Family Law and Successions

Open Issues in European International Family Law: *Sahyouni*, "Private Divorces" and Islamic law under the Rome III Regulation

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The first reference for a preliminary ruling of the European Court of Justice (CJEU) regarding the interpretation of the Rome III Regulation[1] is pending.[2] The case covers two of the most debated subjects concerning the Rome III Regulation: (1) whether the recognition of a "private divorce" obtained abroad falls within the scope of application of the Rome III Regulation and, in the event of an affirmative answer, (2) how to precisely interpret Article 10 Rome III Regulation. Those two questions often occur together. In the following text, I will deal with both of them in the aforesaid order.

I. Are "private divorces" obtained in a third country recognizable?

1. What is a "private divorce"?

"Private divorce" refers to the *ex nunc* dissolution of a marriage that does not require a state authority to be involved. Many EU Member States exclude the possibility to divorce without an involvement of a state authority, commonly a court. For instance, German,[3] English[4] and Austrian[5] law require a divorce to be declared by a state court.[6] Whether and to what extent a court decision is necessary is a question of procedure. The Rome III Regulation only deals with the applicable law (on separation and divorce). Thus, the Regulation does not preclude but neither does prescribe a certain court proceeding.[7]

To distinguish a "private divorce" from a "public divorce" can be difficult. Some legal systems do not require a court to decide. Instead, they allow a (consensual) divorce proceeding in front of a notary or another public authority.[8] The Rome III regulation explicitly states that those divorces are treated as a "public divorce" by a court (Article 3(2) Rome III Regulation[9]).[10] The delineation to a "private divorce", nevertheless, can be blurred, whenever the dissolution of the marriage does not depend on a state decision. This is especially the case whenever a public authority has to register the divorce and it remains unclear to what extent this registration is constitutive for the divorce. For instance, in France,[11] since 2017 a court proceeding is no longer required in certain cases of consensual divorce. The spouses and their attorney have to sign a mutual declaration and a notary has to register that document. Similarly, the Italian[12] divorce law of 2015 provides for divorce by mutual consent in the way that the spouses have to sign an agreement in the presence of their attorneys. Afterwards, the public attorney has the possibility to declare the divorce invalid for reasons of substantive law. The dissolution of the marriage has to be communicated to the civil register but the registration is not constitutive. Those divorces are not regarded as "private" as long as the state or the authority involved still scrutinizes the facts of the case

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1 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, OJ 2010, L 343, 10-16.

2 OLG München, 2.6.2015 – 34 Wx 146/14, *unalex DE-3171* was declared inadmissible for obvious incompetence, CJEU, 12.05.2016 – C 281/15, *Soha Sahyouni ./. Raja Mamisch*, *unalex EU-671* for an analysis see *Gössl*, StAZ 2016, 232. Reading the decision as a misunderstanding, the court re-submitted the request OLG München, 29.6.2016 – 34 Wx 146/14, *unalex DE-3406*; see most recently GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686.

3 Article 17 para. 2 Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche – EGBGB) and sec. 1561 Civil Code (Bürgerliches Gesetzbuch – BGB).

4 See several rules in Matrimonial Causes Act 1973.

5 Sec. 46 Ehegesetz.

6 *Gärtner*, Die Privatscheidung im deutschen und gemeinschaftsrechtlichen Internationalen Privat- und Verfahrensrecht, Tübingen, 2008, 64-66; *Núñez Iglesias*, Revista de Derecho Civil 2015, 153 *et seq*.

7 *Mayer*, in: *Althammer* (ed.), Brüssel IIa ; Rom III, Munich, 2014, Art. 5 Rom III para. 33; *Hausmann*, Internationales und europäisches Ehescheidungsrecht, Munich, 2013 Ch. A para. 238; *Makowsky*, GPR 2012, 266, 268; *Spickhoff*, in: *Spickhoff* (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht, Bonn, 2014, 93, 98; against: *Süß*, MittBayNot 2012, 308, 311 *et seq*.; unclear on the issue: *Raupach*, Ehescheidung mit Auslandsbezug in der Europäischen Union, Tübingen, 2014, different p. 85 and 117.

8 E.g. Denmark, Portugal (Art. 1773 Abs. 2 Código Civil), Finland, see *Borrás*, *unalex MAT-6*, 27, 35 (no. 20); *Franzina*, CDT 2011, 85, para. 27; *Gärtner* (n. 6), *7 et seq*.; *Gärtner*, StAZ 2012, 357, 358; *Hammje*, RCDIP 2011, 291 para. 7; *Schwenzer*, in: *Gottwald* (ed.), FS Henrich, Bielefeld, 2000, 533 *et seq*.;. *Rösler*, RabelsZ 2014, 155, 173; Estland in case of a lost spouse according to *Feldtmann/Freyhold/Vial/Bühler*, Facilitating Life Events Part II: Synthesis Report Final Report for the European Commission, DG JLS - Directorate-General for Justice, Freedom and Security on the project No JLS/2006/C4/004, Bremen 2008, 76 and Romania according to *Bergmann/Ferid/Henrich/Bormann*, Internationales Ehe- und Kindschaftsrecht, Rumänien, p. 31 and Latvia according to *Bergmann/Ferid/Henrich/U. Schulze*, Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, Länderbericht Lettland, p. 54.

