

The law applicable to divorce may not be that of the nationality of one of the spouses, or of the residence or last habitual residence of the spouses, if is that of the court that will subsequently hear the divorce claim

26/01/2022



Ruling of 26 January 2022, appeal no. 20-21.542

**Partial Quashing**

*Article 5 of 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, known as Rome III, states: "1. The spouses may agree to designate the law applicable to divorce and legal separation, provided that it is one of the following laws: (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 (d) the law of the forum." It follows that, when spouses whose union involves a foreign element, designate, in an agreement on the choice of the law applicable to the divorce, the law of a given State, which is not one of those listed in points (a) to (c), this choice shall be valid, under point (d), when the law is that of the court that subsequently had jurisdiction in the divorce petition*

## **Partial quashing**

**Mr CHAUVIN, President**

**Ruling No. 78 FS-B**

**Appeal No. D 20-21.542**

F R E N C H R E P U B L I C

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IN THE NAME OF THE FRENCH PEOPLE

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RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), FIRST CIVIL CHAMBER, OF 26 JANUARY 2022

Mr [R] [E], residing at [Address 2] (Russian Federation), lodged appeal no. D 20-21.542 against the ruling handed down on 24 September 2020 by the *cour d'appel* (Court of Appeal) (Chamber 2-3) of Aix-en-Provence, in the dispute between him and Ms [P] [M], née [N] [E], residing at [Address 1], respondent in the quashing.

In support of his appeal, the appellant invokes three pleas for quashing as appended to this ruling.

The case file has been sent to the Prosecutor-General.

On the report of Ms Guihal, Judge, the observations of SCP Foussard and Froger, lawyer for Mr [E]; SARL Matuchansky, Poupot and Valdelièvre, lawyer for Ms [M]; and the opinion of Ms Marilly, Advocate-General Referee; after the arguments at the public hearing of 30 November 2021, in which Mr Chauvin, President; Ms Guihal, Reporting Judge; Ms Auroy, Elder Judge; Mr Hascher, Ms Antoine, Mr Vigneau, Ms Poinseaux, Mr Fulchiron, Ms Dard, Ms Beauvois, Judges; Ms Gargoullaud, Mr Duval, Ms Azar, Mr Buat-Ménard, Ms Feydeau-Thieffry, Judge Referees; Ms Marilly, Advocate-General Referee; and Ms Berthomier, Chamber Registrar;

the First Civil Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the above-mentioned President and Judges, having deliberated in accordance with the law, has delivered the present ruling.

## Facts and procedure

1. According to the ruling under appeal (Aix-en-Provence, 24 September 2020), Mr [E], of Russian and Mexican citizenship, and Ms [M], of Russian citizenship, were married in [Locality 3] (Russia) on 19 April 1996, without a prior marriage contract.

The spouses established their first common habitual residence in Russia. By way of authentic instrument of 22 February 2016, they adopted the French regime of separation of assets with regard to their assets located in France and chose French law in the event of divorce.

2. On 11 September 2017, Ms [M] filed a petition for divorce.

## Reviewing pleas

### On the first plea

1. In application of Article 1014, paragraph 2 of the Civil Procedure Code,

there is so need to rule by a specially reasoned decision on these pleas, which are clearly not of a nature to lead to the quashing

### On the second plea

Statement of plea

2. M. [E] objected to the ruling stating that French law is applicable to the divorce, whereas:

"1°/ Under the terms of Article 5 of Council Regulation (EU) No. 1259/2010 of 20 December 2010, the choice of the "law of the forum" can only be understood as the will of the spouses to submit the divorce proceedings to the law of the State of the court having jurisdiction to hear the divorce, on the day of this choice, so as to link the jurisdiction of the judge and the law applicable to the merits. In the present case, under the terms of the agreement of 22 February 2016, the spouses had chosen, not the "law of the forum" as understood, but French law, knowing that the choice of French law could potentially dissociate the State to which the court having jurisdiction belongs from the State to which the law applicable to the divorce proceedings belongs. By refusing to dismiss the agreement as unlawful, the trial court infringed Article 5 of Council Regulation (EU) No. 1259/2010 of 20 December 2010.

