

# Special issues on recognition of matrimonial decisions

# Contents

- Recognition in case of violation of *lis pendens*
- Recognition of private and out-of-court divorces
- Recognition of matrimonial decisions and Brexit

# Recognition in case of violation of *lis pendens*

- Is violation of *lis pendens* a ground not to recognise a judgment rendered in another country?
- **CJEU, 16.01.2019, C-386/17, *Liberato***



## CJEU in *Liberato*

*The rules of lis pendens must be interpreted as meaning that where, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the court second seised, in breach of those rules, delivers a judgment which becomes final, those articles preclude the courts of the Member State in which the court first seised is situated from refusing to recognise that judgment solely for that reason. In particular, that breach cannot, in itself, justify non-recognition of a judgment*

# Recognition of private and out-of-court divorces: types of divorces

## Out of court divorce

- Divorce without court
- The court is often replaced by another public authority
- Also includes private divorces
- > not all EU countries provide for out-of-court divorces

## Private divorce

- One of the types of out-of-court divorces
- ‘Private divorces’ - divorces pronounced without the constitutive intervention of a court or public authority.

# Divorce before notary /civil registry

- Rome III Regulation explicitly states that those divorces are treated as a “public divorce” by a court
- Article 3(2) Rome III Regulation: “the term ‘court’ shall cover all the in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation”
- Also Brussels IIa Regulation defines: “the term “court” shall cover all the authorities in the MS

## Recognition of divorce before the notary/civil registry

→ the parties may ask the notary who has officially recorded the divorce agreement to issue them with the certificate under Brussels II a

*Notary/civil registry divorce is available in:  
Romania, Latvia, Estonia, Spain, Portugal*

NB: (check for limitations if divorce will need to be recognised outside the EU)

## Other out-of-court divorces

### Italy

- possibility of *negoziazione assistita* (assisted negotiations)
- agreement on divorce is made, lawyers file the document to public office (Procura della Repubblica)
- Public Officer has the possibility to declare the divorce invalid for reasons of substantive law

### France

- divorce by mutual consent  
→ court proceedings are not required
- agreement is drafted and signed by the counsels and spouses
- agreement is sent to public notary to register it
- *notaire* has no duty to check the fairness of the contract



## Brussels Ia Recast

*“Having regard to the growing number of MS which allow extra-judicial agreements on legal separation and divorce or on matters of parental responsibility, the Presidency compromise text makes it clear that the circulation of such authentic instruments and agreements is a horizontal issue, and **should be facilitated, subject to certain safeguards.***

*As the Regulation **should not allow free circulation of mere private agreements**, the solution should be that circulation is possible **only if an authority depending on each national system - formally drew up or registered the authentic instrument or registered the agreement.**”*

# Recognition of divorces between EU MS and UK after Brexit

## Cases ongoing in England and Wales on exit day

UK MoJ Guidance  
“Family law disputes  
involving EU after  
Brexit: guidance for  
legal professionals”  
29/03/2019

*“If the UK leaves the EU  
without a deal, the court in  
England and Wales will  
continue to recognise  
divorces granted in EU  
Member States in the  
same way under Brussels  
IIa, if the recognition  
proceedings started  
ahead of exit.”*

# Recognition of divorces between EU MS and UK after Brexit

## Cases ongoing in EU MS on exit day

EU Commission.

“Notice to stakeholders.

Withdrawal of the UK and EU  
rules in the field of civil justice  
and private international law”  
18/01/2019

*“Where the relevant instrument foresees exequatur, if a judgment of a UK court has been exequatored in the EU-27 before the withdrawal date but not yet enforced before that date, the judgment can still be enforced in the EU-27, and the fact that it was originally a judgment handed down by UK courts is irrelevant.”*

# Recognition of divorces between EU MS and UK after Brexit

## UK

The court in England and Wales will, after a no deal exit, recognise divorces granted in EU Member States in the same way as they currently do for orders from non-EU countries.

## EU MS

EU law will not apply

## Possible instruments

- 1970 Hague Divorce Convention will provide a framework for recognition of divorces and legal separations Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden, and the UK
- Bilateral agreements + national rules

# Summarising conclusions

Special issues related to the  
circulation of divorce decisions

- Different forms
- Brexit

## Special issues on recognition of matrimonial decisions

### Case study

#### FACTS

Oliver (British national) and Valentina (Italian national) met in Brussels where they were both working for a British company. They married in 2010 in Bruges (Belgium). In 2004, their son Leonardo was born, and in 2016 they welcomed their daughter Rebecca. In 2017, Oliver lost his job and at the same time Valentina got a very good job proposal in Verona. The family moved to Italy.

However, their family life was not going well. They started living separately in September 2018 and since November 2018 the father lives and works in London. In 2019, they decided they should divorce. In fact, they both agree on divorce and its consequences. Their son who was going to private British school, will live with the father in London (Leonardo prefers so, in a couple of years he will finish school and plans to start university in the UK). The daughter is small and will stay with the mother. They agree on visiting rights. As for maintenance, until the son will get 18, no maintenance would be paid by the father or the mother or vice versa (set-off), later, the father will pay maintenance (500 euros/month) for Rebecca. Spouses do not ask maintenance for themselves. They have 3 apartments – in London, Verona and Bruges, and they decided that the one in London will be for Oliver and the ones in Verona and Bruges for Valentina.

They approach you as a lawyer and ask for your advice. They have several questions.

