

Commission's Proposal on Applicable Law to Divorce

Yesterday, the European Commission announced that it was releasing its proposal for a Regulation laying down choice of law rules in divorce matters. For the time being, however, only a press release and a memo are available on the site of the Commission.

UPDATE: see comments for the links to the actual proposition

Freedom of choice

The proposal will allow international couples to choose the applicable law if they were to separate, as long as it is the law of a country to which they have a close connection (such as long-term residence or nationality). For example, it would allow a Swedish-Finnish couple living in Spain to agree that Swedish or Finnish law applies if they were to divorce.

The proposal prevents forum shopping because the criteria for choosing the applicable law are strict. Couples must have a close connection to the country and its laws. The partners' choice of law, which must be in writing and signed by both spouses, is based on:

- 1. their common habitual residence;*
- 2. their last common habitual residence if one of them still resides there;*
- 3. the nationality of one of the spouses; or,*
- 4. the law of the court before which the matter is brought.*

Applicable law in absence of choice

If the spouses themselves cannot agree on the applicable law, it is determined on the basis of the following connecting factors:

- Divorce and legal separation are primarily subject to the law of the country where the spouses have their common habitual residence;*
- Failing that, where they had their last recent common habitual residence if one of them still resides there;*

- *Failing that, to the law of the spouses' common nationality; and,*
- *Failing that, to the law of the court before which the matter is brought.*

Under this formula, the law of the country where the divorce or legal separation was requested will apply in the vast majority of cases. For example, if an international couple living abroad in another EU country asks for a divorce there, the most important factor for the court would be their country of common habitual residence. That country's laws would therefore apply.

Foreign Law

Many courts currently apply the laws of other countries. The aim of today's proposal is to add more consistency in the way they decide which country's laws to apply.

The proposal could lead to the application of a foreign law in limited cases. This is a consequence of the free movement of citizens within the EU. Nevertheless, a court could choose not to apply a country's divorce law if it is manifestly contrary to the country's own public policy – if it is discriminatory, for example.

*The proposal has been designed to avoid that the application of foreign law leads to delays and additional costs in divorce proceedings. If a court is called upon to apply the law of another Member State, the court can turn to the **European Judicial Network in civil and commercial matters (EJN)** to obtain further information on the foreign law. All Member States have designated contact points that are responsible for providing information to judges about national law.*

Information about national divorce laws is already available on the EJN's website. The Commission is currently exploring other measures to facilitate the application of foreign law before the proposal enters into force.

The proposal does not in any way harmonise national divorce laws or practices, which remain very diverse for cultural and historical reasons.

These rules will apply only to international divorce – where both spouses are from different Member States or live in another Member State than that of their nationality or do not live in the same Member State. It will simply be a helpful set of rules for citizens involved in an international divorce.

Third States

The proposal may also benefit people from non-participating countries and non-EU countries whose divorce or legal separation is heard before a court of a participating Member State.

Take the example of a married American couple living in the south of France. If one spouse moves to an EU country that does not take part in the proposal, such as the Czech Republic, Poland or Slovakia, and the other stays in France, in many cases US divorce law would apply because both spouses have a common nationality, even if they had lived in France for most of their lives. However, if the husband moves to a Member State that is part of the proposal, French law would apply to the divorce because France is the last habitual residence of the spouses.

On the other hand, a couple from a participating country may be deprived of the proposal's benefits if the court that is competent to hear the divorce is located in a non-participating country. That would be the case if two French people move to the U.K. and decide to separate.

In any case, this French couple would be no worse off after the proposal takes effect in the participating Member States compared to the current situation, which offers no benefits for international marriages.

Background

The press release identified the current situation for cross-border couples as being:

5. 20 EU countries determine which country's law applies based on connecting factors such as nationality and long-term residence so that the spouses' divorce is governed by a law relevant to them.
6. 7 EU Member States (Denmark, Latvia, Ireland, Cyprus, Finland, Sweden and the UK) apply their domestic law.

The Commission first proposed helping international couples in 2006, but the plan (so-called "Rome III" Regulation") did not get the required unanimous support of EU governments. Since then, 10 EU countries (Austria, Bulgaria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain)

said they would like to use so-called enhanced cooperation to advance the measure. Under the EU Treaties, enhanced cooperation allows nine or more countries to move forward on a measure that is important, but blocked by a small minority of Member States. Other EU countries keep the right to join when they want.

The Regulation proposed today has no effect on Member States' ability to define marriage.

Way forward

EU Member States must now vote on whether the 10 countries may proceed with enhanced cooperation. The European Parliament must also give its consent. "10 governments have asked for the Commission to propose a solution. Using the enhanced cooperation procedure is a good sign that the EU has the flexibility to help its citizens, even with difficult legal issues. My goal is to ensure that citizens can take full advantage of their right to live and work across European borders," said EU Justice Commissioner Viviane Reding.