9 Article 3 no. 2: "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."

10 *Franzina*, NLCC 2011, 1465, 1466; *Gössl,* beck-online.GROSSKOMMENTAR zum Zivilrecht, Munich, 2017, Art. 3 Rom III para. 14 *et seq*.; *Hammje*, RCDIP 2011, 291 para. 7.

11 Article 229 Code Civil, Loi n°2016-1547 du 18 novembre 2016 - article 50.

12 Art. 6 decreto legge: Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile (decreto legge Nr. 132, Gazzetta Ufficiale, 12.9.2014), approvato definitivamente 6.11.2014.

and the legal background and has the final decision about the dissolution of the marriage.

This article will not deal with the concrete definition of a private divorce in those difficult cases.[13]

To analyse whether private divorces in general fall within the scope of application of the Rome III Regulation, I will focus on those divorces which are clearly "private", i.e. a divorce which is dissolved by the spouses' mere declaration or agreement. Furthermore, whenever a religious authority (Sharia Court etc.) issues a divorce, the divorce remains a "private" one as long as that authority is not recognized by state law as a public authority.[14]

2. Relevance in the context of "Recognition" or "Acceptance" by conflict of laws

The discussion regarding the extent to which a private divorce can be relevant within the EU has to be put in context. If a Member State requires a court proceeding for the dissolution of a marriage, the question is of no relevance: The question is one of procedural nature, depending on the *lex fori*. According to the *lex fori,* a court has to be seized. Jurisdiction follows the rules of the Brussels IIa Regulation[15] or domestic procedural law. The court will then use the Rome III Regulation to determine the *lex causae*. It is irrelevant whether said *lex causae* requires a court proceeding or not.[16]

The discussion becomes central in the context of a private divorce obtained abroad. In order to have this divorce produce effects in a Member State that does not know private divorces, the parties have to seek the "acceptance" or "recognition" of the divorce.

a) Recognition and procedural autonomy of the Member States

Whenever the Member State provides a special proceeding for the recognition of a private divorce, e.g. the recognition of a civil status registration, or a special court proceeding,[17] the recognition is a question of procedural law. The EU has not harmonized proceedings to recognize private divorces: Brussels IIa covers only the recognition of "public divorces" and Rome III covers only the law applicable to divorce. Thus, the principle of procedural autonomy of the Member States applies, giving prevalence to special national proceedings.

b) "Acceptance" by conflict of laws

If, on the other hand, a Member State does not provide for a special proceeding to recognize a private divorce obtained abroad, it is possible that the Member State follows the approach of "recognition" or "acceptance by conflict of laws". Using those terms, I refer to a concept which, e.g. is known in Germany for dealing with a change of status abroad. No specific procedural rule of recognition exists in Germany. The question of the validity of a status change can occur as a preliminary question or main question. National authorities then must determine which law is applicable to the status change (e.g. the divorce) abroad to determine its validity requirements.[18] If those requirements are fulfilled according to the *lex causae* determined by the domestic conflict of laws system, the dissolution of the marriage will be 'recognized' or 'accepted' (of course, provided it does not violate the forum's public policy). In that context, the question arises as to whether a national authority is obliged to apply the Rome III Regulation to determine the law applicable when determining the requirements for the divorce. In general, the principles of effectiveness and equivalence speak for the application of the Rome III Regulation. While a Member State has no obligation to introduce such an approach to "acceptance", they are supposed to use the EU conflict of laws rules whenever they usually apply a conflict of laws rule and the scope of application of a harmonized rule is open.[19] Therefore, only if an interpretation of Rome III comes to the conclusion that it excludes "private divorces", is the regulation not applicable to the question of "acceptance" under conflict of laws.

3. Scope of application of the Rome III Regulation regarding private divorces

a) Wording

The wording of the Rome III Regulation seems to exclude private divorces.[20] The Regulation is based on the assumption that divorces always involve a public authority: The Regulation refers several times to "the time the court is seized" (e.g. Article 5 (2); Article 6 (2); Article 8 (a), (b), (c), (d)) and "the law of the forum" (e.g. Article 5 (1) (d);

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13 The characterization of the Italian and the French divorces is unclear. The Italian seems to be regarded as an "administrative", thus, "public" divorce, see *Scalzini*, StAZ 2016, 129, 131; *Gössl* (n. 10), Art. 3 Rom III, para 16.1; the French one is too new to distinguish a concrete tendency, but some scholars seem to categorize it as administrative as well: *Nourissat/Boiché et al*, Plainte contre la France, 19 avr. 2017, http://forum-famille.dalloz.fr/files/2017/04/Plainte-aupr%C3%A8s-de-la-Commission-19.04.2017.pdf, p. 2.

14 *Franzina*, CDT 2011, 85 para. 27; *Gössl* (n. 10), Art. 3 Rom III para 17 *et seq.*; *Hammje*, RCDIP 2011, 291 para. 7; *Henrich*, IPRax 1995, 86, 87, 89; *Rossolillo*, NLCC 2011, 1447-1463, 1449; OLG München, 2.6.2015 – 34 Wx 146/14, *unalex DE-3171*; BGH, 3.5.1995 – XII ZR 29/94, NJW 1995, 2028-2031.