#### Related questions

- 1) They heard of *negoziazione assistita* (assisted negotiations) and think this could be a good option as it might be quicker and, possibly, cheaper. Would this fit in their case? Or better is to go to court?
- 2) Does *negoziazione assistita* fall into the Brussels IIa Regulation? Would it be recognised in the UK? And in Belgium?
- 3) They need the court to divide their real estate. Is this possible through *negoziazione assistita* and would this be recognised in the UK and Belgium?
- 4) What would be the documents that Oliver would need to present in London?
- 5) Brexit is coming. How this will affect their divorce? Can they still divorce in Italy? Would such divorce be recognised under the Regulation Brussels II a?
- 6) Knowledge sharing: Do you have private divorces in your own jurisdiction? Did you have any practical cases on this? You are kindly invited to share your knowledge and experience.

**LEGAL INSTRUMENT(S) TO BE APPLIED**

Regulation No 2201/2003

1996 Hague Convention

Regulation No 1259/2010

National law



## Questions with guidelines

- 1) They heard of *negoziazione assistita* (assisted negotiations) and think this could be a good option as it might be quicker and, possibly, cheaper. Would this fit in their case? Or better is to go to court?

The question here is whether *negoziazione assistita* (assisted negotiations) fall under private divorces or not. Because if so – recognition problems would arise. In short, the answer would be not, but *it is suggested to give floor to trainees to discuss why and what are the main features of negoziazione assistita (in what cases this is appropriate solution, whether possible when children are involved, how hearing of the child would be organized, etc).*

‘Private divorces’ - divorces pronounced without the constitutive intervention of a court or public authority. It is important not to confuse private divorces with non-judicial divorces in which the court is replaced by another public authority.

In Italian situation, *negoziazione assistita* is divorce with intervention of public authority. In case of such divorce, the spouses have to sign an agreement in the presence of their attorneys. As soon as the negotiation agreement is finally drafted and executed, the lawyers must authenticate the signatures, file the document to the competent public office (Procura della Repubblica) and wait for the security clearance (*nulla osta*) by the competent Public Officer (Procuratore). The Public Office has the possibility to declare the divorce invalid for reasons of substantive law.

Issue to discuss: why there is reluctance to advise out of court divorces when cross-border issues are involved?

- 2) Does *negoziazione assistita* fall into the Brussels Ila Regulation? Would it be recognised in the UK? And in Belgium?

As noted above, it is not private divorce and thus it falls under Brussels Ila Regulation.

### Legal provisions:

Brussels Ila Regulation defines: “the term “court” shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1”.

Article 3(2) Rome III Regulation: “the term ‘court’ shall cover all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation”).

Therefore, such divorce should be recognised in the UK and Belgium as EU MS (Brexit to be discussed later).

- 3) They need the court to divide their real estate. Is this possible through *negoziazione assistita* and would this be recognised in the UK and Belgium?

Again, this gives floor to Italian participants to discuss more about *negoziazione assistita* and its possibilities.

Within *negoziazione assistita*, divorce and the division of their property may be handled. This will include their properties in Italy, Belgium and the UK. However, as the UK does not participate in Regulation 2016/1103, we should also take into account the law of this country in relation to real estate there.

Issue to discuss: the trainees can be invited to discuss specifics with enforcement and possible risks when real estate is located in third countries.

#### **4) What would be the documents that Oliver would need to present in London?**

Authentic instruments are recognised and enforced in the same way as court decisions.

The parties can order the certificate referred to in Article 39 of Brussels IIa from the court or other authority which issued the divorce decree/ registered divorce. This certificate together with the divorce decree are EU-wide recognized as sufficient proof of a valid divorce.

#### **5) Brexit is coming. How this will affect their divorce? Can they still divorce in Italy? Would such divorce be recognised under the Regulation Brussels II a?**

Yes, they can divorce in Italy, in fact since the Brexit is coming they would benefit from starting divorce procedure before this date if it is possible to finish the case before the exit date.

##### *Divorcing before Brexit:*

As stated by the MoJ of England and Wales<sup>1</sup>, if the UK leaves the EU without a deal, the court in England and Wales will continue to apply Brussels IIa to divorce proceedings granted in EU Member States in the same way under Brussels IIa, if the recognition proceedings is started before the exit day.

##### *Divorcing after Brexit:*

With Brexit date, under Art. 50(2) TEU the Treaties will cease to apply to the UK. From the EU point of view the UK will become a third State.

The court in England and Wales will, after a no deal exit, recognise divorces granted in EU Member States in the same way as they currently do for orders from non-EU countries. The rules on recognition are to be found in the Family Law Act 1986 which implemented the 1970 Hague Convention on the recognition of divorce and legal separations.

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<sup>1</sup> <https://www.gov.uk/government/publications/family-law-disputes-involving-eu-after-brexit-guidance-for-legal-professionals/family-law-disputes-involving-eu-after-brexit-guidance-for-legal-professionals>

(The 12 EU Member States that are party to the 1970 Hague Convention on Divorce Recognition at the time of exit are Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden.)

**6) Knowledge sharing: Do you have private divorces in your own jurisdiction? Did you have any practical cases on this? You are kindly invited to share your knowledge and experience.**

*The trainers could ask participants whether they had negoziazione assistita in their practice, as well as whether such options exist in Portugal, Hungary, Lithuania, whether they had any problems with recognizing such divorces abroad, etc.*