Enhanced cooperation in the area of the law applicable to divorce and legal separation. Implementing rules. Council Regulation

2010/0067(CNS) - 15/12/2010 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 537 votes to 20, with 80 abstentions, a legislative resolution amending, under the special legislative procedure (consultation procedure), the proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

The main amendments are as follows:

Exclusion from the scope: Parliament clarified that the Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings: (a) the legal capacity of natural persons; (b) the existence, validity or recognition of a marriage; (c) the annulment of a marriage; (d) the name of the spouses; (e) the property consequences of the marriage; (f) parental responsibility; (g) maintenance obligations; (h) trusts or successions.

Relationship with Regulation (EC) No 2201/2003: the Regulation shall not affect the application of Regulation (EC) No 2201/2003.

Definition of "court": the term "court" shall cover all authorities in the participating Member State shaving jurisdiction in the matters falling within the scope of the Regulation.

Universal application: the Regulation should be universal, in the sense that its uniform conflict-of-law rules may designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union.

Choice of law applicable by the parties: the spouses may agree to designate the law applicable to divorce and legal separation, provided that it is one of the laws prescribed in the text. A new recital notes that where the Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be determined in accordance with national law, in full observance of the general principles of the European Union.

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

Mediation: if the spouses are unable to agree on the applicable law, they should complete a mediation procedure including at least one consultation with an authorised mediator.

Consent and material validity: the amended text stipulates that the existence and validity of an agreement on choice of law or of any term thereof shall be determined by the law which would govern it under this Regulation if the agreement or term were valid.

Nevertheless, a spouse, in order to establish that he or she did not consent, may rely on the law of the country in which he or she has his or her habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law specified in this Regulation.

Formal validity: Members introduce a new provision which provides for that the agreement as regards the law applicable shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. If the spouses are habitually resident in different participating Member States at the time the agreement is concluded and the laws of those States lay down different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal requirements for agreements of that type, those requirements shall apply.

Conversion of legal separation into divorce: where the court is seised of an application to convert a legal separation into divorce and the parties have not made any choice as to the law applicable, the law which applied to the legal separation should also apply to the divorce. Such continuity would promote predictability for the parties and increase legal certainty. If the law applied to the legal separation does not provide for the conversion of legal separation into divorce, the divorce should be governed by the conflict-of-law rules which apply in the absence of a choice by the parties. This should not prevent the spouses from seeking divorce on the basis of other rules laid down in this Regulation.

Differences in national law: according to the European Parliament, nothing in the Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce, or does not deem the marriage in question valid for the purposes of divorce proceedings, to pronounce a decree of divorce by virtue of the application of the Regulation.

States with two or more legal systems: in the absence of rules designating the applicable law, spouses choosing the law of the State of the nationality of one of them should at the same time indicate, where the State whose law is chosen comprises several territorial units each of which has its own system of law or a set of rules in respect of divorce, which territorial unit's law they have agreed upon.

Non-application of this Regulation to internal conflicts: a participating Member State in which different systems of law or sets of rules apply to matters governed by this Regulation shall not be required to apply this Regulation to conflicts of law arising solely between such different systems of law or sets of rules.

Report: by five years after the entry into force of this Regulation at the latest, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, where appropriate, by proposals to adapt this Regulation. To that end, the participating Member States shall communicate to the Commission relevant information on the application of this Regulation by their courts.