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As at Wednesday, 12th January, 2011

Tax issues arising from Divorce proceedings within the European Union :

Council Regulation 1259/2010 : 20th November, 2010

Règlement 1259/2010 du Conseil du 20 décembre 2010

<http://eur-lex.europa.eu/Notice.do?val=554399:cs&lang=en&list=554399:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&hecktexte=checkbox&visu=#texte>

As part of the Enhanced legal cooperation provisions of the Union, this Regulation only applies within a specific set of Member States within the Union:

The Participating Member States are currently:

Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

Greece withdrew its request to participate on 3rd March 2010. Other States are free to join in the Participating group, but it is clear that the United Kingdom and Eire will not do so at the present time. The United Kingdom's precedence as an international Divorce forum renders any participation unlikely. As the regulation applies to the Union, the Crown Dependencies are not included in its territorial scope, irrespective of the position of the United Kingdom as to its own participation.

The Regulation applies to divorce and legal separation in situations involving a conflict of laws.

The concept of Court is defined widely by reference to the nature of the proceedings, not the court per se.

The Regulation does not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings:

(a) the legal capacity of natural persons;

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- (b) the existence, validity or recognition of a marriage;
- (c) the annulment of a marriage;
- (d) the name of the spouses;
- (e) the property consequences of the marriage;
- (f) parental responsibility;
- (g) maintenance obligations;
- (h) trusts or successions.

(e) and (h) are of specific interest to the Crown Dependencies in relation to trusts, matrimonial contracts and property regimes. Depending upon the status of the regulation in relation to the national rules in question, it may be possible in certain jurisdictions to apply to have excluded any question of property consequences from the Divorce proceedings *per se* where a trust or foreign matrimonial property régime is involved.

Article 4 states clearly that the law designated under the Regulation is absolute:

Universal application

The law designated by this Regulation shall apply whether or not it is the law of a participating Member State.

The spouses can choose the law applicable under Article 5, subject to certain restrictions.

However, the main issue to be addressed is where no choice of applicable law is made, and the Court of the Participating State concerned has to address the choice of forum and law. These issues are addressed at article 8

Article 8

Applicable law in the absence of a choice by the parties

In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses are habitually resident at the time the court is seized; or, failing that
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that
- (c) of which both spouses are nationals at the time the court is seized; or, failing that

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(d) where the court is seized.

In other words, care needs to be taken in initiating divorce proceedings in any Participating State. The exact scope of article 8, namely as to whether a Court of a Participating State is required to apply the laws of another Participating State and hear the case under that law, or retains the inherent jurisdiction to declare itself incompetent is another matter.

Note here that whilst the Regulation does not address the issue of the property consequences of the marriage and therefore taxation, bringing an action in a State such as France, can have fiscal consequences of a fairly drastic nature, as there are risks of stamp duty on “*partages*” of jointly owned property - ‘*indivisions*’ - of 1%. In that case, it is in both spouses’ interest that the drafting of any order allocating property rights where there are assets in several jurisdictions needs to be handled with care, and with tax advice. Consideration may need to be given to applying for the property matters to be handled in another jurisdiction, citing the Regulation’s limited scope.

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