2°/ Since the spouses' consent must be informed as to the substantive rules likely to apply to the divorce, Article 5 of Council Regulation (EU) No. 1259/2010 of 10 December 2010 presumes that, in the event the "law of the forum" is chosen, the spouses must be assured, at the time they make their commitment, of the content of the law applicable to the divorce. Nothing of the sort was found in this case. By relying on the agreement of 22 February 2016, the trial court infringed Article 5 of Council Regulation (EU) No. 1259/2010 of 10 December 2010.

3°/ The choice of French law could be understood even less as the choice of the "law of the forum", as all sorts of circumstances could affect the jurisdiction of the court authorised to hear the divorce and that in any event, pursuant to Article 3 of Council Regulation (EC) No. 2201/2003 of 27 November 2003, the forum could designate the Russian court or the French court, insofar as Mr [E] had always resided in Russia. In this respect as well, the possibility of the court considering that a choice of law had been made was ruled out, and Article 5 of Council Regulation (EU) No. 1259/2010 of

20 December 2010 was again infringed."

### *Court's response*

5. Article 5 of Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in laws applicable to divorce and legal separation, known as Rome III, states:

"1. The spouses may agree to designate the law applicable to divorce and legal separation, provided that it is one of the following laws:

(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

(d) the law of the forum."

6. It follows that, when spouses whose union involves a foreign element, designate, in an agreement on the choice of the law applicable to the divorce, the law of a given State, which is not one of those listed in points (a) to (c), this choice shall be valid, under point (d), when the law is that of the court that subsequently had jurisdiction in the divorce petition.

7. The *cour d'appel* (Court of Appeal) noted that the Russian spouses, one of whom habitually resided in France, signed a declaration before a notary on 22 February 2016 by which they agreed that if they were to move abroad, to designate French law as the applicable law in the event of legal separation or divorce.

8. It rightly deduced that the French law chosen by the spouses was applicable as the law of the court in which the divorce petition was heard.

9. The plea, which is new and mixed in fact, and as such inadmissible in its second part, is unfounded as to the remainder.

## **But for the second part of the third plea**

### **Statement of plea**

10. M. [E] objected to the ruling stating that French law is applicable to the determination and liquidation of the matrimonial property regime, whereas "grounds of decision must be given for any judgment. Both a contradiction in the grounds and a contradiction between the grounds and the operative part amount to a failure to state grounds. In the case in point, the ruling in its operative part decided that French law is applicable and solely applicable to all of the spouses' assets, without distinction, when it is clear from the grounds of the ruling that the assets located in Russia are subject to Russian law, while the movable and immovable assets located in France are subject to French law. The *cour d'appel* (Court of Appeal) therefore vitiated its decision with a contradiction between the grounds of its decision and between the grounds and the operative part, in violation of Article 455 of the Civil Procedure Code."

## Court's response

By virtue of Article 455 of the Civil Procedure Code:

11. According to this text, grounds of decision must be given for any judgment, and a contradiction between the grounds and the operative part amounts to a lack of grounds.
12. In order to rule that French law is applicable to the determination and liquidation of the matrimonial property regime, the ruling states that it follows from the agreement entered into between the spouses on 22 February 2016 that Russian law is applicable to all assets and real estate rights located in Russia and French law on the separation of assets for all movable and immovable property, real estate rights and income located in France.
13. In so ruling, the *cour d'appel* (Court of Appeal), which contradicted itself, did not satisfy the requirements of the above-mentioned text.

### ON THESE GROUNDS, and without having to rule on the first part of the third plea, the Court:

QUASHES AND SETS ASIDE, but only insofar as it declares French law applicable to the determination and liquidation of the matrimonial property regime, the ruling of the *cour d'appel* (Court of Appeal) of Aix-en-Provence of 24 September 2020, between the parties;

Returns, on this point, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Aix-en-Provence otherwise composed;

Orders Ms [M] to pay costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claims;

Declares that according to the procedures of the Prosecutor-General at the *Cour de cassation* (Court of cassation), this ruling will be transmitted to be noted in the margin or at the end of the partially quashed ruling;

Thus decided by the *Cour de cassation* (Court of cassation), First Civil Chamber, and pronounced by the President at the public hearing of the twenty-sixth of January, two thousand twenty-two.

**President : Mr Chauvin**

**Reporting Judge : Ms Abgrall, Judge**

**Advocate-General Referee : Ms Marilly**

**Lawyer(s) : SCP Foussard and Froger – SARL Matuchansky, Poupot and Valdelièvre**

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