EXITING THE EUROPEAN UNION**

**FAMILY LAW**

**JUDGMENTS**

The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019

*Made 6th March 2019*

*Coming into force in accordance with regulation 1*

The Secretary of State makes these Regulations in exercise of the powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018(a).

In accordance with paragraph 1(1) of Schedule 7 to that Act, a draft of this instrument has been laid before and approved by a resolution of each House of Parliament.

PART 1

Introduction

**Citation, commencement and extent**

1. (1) These Regulations may be cited as the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 and come into force on exit day.

(2) Subject to paragraphs (3) and (4) these Regulations extend to the United Kingdom.

(3) The following provisions do not extend to Scotland

(a) regulation 3;

(b) paragraph 15(6) to (8) of the Schedule.

(4) Subject to paragraph (3), any revocation or amendment made by these Regulations, and any saving or transitional provision in these Regulations, has the same extent as the provision to which it relates.

**Interpretation**

2. In these Regulations

(a) 2018 c. 16.

“Council Regulation No. 2201/2003” means Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000;

“Council Regulation No. 4/2009” means Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

“the relevant Central Authority” means—

- (i) for England and Wales, the Lord Chancellor;
- (ii) for Scotland, the Scottish Ministers;
- (iii) for Northern Ireland, the Department of Justice;

“the relevant competent authority” means—

- (i) for England and Wales, the family court or the High Court, as specified under the law of England and Wales;
- (ii) for Scotland, the sheriff court or the Court of Session, as specified under the law of Scotland
- (iii) for Northern Ireland, a magistrates’ court or the High Court, as specified under the Scotland; law of Northern Ireland.

## PART 2

### Revocation of retained direct EU legislation

#### **Revocation of Council Regulation No. 2201/2003**

3. Council Regulation No. 2201/2003 is revoked.

#### **Revocation of Council Regulation No. 4/2009**

4. Council Regulation No. 4/2009 is revoked.

#### **Revocation of Council Regulation No 2116/2004**

5. Council Regulation (EC) No 2116/2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See is revoked.

#### **Revocation of Council Regulation No. 664/2009**

6. Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations is revoked.

## PART 3

### Amendment of primary and secondary legislation

#### **Amendment of primary and secondary legislation**

7. The Schedule, which sets out amendments of primary and secondary legislation, has effect.

## PART 4

### Saving and transitional provisions

#### **Saving and transitional provisions**

8. (1) The amendments and revocations made by these Regulations do not apply in relation to—

- (a) proceedings before a court in a Member State seised before exit day in reliance upon—
    - (i) the provisions of Chapter II (jurisdiction) of Council Regulation No. 2201/2003, or
    - (ii) the provisions of Chapter II (jurisdiction) of Council Regulation No. 4/2009;
  - (b) proceedings before a court seised in reliance upon a choice of court agreement, whether made before or after exit day, in accordance with Article 4 of Council Regulation No. 4/2009;
  - (c) payments of maintenance which fall due before exit day or applications, requests for assistance or specific measures, where the application or request is received by the relevant Central Authority or where the relevant competent authority is seised before exit (i) Chapter III (recognition and enforcement) or Chapter IV (cooperation between day, in accordance with—
    - (i) Chapter III (recognition and enforcement) or Chapter IV (cooperation between Central Authorities in matters of parental responsibility) of Council Regulation No. 2201/2003, or
    - (ii) Chapter IV (recognition and enforcement), Chapter VI (court settlements and authentic instruments), Chapter VII (cooperation between Central Authorities) or Chapter VIII (public bodies) of Council Regulation (EC) No. 4/2009.
- (2) For the purposes of this regulation, a court is seised—
- (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 the applicant 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 authority responsible for service, provided that the applicant has not subsequently failed to take the steps the applicant was required to take to have the document lodged with the court.
- (3) For the purposes of paragraph (1), references to “Member State” in Council Regulation No 2201/2003 and Council Regulation No. 4/2009 and any implementing legislation are to be read as including the United Kingdom.

