

# GENERAL AND TERRITORIAL JURISDICTION REGARDING JUDGING THE HEARING OF PETITIONS FOR DIVORCE WHEN BOTH PARTIES OR ONLY ONE OF THEM RESIDES/RESIDE IN ANOTHER STATE

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## Abstract

*Romania's accession to the European Union guaranteed the precedence of the provisions of the constituent treaties of the European Union and other mandatory community regulations over the provisions of the national laws based on the constitutional principle set out in Art.148, para. (2)*

*This study analyzes the issues regarding the identification of the competent court in matters of divorce, of legal separation or the annulment of the marriage focussing on three practical situation: a) The hypothesis that the spouses have their habitual residence in different Member States; b) when both spouses have Romanian citizenship, had a joint dwelling place, but after the separation in fact, before the action for divorce was filled, the spouse - Defendant resides abroad/his or her residence is unknown; c) the spouses are of different nationalities, the Petitioner spouse is a Romanian citizen, but none of them lives in Romania any longer, having residences in different states, members of the European Union.*

*Key words: General and territorial Jurisdiction / divorce, legal separation, annulment of the marriage / Regulation No. 2201/2003 / nationality, residence, citizenship of spouses*

JEL Classification: [K36]

Following Romania's accession to the European Union dated January 1, 2007, provisions of Regulation (EC) no. 2201/2003<sup>1</sup> concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility became applicable, and since June 21, 2012, provisions of Regulation (EU) no. 1259/2010<sup>2</sup> for the implementation of enhanced cooperation in the area of the law applicable to divorce and legal separation are applicable.

According to the constitutional principle set out in Article 148 para. (2) of the Basic Law, "as a result of accession, the provisions of the constituent treaties of the European Union and other mandatory community regulations have precedence over the provisions of the national laws, with the compliance of provisions of the Act of Accession".

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<sup>1</sup> of the Council dated November 27, 2003, published in the Official Journal of the European Union series L no. 338 dated December 23, 2003.

<sup>2</sup> of the Council dated December 20, 2010, published in the Official Journal of the European Union series L no. 343 dated December 29, 2010.

Therefore, if the national law for the case being, the Civil Procedure Code contains provisions contrary to the European regulation on divorce matters, as the EU regulations have precedence.

The scope of Regulation No. 2201/2003 (known as “Brussels II”) is indicated in the provisions of Article 1 para. (1) which states that “this Regulation is applicable, regardless of the nature of the court, in civil matters related to: a) divorce, legal separation and annulment of marriage (...)”. This regulation is not applicable, according to Article 1 para. (2) “... (c) the name and surname of the child, (...), e) the obligation of support...”.

Regarding the competence of Article 3 of Regulation No. 2201/2003 identifying the competent court in matters of divorce, of legal separation or the annulment of the marriage, by reference to the following criteria:

a) the court of the Member State in whose territory the following are located:

- the habitual residence of spouses or

- the latest habitual residence of the spouses if one of them still resides there, or

- in the case of a joint application, the habitual residence of one of the spouses or

- the habitual residence of the Petitioner if he/she has resided there for at least one year before filling in his/her application or

- the habitual residence of the Petitioner if he/she has resided there for at least six months before filling in his/her application and if he/she is a national of that Member State or in the United Kingdom and Ireland, has his/her “domicile” there;

b) the court of nationality of both spouses or, in the United Kingdom and Ireland, of the joint “domicile”.

The rules on jurisdiction set out in Article 3 always determine the Member State whose courts can resolve such disputes, but not the court which is competent in the respective Member State. Therefore, establishing the court that can judge the divorce shall be in accordance with the national law of each Member State.

Facing such case, we consider that the grounds of jurisdiction established by Regulation No. 2201/2003 are **alternatives**, which means that there is no hierarchy and, therefore, any order of priority<sup>3</sup>. The main argument for this claim is the **ECJ judgment in Case C-168/08 Hadadi**, where the Court of Justice of the European Union had to decide whether there is such a hierarchy.

Its response “comes” to clarify disputes arising in judicial practice: “... Article 3 para. (1) (a) and (b) of Regulation No. 2201/2003 provides several grounds of jurisdiction, among which no hierarchy is established. All the objective criteria set out in that Article 3 para. (1) are **alternatives**. Taking into account the objective of the said regulation aimed at ensuring legal certainty, Article 6 thereof provides, in essence, that those powers defined in Articles 3-5 of the said Regulation are exclusive. Therefore, the power distribution system established by Regulation No.

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<sup>3</sup> There is another contrary opinion according to which the jurisdiction established would be exclusive. In this regard, see Mădălina Moceanu, Case Study: the court competent to hear a divorce if one of the parties resides in another state, source <http://legestart.ro/studiu-de-caz-instanta-competenta-sa-judece-divortul-cazul-resedintei-uneia-dintre-parti-intr-un-alt-stat/>

2201/2003 in the matter of marriage dissolution is not intended to exclude multiple powers. On the contrary, the coexistence of several courts having jurisdiction, without any hierarchy being established between them, is expressly provided for<sup>4</sup>.