15 Regulation 2201/2003 of 27 November 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, OJ 2003, L 338, 1-29.

16 See, e.g. *Gössl,* beck-online.GROSSKOMMENTAR zum Zivilrecht, Munich, 2017, Art. 1 Rom III para. 36.1.

17 See sec. 44 -54 Family Law Act 1986 (England and Wales).

18 To the different and sometimes confusing concepts of "recognition" see *Gössl*, StAZ 2016, 232, 233; *Gössl/Verhellen*, International Journal of Law, Policy and the Family 2017, 174, 178; to preliminary questions in EU conflict of laws see *Gössl*, JPrivIntL 2012, 63, in the context of Rome III *ead.* (n. 16), Art. 1 Rom III para. 53 *et seq.*

19 *Gössl*, StAZ 2016, 232, 234; similar CJEU, 12.05.2016 – C 281/15, *Soha Sahyouni ./. Raja Mamisch, unalex EU-671*; similar probably *Pika/Weller*, IPRax 2017, 65 *et seq.*

20 E.g. GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686, para. 60; *Helms*, in: *Hilbig-Lugani/Jakob et al.* (eds.), FS Coester-Waltjen, Bielefeld, 2015, 431, 435.

Article 5 (3). Article 3 furthermore explains that "court" can also include other state authorities with jurisdiction but no other private institutions.[21] Moreover, one reason to harmonize the international divorce law in the EU was the intention to diminish "forum" shopping.[22] Thus, the drafters of the Regulation assumed that Rome III would primarily apply to divorces obtained through a court.[23]

b) History

Nevertheless, the weight of the wording of the Regulation should not be overestimated. The Regulation's apparent limitation to proceedings involving a court descends from its early stages. Originally, Rome III was supposed to adjust and amend the existing Brussels IIa Regulation.[24] Brussels IIa only deals with procedural matters, especially jurisdiction and recognition/enforcement. The drafters of Rome III initially intended to harmonize the jurisdiction together with the applicable law. Thus, there was no need to deal with private divorces. After it became clear that such an adjustment of the Brussels IIa Regulation would fail, the wording of the aforementioned provisions remained unchanged.[25] Whether private divorces are included was never explicitly discussed, neither was the concept of "acceptance" or "recognition by conflict of laws".[26] On the other hand, there were extensive discussions regarding the possibility and problem of having an Islamic law *lex causae*.[27] Islamic law and the possibility of dissolving a marriage by unilateral declaration is a classic example of a private divorce. That supports the view that Rome III does not exclude private divorces *a priori*. Thus, wording and history leave unanswered whether Rome III does apply to divorces by a non-state authority.[28]

c) Purpose

The purpose of the Rome III Regulation to broadly harmonize conflict of laws rules in the EU supports a comprehensive understanding of the Regulation's scope of application: The harmonization aims at the prevention of "limping status", here divorces.[29] A divorce not obtained in a court proceeding does not produce a court decision which can be recognized by the Brussels IIa Regulation. Thus, such a divorce is even more vulnerable to resulting in a limping divorce.[30] Harmonizing the law applicable with no regard to the nature of the divorce proceeding helps to reduce the number of limping divorces.

4. First Conclusion

Member States that provide a special proceeding to recognize "private divorces" are not obliged to apply the Rome III Regulation on the recognition of a private divorce.[31] A Member State that does not have a special recognition proceeding but usually "recognizes" or "accepts" foreign divorces by conflict of law, instead, has to apply the Rome III Regulation. The Regulation does not explicitly exclude it. The purpose of harmonizing the applicable law broadly and comprehensively supports an inclusion of private divorces as long as the procedural autonomy of the Member States does not take precedence.

II. Does Article 10 Rome III Regulation (second option) exclude the application of Islamic Law?

Article 10 provides a special referral to the *lex fori* in two cases. I will focus on the second and probably more debated one.[32] A court has to apply the *lex fori* if the *lex causae* is discriminatory. One reason for that debate is that the concrete interpretation of Article 10 Rome III confronts scholars with fundamental questions of purpose and nature of Private International Law today and in the EU.

1. Description of the problem

According to Article 10, the *lex fori* must be applied instead of the *lex causae* if the *lex causae* "does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex".[33] The rule is aimed at family law systems where a divorce can be obtained by the husband's unilateral declaration. The concept of *talaq* in traditional Islamic law and the concept of *ghet* in traditional Mosaic Law constitute such a divorce possibility.[34] The traditional *talaq* results in the dissolution of a marriage if the husband

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21 See n. 9.

22 *Gärtner*, StAZ 2012, 357, 362.

23 *Gössl* (n. 16), Art. 1 Rom III para. 38.

24 E.g. *Rossolillo*, NLCC 2011, 1447-1463 1450; *Gössl* (n. 16), Art. 1 Rom III para 38; *ead.*, beck-online.GROSSKOMMENTAR zum Zivilrecht, Munich, 2017, Art. 2 Rom III para. 2 *et seq*.

25 *Carrascosa González*, CDT 2012, 52 para. 13 *et seq.*; *Gössl* (n. 24), Art. 2 Rom III para. 9; GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686 para. 32 *et seq*.

26 *Gärtner*, StAZ 2012, 357, 362; *Helms*, FamRZ 2011, 1765, 1766. Thus, the assumption that Rome III guarantees a right of a divorce proceeding by a court cannot be based in the wording or history of the regulation. Nevertheless, see *Nourissat/Boiché et. al*, Plainte contre la France, 19 avr. 2017, http://forum-famille.dalloz.fr/files/2017/04/Plainte-aupr%C3%A8s-de-la-Commission-19.04.2017.pdf.