6 March 2019

Lucy Frazer  
Parliamentary Under Secretary of State  
Ministry of Justice

\* \* \*

## Questions with guidelines

### 1) How does Brexit affect the case? Do Italian courts apply EU Regulations in regard of a UK citizen, who is (possibly) habitually resident in Italy? Do UK courts apply EU Regulations?

#### *i. Before UK courts*

According to Part 2 of *The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019*, an act coming into force on Brexit day, the Brussels IIa and the Maintenance Regulations are revoked. Thus, both Regulations are no more applicable in the UK on and after the Brexit day (please note: the 2019 regulation does not revoke Brussels IIa in regard to Scotland).

However, Part 4 derogates the revocation of the Regulation in regard of proceedings that are pending before a court in a Member State seized before exit day in reliance upon the provisions of Chapter II of Brussels IIa and of Chapter II of the Maintenance Regulations. Further exceptions apply to choice-of-court agreements and maintenance payment. (see article 8, Part 4).

In regard of UK courts, one should therefore determine if the proceedings are started before or after the exit day in order to establish if the EU Regulation apply. Please note that the relevant provision (article 8(1)(a)) refers to proceedings pending in a court in a Member State seized before the exit day. It does not refer to a proceedings pending in a UK court, but to proceedings pending in any EU court.

The provision *could* be interpreted as meaning that the separation/divorce proceedings (to be considered as a whole) is started before the Brexit day (1st May 2019) in Italy and the Regulations apply.

*However*, one could also offer an opposite interpretation and conclude that each court establishes when it is seized and if it is to apply EU Regulations. In this latter case, the UK court is seized after the Brexit day and is under no duty to apply the EU regulations.

*(As Alma's or Giorgio's counsel different groups could lead to different conclusions).*

For the purpose of the training we shall assume that UK courts will apply EU Regulations. This solution appears also the more in line with a textual interpretation. At this time there is however no clear solution.

#### *ii. Before Italian courts*

Italian courts should apply EU regulations also after Brexit day. EU Regulations apply in all cases where a ground for jurisdiction is established. In this case there are several cases for jurisdiction, so EU regulation is established. It is totally irrelevant that Alma is a British citizen, possibly having her habitual residence in UK.

### 2) Which courts have jurisdiction to hear the claim for marriage dissolution? Which are the relevant legal instrument and provisions?

*i) Choice-of-court clauses on divorce claim in the agreements*

Alma and Giorgio concluded a prenuptial agreement in 2010 and a new draft agreement in 2016.

According to Regulation 2201/2003 (Brussels IIa) party autonomy is not allowed. It does not provide for any party autonomy in matrimonial matters, any choice of court agreement possibly concluded between the spouses has no effect on the issue of determining jurisdiction over the separation/divorce claim.

- Hence, there is no need to assess the validity of Alma and Giorgio's prenuptial agreement concluded in 2010 and of the new draft agreement of 2016.

*ii) Determining the jurisdiction*

Art. 3 of Regulation 2201/2003 (Brussels IIa) provides for the alternative jurisdiction of seven different *fora*. The choice is left to the plaintiff, i.e. the faster spouse to commence proceedings for marriage dissolution.

- a) If you were Alma's counsel on which grounds would you argue that Alma's habitual residence is in the UK in order to establish the English court's jurisdiction?

Art 3(a) 5<sup>th</sup> indent or 6<sup>th</sup> indent may apply.

Which factual elements may be relevant in this regard?

e.g. main centre of business and life interests, family life with her parents and baby. Alma is still resident with her parents' or own a house of her own?

- b) If you were Giorgio's counsel, on which grounds would you argue that Alma's habitual residence is in Italy in order to establish the Italian court's jurisdiction?

