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# The European Divorce (Applicable Law)

# Council Regulation (EU) No 1259/2010 of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation

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**Abstract**: The main objectives with this paper are to give a brief overview of the Scope of application of the regulation; of the main conflict-of-law rules adopted by the regulation, in special those that are more relevant to the role that a notary might have in an international divorce situation. The regulation provides citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, protects weaker partners during divorce disputes and prevents 'forum shopping'. This also helps avoiding complicated, lengthy and painful proceedings. More specifically, it allows international couples to agree in advance which law would apply to their divorce or legal separation as long as the agreed law is the law of the Member State which they have a closer connection with. In case the couple cannot agree, the judges can use a common formula for deciding which country's law applies. This paper will bring to light some risks and coordination difficulties with the regulation and a few matters that the regulation does not apply to.

**Keywords:** international couples; Member State; European Union

## 1 Introduction

The European Union has set itself the objective of developing an area of freedom, security and justice, by adopting measures relating to judicial cooperation in civil matters having cross-border implications. At the same time, increasing the mobility of citizens within the internal market calls for more flexibility and greater legal certainty.

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (called Rome III Regulation)[2] is an instrument implementing enhanced cooperation between the participating Member States. The enhanced cooperation allows a group of at least nine Member States to implement measures in one of the areas covered by the Treaties within the framework of the Union's non-exclusive competences (Vucheva, 2008).

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[2] (OJ n. L 343, p. 10 ff.).

Pursuant to its Art. 21(2), **the regulation should apply from 21 June 2012 in the 14 Member States which currently participate in the enhanced cooperation** (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

## 2 Enhanced Cooperation

Rome III Regulation is the first EU PIL instrument adopted using enhanced cooperation (art. 326 of the Treaty on the Functioning of the European Union)

This immediately poses a question: which member-states are bound by the Regulation?

We find the answer in the concept of participating Member State defined in article 3 (1) of the Regulation.

Participating member states can be:

- the ones that participate in the enhanced cooperation since its implementation. We can call them the "founders" of this enhanced cooperation; and
- any other Member States that manifest its intention to participate in the enhanced cooperation, pursuant to article 331 (1) of the Treaty on the Functioning of the European Union[1].

Recital 6 enunciates the Member States that addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters.

It is important to note that on 3 March 2010 Greece withdrew its request and, as such, does not participate in the Rome III Regulation.

By way of the Commission Decision n.º 2012/714/EU the Lithuania was the first "non-founder" Member State to express is intention to participate in this enhanced cooperation.[2]

## 3. Temporal Scope. General Rule

The general rule regarding the temporal scope of application is provided by article 18 (1) of the Regulation.

It states that the regulation is applicable to divorce or judicial separations proceedings instituted and choice-of-law agreements concluded on or after 21 June 2012.

However, in the case of Lithuania, the regulation is only applicable to divorce or judicial separations proceedings instituted and choice-of-law agreements concluded on or after 22 may 2014.

[1] Art. 3 (1) "participating Member State' means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation **by virtue of Decision 2010/405/EU**, *or* **by virtue of a decision adopted in accordance** with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union;"

[2] (Recital 6) **Decision 2010/405/EU:** Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia; **Decision 2012/714/EU**- Lithuania

## 4. Material Scope

The rules set forth in Regulation No. 1259/2010 are uniform rules. Uniformity should therefore be ensured in their application: uniform interpretation actually allows uniform rules to achieve their goals.

The teaching of the Court of Justice of the European Union, as developed in respect of other normative instruments regarding judicial cooperation in civil matters, is equally relevant for the purpose of the Rome III Regulation. In particular, the legal expressions employed in the Regulation should be treated as «autonomous» notions, and thus be interpreted independently from national legal systems (Aude, 2008).

In determining the scope and meaning of the said expressions, reference shall be made, as a rule, to the object and purpose of the Regulation and to the meaning ascribed to the corresponding expressions in other relevant instruments («inter-textual» interpretation), be they rules belonging to the «secondary» legislation of the European Union (the Brussels II *bis* Regulation is of particular importance in this respect on account of recital 10) or international conventions concluded by the Union itself (such as the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations).