In the explanatory memorandum of Regulation No. 2201/2003, the European Community has set the objective of creating an area of freedom, security and justice, ensuring free movement of persons. Therefore, providing a space of freedom in justice materializes by offering citizens of the Member States of the European Union variants of choice of competent court, and not by establishing exclusive competence for settling claims for divorce.

Regarding the practical aspects of the matters, we have to introduce some of the cases that may raise problems before the national courts:

1. The hypothesis that the spouses have their habitual residence in different Member States. Starting from the premise that before they parted in fact, they had a common habitual residence/domicile in Romania and they are Romanian citizens. In this case, according to Article 3 para. (1) b) of “Brussels II” Regulation, the court of nationality of both spouses is competent in these cases, meaning the Romanian court.

According to the provisions of Article 915 of the Civil Procedure Code, “(1) the application for divorce lies with the court in whose jurisdiction the last joint residence of the spouses is located. If the spouses did not have a joint residence or if neither spouse lives in the area of the district court where the joint residence is located, the competent court is that where the jurisdiction of the court lies where the defendant has his/her residence, and if the defendant has no residence in the country and Romanian courts are competent in international matters, the court in whose jurisdiction the Petitioner has his/her residence is competent. (2) If neither the Petitioner nor the Defendant have their residence in the country, the parties may agree to file the divorce petition to any court of Romania. In the absence of such agreement, the divorce petition lies with the District Court of 5<sup>th</sup> District of Bucharest”.

Therefore, concerning the territorial jurisdiction, Article 915 of the Civil Procedure Code establishes an exception to the common law (i.e., Article 107 of the Civil Procedure Code), this being an absolute territorial jurisdiction, governed by rules of public order. Regarding the concept of “residence”, the doctrine (Boroi et al., 2013:429-430) and jurisprudence<sup>5</sup> are unanimous in assessing that it must be understood as an element of individual’s identification, being therefore of interest, not the permanent and basic dwelling place, but the actual **address where that person lives**.

For the case being, since the spouses no longer live in the country, the provisions of para. (2) Article 914 of the Civil Procedure Code are applicable. Therefore, if the

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<sup>4</sup> For further information, please see

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d563f0478fe3e24beb9fe0f852631d7ea6.e34KaxiLc3eQc40LaxqMbN4Oc30Se0?text=&docid=72471&pageIndex=0&doclang=R O&mode=lst&dir=&occ=first&part=1&cid=459175>

<sup>5</sup> Decision no. 3210 dated November 18, 2014, given by the Civil Division I of the High Court of Cassation and Justice, concerning a negative conflict of jurisdiction

spouses reach an agreement, they can file the divorce petition to any court in Romania and in the absence of such agreement, the competent court will be the District Court of 5<sup>th</sup> District of Bucharest.

The term “agreement” used by the law-maker shall refer to, as a matter of principle, the understanding governed by Article 5 para. (1) of Regulation (EU) No. 1259/2010, which states that “spouses may agree to designate the law applicable to divorce and legal separation” (Boroi et al., 2013:432).

Specifically, the court in Romania has jurisdiction over the divorce petition of two Romanian citizens, *even if at the time the court is notified, none of them reside in Romania*, the sole criterion for determining such powers being that, at the date of submitting the petition for divorce, *the spouses are citizens of the Romanian state* (Boroi et al., 2013:431).

Having in mind that HCCJ decided that<sup>6</sup>, where parties, Romanian citizens file a petition for the dissolution of marriage concluded in a Member State of the European Union, the provisions of Article 3 para. b) Thesis I of the Regulation No. 2201/2003 are incident, which determines the international jurisdiction of the courts of Romania. HCCJ added that, if the Defendant is not dwelling in the country, the territorial jurisdiction lies with the **Petitioner’s home court**.

In case of invoking a plea of lack of territorial jurisdiction, I consider that the solution should be to admit the exception and declining the jurisdiction in favor of the District Court of 5<sup>th</sup> District of Bucharest.

2. A second assumption when both spouses have Romanian citizenship, had a joint dwelling place, but after the separation in fact, before the action for divorce was filled, the spouse -Defendant resides abroad/his or her residence is unknown.

Applying the same reasoning as above, we believe that the court of jurisdiction will be:

- the court within whose jurisdiction the last joint residence of the spouses is located if the spouse-Petitioner still resides in the district court where the last family residence is located,

- if the Petitioner spouse does not live in the district court where the last family residence is located, and Romanian courts are competent in international matters, the court in whose jurisdiction the residence of the Petitioner is located is competent. Thus, in order to operate this power, it is necessary to fulfill three conditions at the same time: 1. The Defendant has no residence in the country; 2. in terms of procedural relations of private international law, Romanian courts have eth jurisdiction. 3. The Defendant has his/her residence in Romania, as it is the benchmark depending on which territorial jurisdiction is established, as being the court of this district (Boroi et al., 2013:431).