Giorgio should contest the UK jurisdiction arguing that the Italian court has competence to hear the dispute pursuant to Art. 3(a) 1<sup>st</sup> or 2<sup>nd</sup> indent.

Which factual elements may be relevant in this regard?

e.g. residence certificates, main centre of business and life interests.

More precisely, Giorgio could maintain that family life, although being fragmented in different Member States, is centred in Genoa, then Italian courts have jurisdiction under Art. 3(a) 1<sup>st</sup> indent, which provides for the competence of the courts of the Member State where the spouses are habitually resident.

However, Art. 3(a) 2<sup>nd</sup> indent may appear a stronger ground for jurisdiction because it provides for the jurisdiction of the courts of the country where the spouses were last habitually resident, insofar as one of them still resides there. Giorgio still lives in Italy and Alma lived there until June 2017 and occasionally returned in Genoa.

As a further argument to contest the UK jurisdiction, Giorgio could maintain that Alma has not acquired her habitual residence/domicile in the UK because they usually spent the summer season in Spain and the winter season in France.

Which factual elements may be relevant in this regard?

e.g. quantitative analyses of time spent per year in the UK and abroad.

Possible issues to be discussed:

- habitual residence of the spouses whose family life is “fragmented” in different member States (e.g. Italy, Spain and France, UK) → how is habitual residence established?

*In particular:*

- Is it possible to have multiple habitual residences? → multiple courts competent to hear the claim?

- or must the court assess where the spouses have their main habitual residence by combining both quantitative and qualitative elements connecting the case with a certain country (see e.g. *Tribunale di Milano*, 16 April 2014)?

**3) Which courts have jurisdiction over the assignment of marital home?  
Which are the relevant legal instrument and provisions?**

According to its Recital No 8, Regulation 2201/2003 (Brussels IIa) applies only to the dissolution of matrimonial ties and does not deal with issues such as the grounds for divorce, property consequences of marriage or other ancillary measures.

Moreover, under its Art. 1(3)(e), the Regulation does not apply to maintenance obligations.

It is thus necessary to qualify the claim concerning the assignment of marital home in favour of Alma in order to determine the applicable PIL regime.

In particular:

- is it a measure of protection of children, thus falling under parental responsibility matters and subject to Regulation 2201/2003?, or
- is it a means for protecting the weaker spouse, thus qualifying as maintenance under Regulation 4/2009?, or
- does it qualify as a measure concerning matrimonial property regimes, thus subject to Regulation 2016/1103?

*(As Alma’s or Giorgio’s counsel the qualification may lead to different conclusions).*

Possible issues to be discussed:

- qualification of the claim concerning the assignment of marital home in favour of one spouse when no children are involved.

Case law:

In one case Italian courts applied Art. 32 of Law No 218/1995 (on patrimonial relationships between the spouses) to the assignment of the marital home (see *Tribunale di Belluno*, 30 December 2011).

**4) Which courts have jurisdiction over the claim for compensation for moral damages suffered as a consequence of adultery committed by her husband? Which are the relevant legal instrument and provisions?**

Again, Recital No 8 defines a very limited scope of application for Regulation 2201/2003 (Brussels IIa) as far as matrimonial matters are concerned.

Although certainly connected to marriage dissolution, the Alma's claim for damages suffered by one spouse as a consequence of adultery seems to better fall within the notion of non-contractual matters, relevant under Art. 7 No 2 of Regulation No 1215/2012 (Brussels I-bis), according to which in matters relating to tort, delict or quasi-delict, the courts for the place where the harmful event occurred or may occur has jurisdiction (that must be considered as the place where the damages are suffered).

- Alma's counsel shall ground the UK jurisdiction based on the fact that Alma has suffered damages in the UK, where she lives.
- Giorgio's counsel shall contest the UK jurisdiction and maintain that the Italian courts are competent to hear the case because the event occurred in Italy, where he was dating the other woman.

**Possible issues to be discussed:**

- qualification of the claim for moral damages suffered as a consequence of adultery committed by one spouse.