27 *Gössl* (n. 16), Art. 1 Rom III para. 39.

28 *Helms*, FamRZ 2011, 1765, 1766; *Martiny*, in: *Prütting*, et al. (eds.), Bürgerliches Gesetzbuch. Kommentar, Köln, 11th. ed 2016, EGBGB Anh. I Art. 17 para. 5; *Mörsdorf-Schulte*, RabelsZ 2013, 786, 804; *Spickhoff*, in: *Spickhoff* (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht (n. 7), 93, 98. Contrary conclucion GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686, para 64-66.

29 *Arnold*, in: *Althammer* (ed.), Brüssel IIa ; Rom III, Munich, 2014, Art. 1 Rom III para. 7; *Raupach* (n. 7) 93 *et seq.*; *Makowsky*, GPR 2012, 266, 268.

30 *Mayer*, in: *Althammer* (ed.) (n. 7), Art. 5 Rom III para. 34; *Helms*, FamRZ 2011, 1765, 1766.

31 Similar GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686, para. 32 *et seq*.

32 When I refer below to Article 10 Rome III, I am referring to the second option.

33 *Franzina*, CDT 2011, 85, para. 73.

34 *Budzikiewicz*, in: NomosKommentar (ed.), NomosKommentar Bd. 6 (Rom-Verordnungen), Baden-Baden, 2nd. ed 2015, Art. 10 Rom III paras. 23 *et seq.*; *Henrich*, Internationales Familienrecht, Frankfurt am Main, 2nd. ed 2000 para. 95; *Duintjer Tebbens*, in: The Permanent Bureau of the Hague Conference on Private International Law (ed.), Essays in honour of Hans van Loon, Cambridge, 2013, 123, 129; *Makowsky*, GPR 2012, 266, 271; *Sportel*, Divorce in transnational families, Cham, 2016, 77 *et seq.*; *Winkler von Mohrenfels*, in: *Witzleb/Ellger et al.* (eds.), FS Martiny, Tübingen, 2014, 595, 595 *et seq*.

declares three times that he wants the marriage to be dissolved. Many Islamic or Mosaic law-based legal systems today ensure (e.g. by additional procedural regulation)[35] that in the concrete case the wife's rights are preserved. Still, the substantive law originating from Islamic law often makes a distinction between the possibilities of divorce on the grounds of the spouses' sex. Often only the husband can declare the dissolution of the marriage.

In cases of clear discrimination, for instance, a case of divorce by the husband without his wife's consent or even consultation, there is no doubt that Article 10 Rome III applies. A court must not apply the discriminatory foreign rule but the *lex fori* instead, protecting the interests of both spouses equally.

Unclear, on the other hand, are situations where the wife actually wants the husband to divorce her or where the requirements for a divorce under the *lex fori* are also met. In these cases the concrete application of the foreign law does not result in a discrimination. Scholars, thus, claim that Article 10 Rome III should only apply in cases of a (real) concrete discrimination of the spouse, classifying the rule as a specific version of the public policy exception,[36] i.e. a rule that blocks the application of the *lex causae* in exceptional cases.[37] Other scholars regard the rule as a conflict of laws rule "with a substantive flavour"[38] or as some kind of international mandatory rule.[39]

After a short overview of background and context of Article 10 Rome III and an evaluation of the arguments supporting both views, I come to the conclusion that Article 10 Rome III is not only a special case of public policy exception. Thus, the rule does not fit into the usual instruments of traditional Private International Law. Instead, the rule is a good example of the changed understanding and purpose of EU Private International Law that follows concrete substantive goals and policies other than those of traditional Private International Law.

2. Reference(s) to the CJEU and national decisions

As mentioned above, the question as to whether Article 10 Rome III only applies in cases of concrete discrimination was referred to the CJEU in 2015 by a German court.[40] In contrast, a Spanish court[41] applied Article 10 Rome III without discussion, only abstractly focusing on the different treatment of wife and husband, as the courts did in former times for reasons of public policy.[42] In 2016, the CJEU declared the request to be inadmissible for reasons of obvious lack of jurisdiction.[43] It will probably decide on the issue again as the referring court repeated the referral.[44] The interpretation, therefore, remains an open issue.[45]

3. Background of Article 10 Rome III (second option)

The overall purpose and background of Article 10 Rome III are clear: to protect the fundamental value of equality between man and woman and prohibit any discrimination on the grounds of sex.[46] Rome III provides universal conflict of laws rules. Thus, the content of the law applicable is unpredictable in advance. The drafters of the Regulation were concerned that a referral could lead to the application of religious, discriminatory law. Modelled after Article 107.2.2 lit. c Código Civil (Spain)[47],[48] Article 10 Rome III provides an explicit prohibition of the application of such a discriminatory law with the intention of convincing the more concerned Member States to support the Regulation.[49] The rule, therefore, is supposed to give protection beyond the usual devices of conflict of laws to maintain substantive values (esp. the public policy exception).

4. Arguments supporting a concrete understanding of Article 10 Rome III

a) Avoidance of discrimination

What primarily speaks against an abstract evaluation of the foreign *lex causae* is the overall purpose of the rule: The rule intends to prevent the discrimination of one of the

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35 See e.g. latest amendment in Israel: Knesset Rabbinical Courts, Enforcement of Divorce Judgements (Amendment No. 8) Law, 5777-2017 of 3.4.2017, http://fs.knesset.gov.il/20/law/20_lsr_382428.pdf or Marocco: Articles 78, 79 of the Family Law Code, Dahir Nr 1-04-22 v 12. hijala 1424 of 3.2.2004.