Divorce, the dissolution of the marriage with mostly the same legal effects to the marriage as the death of one of the spouses, is known in all legal systems of the European Union.

The regulation applies, in coherence with the Brussels II *bis* Regulation, to every kind of divorce judgment made by a "court", in the meaning of these Regulations.

Legal Separation is not a divorce, but a "weakening" of matrimonial ties. The duties of marriage are redefined. Normally the obligation to live together and to build a marriage community ends. The duty of maintenance remains.

As it pertains only to divorce and legal separation, the dissolution of registered partnerships are outside of the material scope of the regulation.

**Case 1:** A and B, are Portuguese nationals, habitually resident in Spain. A institutes today divorce proceedings against B, also asking for alimony. Which law or laws applies?

The regulation only applies to the dissolution or loosening of matrimonial ties.

It does not apply to the consequences of the dissolution or loosening of matrimonial ties.

This is clear from the subject matters that, under article 1 (2), are outside the material scope of this regulation.

In our case, we can infer from article 1 (2) and recital 10 that the consequences of a judgment dissolving or "weakening" the marriage do not fall within the scope of the regulation.

Rather, they are regulated by (1) other European Union Regulations; (2) by international conventions adopted by the forum or (3) by their national conflict-of-laws rules.

In this case, the Portuguese court will have to apply:

- the Rome III regulation to determine the applicable law to the dissolution of marriage; and
- the Maintenance Regulation (n.º 4/2009) to determine the applicable law to maintenance obligation (art. 1 (2) (g)).

**Recital 10**

"(…) Preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures should be determined by the conflict-of-laws rules applicable in the participating Member State concerned. (…)"

And, as we can see from the wording of recital 10 the EU Legislator appears to have adopted the *lex fori* approach to the treatment of preliminary questions. (de Almeida, 2014)

This same idea is present in article 13 of the Regulation: "Nothing in this Regulation shall oblige the courts of a participating Member State **whose law** (…) **does not deem the marriage in question valid** for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation"

## 5 Spatial Scope. Applicable Law

The expression in article 1 (1) "(…) involving a conflict of laws (…)" — also present in the «Rome I» and «Rome II» Regulations— is meant to clarify that the Rome III Regulation is exclusively concerned with situations featuring a foreign element. Divorce and legal separation occurring within a purely domestic scenario will be in no way affected by the rules we are examining.

This idea is reinforced by article 16 of the Regulation that states that "A participating Member State (…) shall not be required to apply this Regulation to conflicts of laws arising solely between different internal systems of law or sets of rules.

A situation is international in nature when it has relevant points of contact with two or more Sovereign States. A point of contact is relevant if it is an element that can, *in abstracto*, to play some role in the conflict-of-laws rules on divorce and legal separation.

**Case 2:** Two Spanish nationals, with common habitual residence in France, are married. They choose the French law as the law applicable to their divorce. This agreement is concluded in 22 August 2012 and complies with articles 6 and 7 of the Regulation. In January of 2013 they change their common residence to Spain. Today one of them institutes divorce proceedings in the Spanish courts.

- Is it an international divorce?

One could say that this is not a situation international in nature because, at the moment the court was seized, all the elements of the situation point to Spain.

And as the Rome III Regulation is only concerned with the dissolution or loosening of marriage, and not with marriage itself, the relevant moment for the purpose of ascertaining «the international nature of the situation» should be the moment at which divorce or legal separation proceedings are instituted.

On this assumption, the applicability of the Regulation should be excluded in a situation where the matrimonial relationship at stake, though initially international in nature, had since lost all of its foreign elements.

This position can be argued quite effectively.

However, we don't agree with this position. I believe that this case reflects an international divorce and that the Rome III regulation should apply. The reasoning is as follows:

1. At the time the agreement was made, the situation was evidently international in nature (the spouses had Spanish nationality and habitual residence in France);
2. The idea behind allowing the spouses to choose the applicable law is to increase the mobility of citizens through more flexibility and greater legal certainty (as Recital 16 informs us). To not apply the Rome III Regulation would be to disregard the reasonable expectations of the parties, that made an agreement according to the rules of the regulation and chosen a law that, at the time the agreement was made, had a genuine and strong connection with the situation.
3. To not apply the regulation could be seen as a restriction to the right of every European Union citizen to move and reside freely within the territory of the Member States (see article 21 of the Treaty on the functioning of the European Union).