If the Defendant spouse has no known residence, as it is considered in the literature (Boroi et al., 2013:434), to common law rule laid down in Article 107 of the Civil Procedure Code does not apply, as the mandatory special rule established by

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<sup>6</sup> Decision No. 687 dated February 27, 2014, given by the Civil Division I of HCCJ.

Article 914 of the Civil Procedure Code will also be applicable, which establishes the jurisdiction in favor of the court at the Petitioner's domicile, just as if the Defendant would reside abroad. It is worth noted that, in this case, if the Petitioner informs on due grounds that although he/she has done everything in his/her power, he/she failed to find out the Defendant's domicile or any other place where he/she could be summoned according to law, the court may approve his/her summoning by advertising, according to Article 167 para. (1) of the Civil Procedure Code. In order for the Defendant not to be left defenseless, with the approval of summoning by advertising, the court will appoint a trustee of the lawyers of the bar, according to Article 58 who will be summoned to debates to represent the interests of the Defendant (Article 167 para. (3) of the Civil Procedure Code).

3. Finally, a third hypothesis is that the spouses are of different nationalities, the Petitioner spouse is a Romanian citizen, but none of them lives in Romania any longer, having residences in different states, members of the European Union.

In this situation, the provisions of Regulation No. 2201/2003 become fully applicable.

Therefore, the court of jurisdiction may be:

- the court of the Member State where the habitual residence of the Defendant is located, if known; or
- the court of the Member State where the habitual residence of either spouse is located, in case of a joint petition; or
- the court of the Member State where the habitual residence of the Petitioner is located, if he or she has been residing there for at least one year before submitting the petition; or
- the court of the Member State where the habitual residence of the Petitioner is located if he or she has been residing there for at least six months immediately before submitting the petition and it is a national of that Member State or, in the case of the United Kingdom and Ireland, has his/her "domicile" there.

The liability of proofing the residence lies with the person making an endorsement before the court, in the present case, the person that submits the petition for the summoning.

Similarly, Regulation (EU) No. 1259/2010 sets out a number of special rules, derogatory in divorce matters and legal separation in situations involving a conflict of laws, nevertheless without prejudice to the provisions of Regulation "Brussels II".

Article 1 para. (2) of Regulation establishes the cases where it is impractical, even if they are only preliminary issues in the context of divorce or legal separation proceedings: the legal capacity of individuals; the existence, validity or recognition of a marriage; annulment of marriage; name of the spouses; the consequences on the property consequences of the marriage; parental responsibility; liability for support; fiduciary/trustee act or hereditament.

According to Article 5 para. (1) of the Regulation, 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 have their habitual residence at the date of the agreement; or
- b) the law of the State where the spouses' last habitual residence was located, provided that one of them still resides there at the date of the agreement; or
- c) the law of the State of nationality of either spouse at the date of the agreement; or
- d) *Lex fori*.

This agreement can be concluded and amended at any time but not after the court has been notified. If this is allowed by the *lex fori*, the spouses may designate the law applicable before the court during the procedure. In this case, the court notes the spouses' agreement, according to *lex fori* (Article 5 para. (2) and (3) of the Regulation).

In the absence of a choice pursuant to provisions of Article 5, divorce and legal separation are governed, according to Article 8 of the Regulation, by the law of the State:

- a) where the spouses have their habitual residence at the time the court is being notified; or otherwise
- b) where the spouses had their last habitual residence, provided that that the respective period had not ended for more than one year before the court was notified, as long as one of them still resides there at the date of court notification; or, in the absence thereof
- c) whose nationality is held by both spouses at the date of court notification; or otherwise
- d) where the court is being notified.

Regulation No. 1259/2010 becomes applicable to the extent that there is a conflict of laws without, however, being able to affect the provisions of Regulation No. 2201/2003. Thus, whenever there are several competent courts according to Article 3 of Regulation No. 2201/2003, and there is a conflict of laws, the Petitioner is that who has the power to choose where he/she files for the divorce petition.

Conclusions. Therefore, we consider both general and territorial jurisdiction, in terms of judging the petition for divorce when both parties or only one of them lives/live in the territory of another Member State of the European Union will be determined according to criteria established alternatively by Regulation No. 2201/2003. The person who files the petition for divorce has the possibility of choice between several equally competent courts. Nevertheless, if it appears that the Romanian court has jurisdiction, the provisions of Article 914 of Civil Procedure Code are applicable, which establish an exclusive territorial jurisdiction.

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