36 *Basedow*, in: *Verbeke* (ed.), Liber amicorum Pintens, Cambridge, 2012, 135, 148; *Coester-Waltjen/Coester*, in: *Michaels/Solomon* (eds.), Liber Amicorum Schurig, Munich, 2012, 33, 44; *Kohler*, in: *Kronke/Thorn* (eds.), FS von Hoffmann, Bielefeld, 2011/2012, 208, 212; *Möller*, J Private Int Law 2014, 461; *Schurig*, in: *Kronke/Thorn* (eds.), FS von Hoffmann, Bielefeld, 2011/2012, 405, 408 *et seq.*; *Spickhoff*, in: *Spickhoff* (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht (n. 7), 93, 110; broad overview over the discussion at *Gössl*, beck-online.GROSSKOMMENTAR zum Zivilrecht, Munich, 2017, Art. 10 Rom III para 17 *et seq.*

37 See e.g. in detail *Gössl*, EuLF 2016, 85.

38 *Franzina*, CDT 2011, 85 para. Fn. 142, inspired by Gaudemet-Tallon RCADI 312 (2005), 228 "à charactère substantiel".

39 *Verschraegen*, Internationales Privatrecht, Wien, 2012, para. 138; *Winkler von Mohrenfels*, in: *Witzleb/Ellger et al.* (eds.), FS Martiny (n. 34), 595, 596 *et seq.*, 615; see also *Weller/Hauber/Schulz*, IPRax 2016, 123; *Weller*, RabelsZ 2017, forthcoming.

40 Reference OLG München, 2.6.2015 – 34 Wx 146/14, *unalex DE-3171*.

41 Audiencia Provincial de Logroño ECLI:ES:APLO:2014:223.

42 *Gössl*, EuLF 2016, 85, 91 *et seq.*

43 CJEU, 12.05.2016 – C 281/15, *Soha Sahyouni ./. Raja Mamisch, unalex EU-671*, see *Gössl*, StAZ 2016, 232.

44 Reference OLG München, 29.6.2016 – 34 Wx 146/14, *unalex DE-3406*.

45 *Gössl*, StAZ 2016, 232.

46 Articles 20, 21 para. 1 Charter of Fundamental Rights of the EU und Article 14 ECHR; *Calvo Caravaca/Carrascosa González*, CDT 2009, 36 paras. 42 *et seq.*; *Duintjer Tebbens*, in: The Permanent Bureau of the Hague Conference on Private International Law (ed.), Essays in honour of Hans van Loon (n. 34), 123, 129 *et seq.*; *Franzina*, CDT 2011, 85, paras. 73 *et seq.*; *Leandro*, NLCC 2011, 1503–1509. Sex in that context refers to male, female or also a third sex if provided by domestic law, see *Gössl*, StAZ 2013, 301; *Goessl*, Journal of Private International Law 2016, 261.

47 Art. 107 CC: 2. […] En todo caso, se aplicará la ley española cuando uno de los cónyuges sea español o resida habitualmente en España: […] c) Si las leyes indicadas en el párrafo primero de este apartado no reconocieran la separación o el divorcio o lo hicieran de forma discriminatoria o contraria al orden público.

48 *Calvo Caravaca/Carrascosa González*, CDT 2009, 36, para. 41; *Möller*, J Private Int Law 2014, 461; *Weller/Hauber/Schulz*, IPRax 2016, 123, 127.

49 *Budzikiewicz*, in: NomosKommentar (ed.) (n. 34), Art. 10 Rom III, para 2-4; *Möller*, J Private Int Law 2014, 461, 466 *et seq*.

spouses. So, it seems contradictory to force a person to remain in a marriage even though s/he wants to be divorced and the divorce is possible under the applicable law. At least in a case of a consensual *talaq*, meaning that husband and wife agree and the unilateral dissolution of the marriage is the easiest or most efficient way, the rejection of Islamic law is not actually discriminatory to the wife.[50]

b) Recital 24: "certain situations"

A concrete, situation-based understanding of Article 10 Rome III is supported by recital 24:[51] Article 10 Rome III only applies in "certain situations" according to recital 24. Thus, the recital refers to a concrete situation, not a legal system as such.[52] On the other hand, a recital is not a rule and the rule does not reflect a limitation on "certain situations" but has the foreign *lex causae* as object of scrutiny, i.e. the abstract rules.

c) Avoidance of "limping divorces"

The consequence of such an abstract scrutiny of the *lex causae* leads to a rejection of the majority of Islamic or Mosaic divorce laws.[53] The application of the *lex fori*, instead, risks a rejection of the recognition of the divorce decision in the State of the l*ex causae*, causing more "limping" divorces, i.e. divorces that are valid in one State and invalid in another.[54] Private International Law in general tries exactly to prevent that situation by supplying abstract conflict of laws rules.[55]

d) Equality of legal systems

Additionally, one fundamental principle of traditional conflict of laws is the equality of all legal systems.[56] Traditional conflict of laws only exceptionally rejects the *lex causae* in cases of unbearable results of its application (public policy exception). The EU uses the traditional conflict-of-laws-approach. Thus, within that approach, an abstract understanding of Article 10 Rome III is – at least – unusual.[57]