If the first interpretation is upheld, then the couple in our case have to decide if they want to keep the agreement valid or, on the other hand, if they would like to return to their national country.

**Art. 3 (2) of Rome III**

"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."

**Art. 2 (1) of Brussels II *bis***

*"*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;"

As we can see the definition of "court" in the Rome III Regulation is identical, almost word for word, to the definition of "court" stated in the Brussels II *bis* Regulation. The same rule can also be found in article 1 of the 1970 Hague convention on the recognition of divorces and legal separations.

From the definition one can infer that court does not necessarily mean a judicial court.

On most participant member states divorce remains a judicial proceeding.

In some participant member states however there are administrative proceedings for divorce: in Portugal a public authority - the Conservatória do Registo Civil - has competence over consent divorces.

However, in most cases, the notary will not be considered a court for the purposes of this Regulation. He can, nevertheless, play a role in the preparation of the divorce, by advising the spouses.

In this regard, the most important rules of the Rome III regulation for the notary in an advisory role are the ones about choice-of-law.

### 5.1. Limited Choice-of-law

The regulation allows for a limited choice-of-law by the spouses. This is a remarkable innovation for most of the participating member states. Germany and the Netherlands recognized party autonomy in their national conflict-of-laws rules, but not with as wide a scope as the Rome III Regulation.

Recital 15 explains that giving the spouses a limited choice-of-law simultaneously increases flexibility and certainty. In a way this statement rings true. The choice-of-law provides greater certainty in two different ways: in one hand, a law that is chosen by both parties is a law that is more easily known by the parties than a law that is determined by a legislator using abstract connections. On the other hand,

it "freezes" the applicable law, and this not only provides more certainty, as the couple can change habitual residence without changing the applicable law, it also provides more flexibility as the couple does not have to worry if a change of habitual residence or the acquisition of a new nationality can cause a change in the applicable law.

Looking at the choices that are possible we see that they mainly rely on the connecting factors of habitual residence or nationality. This can be seen as a compromise between the different traditions in Private International Law. The national conflict-of-law rules of most member states of the European Union favoured or the law of the common nationality or the law of the common habitual residence or domicile. Some, like the UK and Denmark, apply the law of the forum.

It can also be seen as a way to favour the dissolution or weakening of the matrimonial ties. Party autonomy allows the spouses to choose the law that is the most divorce-friendly.

It should be noted that the spouses can only choose the law of a State or, in cases of States with two or more legal systems, either territorial (art. 14) or inter-personal (art. 15), the law of one of those legal systems. The Spouses cannot choose religious rules directly.

It should also be noted that there is no ranking among the laws mentioned in article 5 (1).

**Art. 5 (1)**

"(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"

**Case 3:** A and B are married. They have habitual residence in France and are Portuguese, Italian and Brazilian nationals. Can they choose the law of Brazil to rule their divorce?

According to the letter (a) of article 5 (1) the spouses can choose the law of their common habitual residence at the time of the agreement.

The concept of habitual residence, as usual, is not defined in the Regulation.

The European Court of Justice provides a somewhat helpful element of interpretation.

Ruling on the concept of habitual residence of a child regarding article 8 (1) of the Brussels II *bis* regulation, the Court said "that the concept of 'habitual residence' (…) must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment.

To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

This definition is not directly applicable to the Rome III regulation, simply because the spouses will be adults and not children. However we can use some, if not most of the concepts:

Taking in consideration the European Court of Justice ruling, one could say that the law of the habitual residence corresponds to the place that reflects some degree of integration by the spouses in a social and family environment.

The duration, regularity, conditions and reasons for the stay in the territory of a Member State must be taken into consideration.

For the sake of the Rome III Regulation, the intentions of the concerned individual, as they objectively appear from the circumstances, can also be relevant.

And it is a mission of the national court to establish the habitual residence of the spouses, taking account of all the circumstances specific to each individual case.