**5) Is there any situation of lis pendens between the two sets of proceedings instituted in the UK and in Italy? Which is the court first seised?**

Both Italian and English courts can be deemed to have jurisdiction on the separation/divorce petition, respectively, on the grounds mentioned above at No 1. As a result, and taking into account the broad notion of lis pendens between proceedings concerning matrimonial matters (which comprises proceedings relating to divorce, legal separation and marriage annulment according to Art. 19(1) of Brussels IIa Regulation), a question of parallel proceedings may indeed arise in this case.

Therefore, it is key to establish which is the court first seised. Pursuant to Art. 16(a) of Brussels IIa Regulation, a court shall be deemed to be seised at the time when the document instituting the proceedings is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.

In the case at stake, the only relevant dates are those when the two applications were filed with the Italian and English courts, i.e. 30 April 2019 and 2 May 2019, respectively.

As to the dates of service, the fact that Alma's application has been served on Giorgio (on 20 May 2019) before that his application has been served to her (on 25 May 2019) is completely irrelevant provided that both parties have diligently taken the subsequent steps required by national law to effectively serve their application.

- Hence, it can be argued that the Italian court has been seised first (30 April 2019); on the contrary, the UK court is the court second seised (2 May 2019) and under Art. 19(3) Brussels Ia shall, of its own motion, stay its proceedings until such time as the jurisdiction of the court first seised is established.

Here again the possible impact of Brexit can have different outcomes.

*As Alma's or Giorgio's counsel you may want to offer different conclusions and elements for reasoning.*

Possible issues to be discussed:

- Suppose that the UK court, despite the lis pendens, does not stay its proceedings and deliver its decision on the very same day as (or even earlier than) the Italian court. Can the English decision be recognised in Italy? Is there any ground for opposing its recognition in Italy?

Relevant case-law:

- CJEU, 6 October 2015, Case C-489/14, *A v B* on *lis pendens* between separation and divorce proceedings and on time difference between the Member States
- CJEU, 16 January 2019, Case C-386/17, *Liberato v Grigorescu* on the breach of the *lis pendens* rule as a possible ground of non-recognition.

**6) Assume that we are before the Italian court, because it is the court first seised and shall rule on the separation claim.**

**Can the 2010 prenuptial agreement on choice-of-law on the separation/divorce be deemed to be valid? Which is the law applicable to assess its validity? And in case the agreement is invalid, how would the court assess the applicable law?**

**Can the common written request made via e-mail by the spouses in 2016 to their family lawyer be sufficient to qualify as a valid choice of law agreement? Under which law? In the negative, can the spouses agree on the law applicable to separation/divorce also after proceedings are commenced?**

NB - These issues are discussed before the Italian court, since the UK is not a part to the enhanced cooperation of Rome III Regulation and thus shall apply its national law to assess the agreements.

*1) Prenuptial agreement of 2010*

By means of an agreement signed before a notary in Brighton in 2010 Alma and Giorgio chose to confer exclusive jurisdiction over their divorce to UK courts which should apply English law. (*On choice-of-courts clause see supra, Question No. 1*)

a) Choice of law regarding the separation/divorce

The relevant instrument that the Italian court should consider when assessing the validity of the agreement, and whether the choice of law was validly made, is Regulation 1259/2010 (Rome III).

According to its Art. 6(1), the existence and the validity of a choice-of-law agreement shall be determined by the law which would govern it under the Regulation if the agreement were valid. In this case, the chosen law is one of those alternatively provided by Art. 5 of Rome III Regulation, namely the law of the State of nationality of either spouse at the time the agreement was concluded, i.e. English law. This law therefore governs the validity of the choice-of-law agreement.