5. Arguments supporting an abstract understanding of Article 10 Rome III

a) Wording Article 10 versus Article 12 Rome III

Given that some scholars of the abovementioned opinion regard Article 10 Rome III as a special form of the public policy exception, such an understanding is not inevitable. A comparison of the wording of Article 12 Rome III (public policy exception) with Article 10 Rome III speaks against such an understanding. Article 12 is clearly drawn in a different way to Article 10 Rome III: Article 10 refers to situations where "the law applicable […] does not grant one of the spouses equal access". Article 12, instead, refers to situations where "the application of a provision of the law" is incompatible with the public policy of the forum. Thus, the wording distinguishes between an evaluation of the rule itself (Article 10) and the application of such a rule (Article 12) and treats both cases differently.[58] Both the public policy exception and Article 10 Rome III aim to protect certain fundamental, substantive values.[59] To achieve that protection, the Article 10 wording focuses on the rule, hence its abstract content, and Article 12 focuses on the application of that rule, hence its concrete use in a certain case.[60]

b) Systematic review Article 10

A systematic review of Article 10 and Article 12 confirms the finding that Article 10 is not merely a specific, explicit version of the public policy exception. Article 12 follows Article 10. Usually, specific rules or exceptions to general rules follow the rule they deviate from, not v*ice versa*. Furthermore, Article 10 forms part of a row of *leges speciales* to the general rules of Article 5: Article 6 and 7 and 9 treat the law applicable to special questions of the divorce, Article 8 handles the case where no choice of law (Article 5) took place. Article 9(2) and Article 6(2) provide special referrals if certain purposes of the Regulation cannot be achieved by applying the *lex causae*. Besides, Article 11 closes the chain of conflict of law rules by determining the sort of referral (exclusion of *renvoi*).[61] Contrary to that, Article 12 and Article 13 do not provide referrals to a certain legal system. Both rules only give room to domestic values and leave the determination of the consequences to domestic law and the discretion of the judge.[62] Thus, Article 10 Rome III is clearly not only drawn as a specific case of the public policy exception. Consequently, there is also no necessity to apply the rule corresponding to Article 12.

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50 *Kohler*, in: *Kronke/Thorn* (eds.), FS von Hoffmann (n. 36), 208, 212; *Möller*, J Private Int Law 2014, 461, 469.

51 "In certain situations, such as where the applicable law […] does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the court seized should nevertheless apply. This, however, should be without prejudice to the public policy clause."

52 *Gössl* (n. 36), Art. 10 Rom III para. 19; sceptical *Hausmann* (n. 7), Ch. A para. 342; *Budzikiewicz*, in: NomosKommentar (ed.) (n. 34), Art. 10 Rom III para. 27.

53 *Hausmann* (n. 7), Ch. A para. 341; *Gössl* (n. 36), Art. 10 Rom III para. 24.

54 *Helms*, in: *Hilbig-Lugani/Jakob et al.* (eds.), FS Coester-Waltjen (n. 20), 431, 440; *Kohler*, in: *Kronke/Thorn* (eds.), FS von Hoffmann (n. 36), 208, 212; *Möller*, J Private Int Law 2014, 461, 466; *Rösler*, RabelsZ 2014, 155, 185.

55 See *supra* II. 4. d).

56 *Budzikiewicz*, in: NomosKommentar (ed.) (n. 34), Art. 10 Rom III para. 27; *Möller*, J Private Int Law 2014, 461; *Schurig*, in: *Kronke/Thorn* (eds.), FS von Hoffmann (n. 36), 405, 410.

57 *Gössl* (n. 36), Art. 10 Rom III para. 19, 23.

58 *Budzikiewicz*, in: NomosKommentar (ed.) (n. 34), Art. 10 Rom III para. 27; *Weller/Hauber/Schulz*, IPRax 2016, 123, 129 *et seq*.

59 *Hammje*, RCDIP 2011, 291, para 41.

60 *Gössl* (n. 36), Art. 10 Rom III para. 20; *Gruber*, IPRax 2012, 381, 391; *Helms*, FamRZ 2011, 1765, 1771 *et seq*.; *Kohler*, in: *Kronke/Thorn* (eds.), FS von Hoffmann (n. 36), 208, 212; similar GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686 para. 82.

61 *Gössl* (n. 36), Art. 10 Rom III para. 21 similar GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686 para. 79-81.

62 *Corneloup*, in: *Roth* (ed.), Die Wahl ausländischen Rechts im Familien- und Erbrecht, Baden-Baden, 2013, 15, 26.

c) Comparative and historical arguments

The aforementioned origins of the rule confirm an abstract reading. First, the Spanish rule from which it stems prohibited the application of abstractly discriminatory rules. [63] Furthermore, Article 10 Rome III was explicitly enacted to impede misogynist law with a special focus on certain Islamic law provisions. Consequently, the drafters of the rule were concerned not only with the result of the application of rule but also its context.[64]