The difference between letters (a) and (b) is small. In the letter (b) the spouses don't reside in the same State at the time of the agreement. It presumes that one of spouses has abandoned the habitual residence of the couple. But, for the choice of the last common habitual residence to be possible, one of the spouses has to continue to reside in that State.

If both spouses leave the last habitual residence, then there is a risk that the law of the last habitual residence does not have a special connection with the situation that can justify the possibility of choice.

The biggest issue that I see with the letter (c) of article 5 (1) is how to solve cases in which one or both of the spouses have multiple nationalities.

The regulation does not have any rule regarding multiple nationalities.

It does however have recital 22.

**Recital 22**

"Where this 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 left to national law**, in full observance of the general principles of the European Union."

However we don't believe that we should interpret article 5 (1) (c) according to recital 22.

One formal reason is that under article 5 the connecting factor is not nationality. The connecting factor in article 5 is party autonomy.

One other argument that can be used is the Hadadi ruling, case C-168/08, in which the European Court Justice established that the spouses could choose the courts of any of their common European nationalities to institute proceedings of divorce under article 3 (1) (b) of the Brussels II *bis* Regulation.

Recital 10 of the Rome III and the need for coherence with the Brussels II *bis* Regulation make it advisable to transpose this ruling to the choice of applicable law. As such, at least when the spouses have common multiple nationalities of two or more Member States, they can choose the law of any of their nationalities.

But even if the there are no common nationalities or even if the multiple nationalities are of non-Member States, we still believe that the best solution is to allow the spouses the right to choose any of their nationalities.

The main argument is a systematic interpretation. The solution to allow the parties to choose any of their nationalities was expressly adopted by the Succession Regulation in article 22 (1) and by the

Maintenance Regulation in article 8 (1) (a) of the Hague Protocol on Maintenance Obligations, applicable by way of article 15 of the Regulation.

This means that in questions of similar in nature (as they all refer to or are close to the personal status of an individual) the European legislator has already adopted the solution that any nationality is a sufficiently strong connection. That any nationality is generally capable of expressing a sense of «belonging» in respect of an individual, based on historical, ethnic and cultural ties.

As such, and taking in consideration that no provision exists in Rome III Regulation that expressly tackles the question of multiple nationalities, I argue that we should follow the solution expressly adopted in the Successions and Maintenance Regulation.

So, in our case and in our view, the couple could make an agreement to choose the Brazilian law.

The regulation allows the choice of the law of the forum, I think, for practical reasons, as it guarantees that court will apply local law (Pop, 2011).

However, I believe that choosing the law of the forum is not advisable in most situations.

One of the advantages of choosing the applicable law is a greater certainty in determining what law will apply to the divorce or legal separation. In fact, in letters (a) to (c), the applicable law is determined at the time the agreement is concluded. So the applicable law is fixed and can't be changed except by a new agreement made by the spouses.

On the contrary, the law of the forum is necessarily determined at the time the court is seized.

This makes it uncertain. At the time of the agreement the spouses cannot know which law will apply to their future divorce or legal separation.

This point is aggravated by the rules on international jurisdiction of the Brussels II *bis* Regulation.

The spouses can't choose the applicable jurisdiction, as there is no provision allowing choice of jurisdiction in the Brussels II *bis* Regulation.

And the Brussels II *bis* regulation provides for multiple alternative grounds of international jurisdiction. This means that the spouse that initiates the divorce proceedings can choose any of the courts of the Member States indicated in Article 3.

As such, if the spouses choose the lex fori as the applicable law they are, indirectly, agreeing that the first spouse to initiate divorce or legal separation proceedings can determine not only the applicable jurisdiction but also the applicable law to the divorce or legal separation.

So, in conclusion, we don't believe that this choice of law is advisable at the moment. If, in the future, Brussels II bis is amended to allow the choice of jurisdiction by the spouses, then the choice of the forum law can be a worthwhile option.

### 5.2. Formal Validity

**Case 4:** A and B are Romanian nationals, habitually resident in Germany. They want to make an agreement on choice of applicable law to divorce.

What are the formal requirements?

Article 7 rules on the formal validity of the choice of law.