According to Art. 7 of Rome III Regulation, for a choice-of-law agreement to be formally valid it is required that it be expressed in writing, dated and signed by both spouses. In the case at stake, the agreement was concluded by means of an authentic instrument, and therefore appears met the formal requirements set out by Art. 7.

b) Choice of law regarding all other claims consequences deriving from the separation/divorce.

*See the remarks made under Questions 2 and 3.*

- The Italian court should apply the English law to marriage dissolution, unless it considers the joint request made by Alma and Giorgio via e-mail to their family lawyer in 2016 to prepare a draft agreement sufficient to qualify as a valid choice of law agreement.

II) *New draft agreement of 2016*

In October 2016, in order to protect their future child, Alma and Giorgio have sent an e-mail (signed by both of them) to their family lawyer to ask him to draft a new agreement, replacing the prenuptial one, to confer Italian courts jurisdiction to decide any possible disputes arising from their family relation according to Italian law.

Pursuant to Art. 6(1) Rome III Regulation, the existence and the validity of a choice-of-law agreement shall be determined by the law which would govern it under the Regulation if the agreement were valid. In this case, the chosen law would be one of those alternatively provided by Art. 5 of Rome III Regulation (which one depends on the solution given to the issue of determining the spouses' habitual residence). Italian law would then in principle govern the separation/divorce between Alma and Giorgio, provided that all requirements for its formal validity are met.

Under Art. 7 of Rome III Regulation, a choice-of-law agreement is valid as its form if it is made in writing, dated and signed by both spouses. Moreover, any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

- The Italian court should apply the Italian law to assess the validity of the choice-of-law agreement sent via e-mail in 2016, since the e-mail should be deemed as an electronic means providing a durable record of the agreement.
- Moreover, the Italian court should also verify in accordance with its own law the validity of the choice-of-law clause contained in the previous prenuptial agreement concluded in 2010.

In this case, according to Italian law, prenuptial agreements are considered void as they would allow the parties to decide on rights deriving from the status of spouse in advance of the possible separation/divorce proceedings.

- ❖ Thus, the choice-of-law made in the prenuptial agreement has no effect in the Italian separation proceedings and the Italian court should rule on the separation according to the law chosen via e-mail, that is the Italian law.

## 7) Alma wants to ask for the fault-based separation against the husband.

**Which courts have jurisdiction over the issue concerning the husband's fault as a basis for separation? Which are the relevant legal instrument and provisions?**

According to Recital No 8, Regulation 2201/2003 (Brussels IIa) applies only to the dissolution of matrimonial ties and does not deal with issues such as the grounds for divorce, property consequences of marriage or other ancillary measures.

It is thus necessary to qualify the claim concerning the ascertainment of any responsibility of one of the spouses in the matrimonial crisis leading to separation/divorce.

From a procedural point of view, does it qualify as:

- a) an autonomous claim concerning non-contractual liability of one party (and, hence, subject to autonomous grounds of jurisdiction)?
  - Art. 7, n. 2 of Brussels I-*bis* applies (place of the harmful event/where the damages are sustained).
  - Alma's counsel may support the UK jurisdiction, whereas Giorgio's counsel the Italian jurisdiction.
- b) a claim dependent from the claim for separation/divorce (and, hence subject to the same or similar provisions on jurisdiction, i.e. Brussels IIa)?
  - Art. 3 of Brussels IIa applies. *See the remarks under Question 1.*

### Case law:

Italian case-law has mostly extended Brussels IIa scope of application by way of analogy to cover also the claim concerning fault in causing separation/divorce,

because from a logical point of view, although being an autonomous claim, it is inextricably connected to the claim for marriage dissolution and cannot be separated from it (e.g. *Tribunale di Belluno*, 30 December 2011; *Tribunale di Padova*, 6 February 2015; *Tribunale di Parma*, 18 November 2016); in one case the court qualified the claim for fault assessment as a claim on non-contractual liability of one of the spouses subject to Art 5 No 3 of Brussels I Regulation: e.g. *Tribunale di Tivoli*, 6 April 2011).