A comparison of national practises using the public policy exception in cases of *talaq* shows that several national courts had and have a tendency to not apply a *lex causae* that abstractly discriminates on grounds of one spouse's sex, e.g. the French Cour de Cassation,[65] the Austrian OGH[66] and the Dutch Hoge Raad[67]. Similarly, Italian courts regarded the discrimination of a wife as such a grave violation of Italian public policy that her consent to the repudiation was not sufficient to compensate for that violation.[68] Also, some legal scholars claim that gender equality is such an important value of the EU and its Member States that even merely abstractly discriminating rules should be excluded from application at all circumstances as violations of EU public policy.[69] An abstract evaluation of the rules, therefore, is not absolutely uncommon in this context.

d) Changed purpose of EU Private International Law: Pursuing political goals

Reading Article 10 in an abstract way, the rule has not only a function to protect individual spouses but also to focus on an educational or pedagogic goal: A rule which abstractly violates essential values of the EU should not have any legal effect in any Member State forum.[70]

Thus, the rule protects the legal community and the legal system of the forum in general: They should not use a rule which is an expression of values contradictory to the fundamental values of the forum.[71] Article 10, in this reading, is not only concerned with the individuals in the case but expresses a statement about values or morals regarded as being more important than the interests of the individuals.[72]

Understood that way, the rule gains a supra-individual meaning: It is not only concerned with the individual case. Additionally, it acquires a declaratory value explicitly expressing a political direction and statement. While such a political use of Private International Law is unusual in traditional Private International Law, it is not unusual in the modern form of Private International Law, especially in the EU.[73]

6. Second Conclusion

The traditional conflict of laws approach supports a view to reduce the scope of application of Article 10 Rome III: The application of the *lex fori* (instead of the *lex causae*) should be limited to cases where the concrete application of the *lex causae* results in the actual discrimination of one of the spouses.[74]

Having said that, I come to the conclusion that Article 10 Rome III, should instead be read and applied literally without any reduction in concrete situations. Article 10 Rome III does not fit in the traditional conflict of laws system. The rule demonstrates a modern, changed and political *modus operandi* of EU Private International law. It exemplifies the changed role of Private International Law in the EU and the tendency to use it for the pursuit of concrete, substantive values different from traditional Private International Law values.

Therefore, even though, unfortunately from the point of view of traditional Private International Law, the courts have to apply the *lex fori* whenever there is abstractly a distinction between men and women in the rules and that distinction leads to discrimination. This changed purpose and intention leaves no room for a different interpretation *de lege lata*.[75]

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63 *Ortiz Vidal*, CDT 2014, 201 para. 146.

64 *Franzina*, CDT 2011, 85 para. 82; *Helms*, FamRZ 2011, 1765, 1772; *Leandro*, NLCC 2011, 1503–1509, 1507 et seq.; *Weller/Hauber/Schulz*, IPRax 2016, 123, 130; see also Austrian decree regarding Rome III: Erlass des BM, 30.3.2012, BMJ-Z30.051/0002-I 9/2011, 4.

65 Cass. 1ère civ., 17.2.2004, arrêt no. 01-11.549; 19.9.2007, Bill. Civ. No. 280.

66 OGH, 31.08.2006 – 6Ob189/06x; 3Ob130/07z; 7Ob10/08h; 6Ob69/11g; 2Ob81/11t, ECLI:AT:OGH0002:2006:RS0121192; OGH, 20.10.2011 – 2Ob81/11t, ECLI:AT:OGH0002:2011:0020OB00081.11T.1020.000.

67 Hoge Raad, 14.9.2001 – Acc R01 / 022HR, ECLI:NL:PHR:2001:AD4011; see also *Sportel* (n. 34), 76 *et seq*.

68 Cort. Cass., 5.12.1969, RDIPP 1970, 868, 871; App. Milano, 14.12.196, RDIPP 1966, 381, 382; App. Milano, 17.12.1991, RDIPP 1993, 109, 113; Trib. Milano, 24.3.1994, RDIPP 1994, 853, 855.

69 *Büchler*, in: *Götz/Schwenzer et al.* (eds.), FS Brudermüller, Munich, 2014, 61, 67 *et seq*., 71; *Contaldi*, in: *Baratta* (ed.), Diritto internazionale privato, Milano, 2010, 273, 279; *Esteban de La Rosa, Gloria*, Beijing Law Review 2015, 147, 150 *et seq*.; *Lorenz*, in: *Bamberger*, et al. (eds.), BeckOK BGB, Munich, 2017, Art. 6 EGBGB para. 11; *Ortiz Vidal*, CDT 2014, 201 para. 146 *et seq*.

70 *Büchler*, in: *Götz/Schwenzer et al.* (eds.), FS Brudermüller (n. 69), 61, 67 *et seq*., 71; *Leandro*, NLCC 2011, 1503–1509, 1507 *et seq*.; *Weller/Hauber/Schulz*, IPRax 2016, 123, 130; *Weller*, RabelsZ 2017, forthcoming.

71 *Ortiz Vidal*, CDT 2014, 201 para. 146; similar GA Saugmannsgaard Øe, opinion, 14.9.2017 – C-372/16, ECLI:EU:C:2017:686 para. 84, 87 *et seq*.

72 *Gössl* (n. 36), Art. 10 Rom III para. 22 *et seq*.; *Ortiz Vidal*, CDT 2014, 201 para. 151 *et seq*.

73 Extensively see articles in *Gössl et al*. (eds.), Politik und Internationales Privatrecht (?), Baden-Baden, 2017 (forthcoming); also *Gössl* (n. 16), Art. 1 Rom III para. 13; *Weller*, RabelsZ 2017, forthcoming.