The general requirements are stated in article 7 (1) and are as follows:

- the agreement should be (1) expressed in writing (2) dated and (3) signed by both spouses.

As we can see these requirements are quite easy to comply and should not raise any problem.

However the same cannot be said for the additional requirements stated in article 7 (2) (3) and (4).

Articles (2), (3) and (4) impose a duty to investigate the national law of the participating member states to check if they impose additional requirements on formal validity.

In our case, as A and B are habitually resident in Germany and Germany is a participating member state, so we must check if German national law lays down any additional formal requirements.

German law imposes an additional formal requirement in article 46-d (1) of the introductory act to the civil code. In this article it is stated that the choice of applicable law has to be recorded in a notarial act.

And, as in our example, the spouses had a common habitual residence in Germany, the choice of law will only be valid if it complies with article 7 (1) of the Regulation and article 46-d (1) of the German introductory act to the civil code.

So the choice of law would only be valid if it was recorded in a notarial act.

This is a serious blow to the uniform application of the regulation and to the greater certainty that the regulation brings. If one can imagine, with some difficulty, couples getting to know the Rome III Regulation, it is not likely that "normal" couples, without legal counselling, will be able to predict the application of national formal requirements.

It is important to know that the participating Member States have a duty to inform the Commission of any additional formal requirements their national law lays pursuant to article 17 (1) (a).

The information provided will be accessible in the European Judicial Atlas in Civil Matters (de Almeida, 2014).

### 5.3. In the Absence of Choice

Although not as important for the notaries as article 5, article 8 determines which law applies if the spouses don't choose the applicable law.

The connections here are all determined at the time the court is seized. So one can only presume what law is going to be applied. One cannot be certain, because at least the habitual residence can easily change during the course of the marriage and can even cease to exist.

One or both of the spouses can also acquire or renounce nationality during the course of the marriage.

So it is quite possible to have modifications on the applicable law to divorce in the absence of choice during the course of a marriage.

Letter (a) imposes an actual common habitual residence. That is to say, both spouses have to be habitually resident in the same State.

Letter (b) has a time limit of one year. This means that the spouse that abandons the common habitual residence will not be able to benefit from this connection if he wishes to initiate divorce proceedings in the State of his new habitual residence.

This is because the Brussels II *bis* regulation only gives international jurisdiction to the courts where the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made (art. 3 (1) fifth dash). The only exception to this rule is if the applicant has chosen for his new habitual residence the state of his nationality. In that case, he only needs to wait 6 months (art. 3 (1) sixth dash).

Letter (c) poses again a question regarding multiple nationalities. There is no doubt that recital 22 applies to article 8 (c).

But it is not without difficulties.

**Case 5:** A is a Portuguese and Brazilian national. He is married to B, who is a Brazilian national. Following some disagreements, A left France, where he and B habitually resided, and started living in Portugal. After one year and 2 months, he initiates divorce proceedings in the portuguese courts. The spouses didn't make an agreement on choice of law.

Which law applies?

As we can see letter (a) doesn't apply because at the time the court is seized, there isn't a common habitual residence.

Letter (b) does not apply because the last habitual residence of the spouses ended more than 1 year before the court was seized.

What about letter (c)? If we follow recital 22 to the letter, then the Portuguese courts have to determine the prevailing nationality of A. According to article 27 of the Portuguese nationality law, if a person has Portuguese and foreign nationality, the Portuguese nationality will prevail.

So, in this case, A will be considered a Portuguese national and B a Brazilian national. Letter (c) will not be applicable because there is no "common" nationality.

We argue that this solution is not the best. It does not promote uniform decisions, quite the opposite.

And, in cases like this one, it will make us apply the law of the forum, when the Brazilian law has a more substantial connection with the situation, as it is the national law of both spouses (Goering, 2008).

In our opinion, the best solution is to apply the Brazilian law recognizing that this law has a closer connection with both spouses.

## 6 Limits to the Application of Foreign Law

### Article 10

"Where the law applicable pursuant to Article 5 or Article 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* shall apply".

When advising one or both the spouses on the choice-of-law, it will probably be recommended to make them aware of some risks inherent to the regulation.

One of the first risks regards the limits to the application of foreign law.

If one is advising the spouses on which law to choose, one must bear in mind that:

(1) the regulation, in most of its articles, follows the principle of *favor divortii*, this means that most of the provisions of the regulation are designed with the intent to facilitate the dissolution or weakening of matrimonial ties.

This is quite clear in the first part of article 10. If the law chosen by the spouses makes no provision for divorce, the court must set aside the chosen law and apply its own local law.

"Makes no provision for divorce" means that, under the applicable law, the possibility of obtaining divorce is excluded altogether (ex. Philippines). If divorce is, in abstract, possible under the designated law, and Article 10 shall not step in.

(2) one must analyse the contents of the chosen law, because this law must also be set aside if it does not provide equal access to divorce or legal separation.

It is assumed that the application of the *lex fori* under Article 10 of the Regulation as a «remedy» for the designated law being discriminatory, will occur in respect of those legal systems that provide for repudiation of the wife on the part of the husband, and deny the former any equivalent opportunity for obtaining the dissolution of marriage.

So one must counsel the couples that a choice of a law that is discriminatory or that makes divorce impossible is of little consequence, because the court of participating Member State will set it aside.

## 7 Vulnerability of the Agreement on Choice-of-law

**Case 6:** A and B are married. They reside in France and are citizens of the United Kingdom. They made an agreement under the Rome III regulation choosing French law to rule their divorce. The agreement complies with all the requirements set forth in the Regulation.

A wants to get a divorce but does not want French substantive law to be applied. Is it possible?

The possibility of an agreement on the applicable law to divorce or legal separation is an innovation. Most Member States do not allow the spouses to choose the law applicable to their divorce.

This, coupled with the fact that the regulation is only applicable in 15 of the 28 Member States gives each of the spouses an indirect way to make a valid agreement under the Rome III Regulation ineffective.

If A does not want to be bound by the agreement he only has to choose the right Member State where to initiate proceedings for divorce.

Under Article 3 (2) of the Brussels II *bis* A can initiate proceedings for divorce in a court of the United Kingdom.

As the courts of the United Kingdom **are not bound** by the Rome III regulation, the agreement made will be deemed invalid according to the national private international law rules of the United Kingdom.

The court of the United Kingdom would consider that he has jurisdiction over the case and he would apply the forum law.

In conclusion, one of the spouses can, in most cases, with proper counselling, "escape" an agreement previously made on the law applicable to divorce.

This is mostly due to a deficient coordination between the Rome III Regulation and the Brussels II Regulation.

We can see two ways to improve, in the future, this coordination:

- the first, that more member states follow the Lithuanian example and participate in the Rome III Regulation;
- the second, and probably easier to accomplish, is to amend the Brussels II *bis* Regulation inserting a provision allowing for an exclusive choice of jurisdiction on matters of divorce, legal separation and marriage annulment.

## 8 Conclusions

As shown in this paper the Regulation (EU) No 1259/2010 seeks to protect parties with the limitation of the choice in family matters. They have the opportunity to decide for themselves which law will regulate their affairs.

This Regulation does not, on the other hand, apply to the following matters: the legal capacity of natural persons; the existence, validity and recognition of a marriage; the annulment of a marriage; the name of the spouses; the property consequences of the marriage; parental responsibility; maintenance obligation and trusts and successions. It also does not affect the application of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Whether this protection is adequate remains to be seen in practice, just like whether parties will take the opportunity to choose the law that will apply to their divorce.

## 9 References

Aude, F. (2008). Rome III-Choise of Law in Divorce: Is the Europeanization of Family law going to far? *International Journal of Law Policy and the Family*, 175-205.

de Almeida, J. G. (2014). *Rome III Regulation:a brief overview.* Bucharest: Europe for Notaries, Notaries for Europe.

Goering, L. (2008, November 14). *Chicago Tribune.* Retrieved January 15, 2014, from Chicago Tribune: http://www.chicagotribune.com

Pop, V. (2011, December 13). *Euobserver.* Retrieved January 15, 2014, from Euobserver: http://euobserver.com

Vucheva, E. (2008). *Divorce rules could divide EU states.* EU Observer.

http://ec.europa.eu/justice_home/judicialatlascivil/html/di_information_en.htm