74 *Kohler*, in: *Kronke/Thorn* (eds.), FS von Hoffmann (n. 36), 208, 212 *et seq*.; *Schurig*, in: *Kronke/Thorn* (eds.), FS von Hoffmann (n. 36), 405, 410; *Spickhoff*, in: *Spickhoff* (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht (n. 7), 93, 110; *de lege ferenda*: *Gruber*, IPRax 2012, 381, 391.

75 *Gössl* (n. 36), Art. 10 Rom III para. 24.

7. Consequences: Determination of a discriminatory rule

The object of the analysis has to be the abstract rule instead of the concrete result of its application. Nevertheless, the assessment of whether there is actual discrimination should be handled restrictively.[76] A judge should refrain from the temptation to use Article 10 Rome III quickly to evade the effort[77] the application of foreign law can bring.[78]

a) "Equal access" versus "identical access"

A restrictive interpretation of "equal access" to divorce is feasible: "Access" refers to the circumstances under which the spouses can start a divorce proceeding and reach the dissolution of the marriage.[79] When determining those concrete circumstances, according to the aforementioned the court is not allowed to look at the facts of the case, but is limited to the concrete rules in question. "Equal access", however, does not mean "identical" access.[80] Thus, access to divorce can be regulated in different ways. Access is equal, still, if both spouses have equal opportunity to apply for a divorce and achieve the dissolution of the marriage. Again, result here does not refer to the facts of the case, but the legal rules that form part of the *lex causae*.

In general, the judge has to find the abstract rule that applies to the divorce and then compare it to rules that are provided for the spouse in the same legal system regarding the same situation (but *vice versa* regarding the sex). Article 10 Rome III applies only where the wife is not granted access to divorce under the same rules as apply to the husband in the very same situation.[81]

b) Concrete examples

Access is clearly unequal if one of the spouses cannot initiate a divorce proceeding for reasons of his/her sex or only with higher burdens than is the case with the partner.[82] The same applies to rules that give the husband a right to divorce for a certain reason but does not grant that right to the wife and *vice versa*.[83]

On the other hand, a *lex causae* providing for divorce by unilateral declaration does not automatically constitute "unequal access" to the divorce proceeding: Access is still equal if both spouses have equal rights to initiate the proceedings and both have the equal opportunity to obtain a husband's *talaq* declaration controlled by a judge.[84] If a *ghet* rule provides that only the husband can initiate a divorce by handing over the divorce letter, there is unequal access. If the husband, instead, is only allowed to hand it over framed in a legal proceeding which can be initiated by husband and wife equally and where both have to consent to the *ghet*, equal access is not violated.[85]

III. Conclusions

1. As long as a Member State provides special proceedings to recognize "private divorces", the Rome III Regulation does not apply. Nevertheless, if a Member States does not have such a proceeding and usually "recognizes" or "accepts" foreign divorces under conflict of laws, it has to apply the Rome III Regulation.

2. Article 10 second option Rome III is an expression of a modern, changed and political *modus operandi* of EU Private International Law. Courts have to apply the *lex fori* whenever the *lex causae* abstractly distinguishes between men and women and that distinction leads to discrimination.

3. Courts have to evaluate the potentially discriminatory *lex causae* abstractly but restrictively to find out whether it provides "equal access" to divorce. The judge has to determine the abstract rule that applies to the divorce and then compare it to the rules that provide for the other spouse in the same legal system in the same situation *vice versa*. Access is not necessarily identical but is still equal if the *lex causae* grants the same opportunities to apply for divorce and to reach the dissolution of the marriage.

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76 *Franzina*, CDT 2011, 85 para. 73, *Gössl* (n. 36), Art. 10 Rom III para. 25.

77 To the economic advantages of the rule: *Calvo Caravaca/Carrascosa González*, CDT 2009, 36 para. 43.

78 *Gössl* (n. 36), Art. 10 Rom III para. 23.

79 *Gössl* (n. 36), Art. 10 Rom III, para. 25.

80 *Gössl* (n. 36), Art. 10 Rom III, para. 25; *Möller*, J Private Int Law 2014, 461, 465.

81 Probably similar Tribunale di Firenze, 9.5.2014, n. 1629/2014, pub. 22.5.2014; *Gössl* (n. 36), Art. 10 Rom III para. 27; *Winkler von Mohrenfels,* Münchener Kommentar zum BGB, Munich, 6th. ed 2015, Art. 10 Rom III-VO para. 10 *et seq*.

82 *Ortiz Vidal*, CDT 2014, 201 para. 142.

83 SAP La Rioja, 7.4.2014, JUR 2014\136298, according to *Ortiz Vidal*, CDT 2014, 201 para. 145 n. 104); e.g. reason for the husband to divorce if his wife stayed a night outside (not vice versa) in Cypriot law according to *de Boer*, in: *Malatesta/Bariatti/Pocar* (eds.), The external dimension of EC private international law in family and succession matters, Padua, 2008, 295, 306 n. 34.

84 *Ortiz Vidal*, CDT 2014, 201 para. 150.

85 More examples *Möller*, J Private Int Law 2014, 461, 470 *et seq*.; *Winkler von Mohrenfels* (n. 81), Art. 10 Rom III-VO, para. 11; to the Iranian law *Arif*, ZfRV 2012, 228, 235.