

LAW APPLICABLE TO DIVORCE WITH FOREIGN ELEMENT

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Abstract

Increasing citizens' mobility at an international level and, in particular, within the European Union has increased the number of families with an international dimension, ie families whose members have different citizenships or live in different states.

When families are separated, international cooperation is required to protect the major interests of children resulting from marriage, in order to provide them with a secure legal environment to maintain relationships with persons who have parental responsibility towards them. Law systems have adopted specific regulations that establish how to determine the law applicable to family relationships with a foreign element. Within the European Union, uniform regulations have been adopted on family relationships with a foreign element (divorce with a foreign element being one of the regulated areas).

Keywords: *divorce with foreign element; Determination of the applicable law; Enhanced cooperation; European Union Law; Recognition of foreign judgments.*

1. General legal framework for determining the law applicable to divorce with a foreign element

The general provisions on the settlement of foreign-born divorce are contained in Book VII of the Romanian Civil Code. The provisions of private international law are correlated with the provisions of substantive law (Article 373-404 C. civ.), Which regulates the reasons and the procedure of divorce; Divorce by agreement of the parties; Divorce due to one of the spouse's health and divorce.

In the matter of divorce, the solutions introduced in the Romanian Civil Code are new in both the points of connection and the possibility of the husbands to choose, within certain limits, the applicable law. Thus, the link points "common citizenship - common domicile" are reversed, the applicable law being mainly the law of common habitual residence, and, failing that, the law of the common citizenship of spouses. Also, the conditions under which the dissolution of marriage by unilateral repudiation / denunciation, unknown in Romanian law, can be recognized in Romania. In essence, it was considered that the solution to invoking public order was not justified when the

woman itself accepted this way of selling marriage, which is basically equivalent to a divorce agreement.[1]

The legislator of the Romanian Civil Code has agreed the national provisions of private international law with the European norms.[2] The proposed solutions are in line with the Green Paper on applicable law and divorce competence, launched by the European Commission on 14 March 2005, which proposed a unification of conflict rules at EU level, starting from the premise of the need to ensure greater security and Predictability with regard to the law applicable to divorce.¹³

1.1. Conceptual delimitations

The Romanian private international law qualifies divorce as the way to sell marriage with a foreign element during the spouses' life and in compliance with the conditions set forth in Book II of the Civil Code ("About Family").[3] The actual separation of the spouses is a reason for divorce, if the requirements laid down in Art. 373 lit.c C. civ.

Divorce is a legal institution with distinct significance, different from the institutions "marriage termination", "abolition of marriage", "separation of body". By analyzing the significance of these notions, we find that not only the content of the notions is different, but also the laws applicable in private international law are different (with the exception of the separation from the body, which is governed by the same law that applies to the divorce with the foreign element).

1.2. Choice of divorce law

The law applicable to divorce can be determined in two ways:

- either by subjective determination, or by the spouses' choice of the law applicable to divorce, between the express laws provided by the civil code;

¹³ At its meeting on 5 and 6 June 2008 in Luxembourg, the Council found that there was no unanimity on the proposal and that the objectives of the proposal can not be achieved within a reasonable time by the application of the relevant provisions of the Treaties. On 12 July 2010, the Council adopted Decision 2010/405 / EU authorizing a form of enhanced cooperation in the area of divorce and separation from the law, and subsequently adopted Regulation (EU) No. No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

- either by objective determination, on the basis of legal criteria, if the spouses have not chosen the law applicable to divorce.

A) Extent of spouse's will to choose the law applicable to divorce

Under Article 2597 of the Civil Code, spouses can jointly choose one of the following laws applicable to divorce:

- a) the law of the State in the territory of which the spouses have their habitual common residence at the date of the convention on the choice of applicable law;
- b) the law of the State in the territory of which the spouses have their last common habitual residence if at least one of them resides there at the date of the applicable law choice convention;
- c) the law of the State of which one of the spouses is a national;
- d) the law of the State in which the spouses have lived for at least 3 years;
- e) Romanian law.

B) Date of the Convention of Choice of applicable law

According to the disp. 2.598 of the Civil Code, the Convention on the choice of law applicable to divorce may be terminated or amended at the latest by the date of referral to the competent authority for divorce.

However, the court can take note of the consent of the spouses at the latest by the first time that the parties have been legally summoned.

C) Form of the applicable law choice convention

The formal conditions of the convention on the choice of law applicable to divorce are governed by provision. Article 2.599 of the Civil Code. Under these provisions, the Convention on the choice of law applicable to divorce must be concluded in writing, signed and dated by the spouses.

1.3. The law applicable to divorce in the absence of choice

A) Objective determination of divorce law

The criteria for determining the law applicable to divorce in the absence of this law by spouses are laid down in the provision. art. 2.600 paragraph 1 of the Civil Code.

In the absence of choice, divorce will be subject to one of the following laws:

- a) the law of the State in the territory of which the spouses have their habitual common residence at the time of the application for divorce;

- b) in the absence of common ordinary residence, the law of the State in the territory of which the spouses have their last common ordinary residence if at least one of the spouses is habitually resident in that State at the date of the application for divorce;
- c) in the absence of the common habitual residence of one of the spouses on the territory of the State where the spouses had their last common habitual residence, the law of the common nationality of spouses at the time of the introduction of the divorce application;
- d) in the absence of the law of the joint citizenship of the spouses, the law of the last common citizenship of the spouses, if at least one of them has this citizenship at the date of filing the divorce application;
- e) Romanian law, in all other cases.

B) Invoking public order of Romanian private international law - in the matter of divorce

Public order may be invoked against divorce law or some of the provisions of this law.

In the case of removal of foreign law, Romanian law is applied as a law of the forum.

According to art. 2.600 paragraph 2, if the foreign law thus determined does not allow divorce or admits it under particularly restrictive conditions, the Romanian law shall apply if one of the spouses is, at the time of the divorce request, a Romanian citizen or has his habitual residence in Romania.

These provisions are also applicable if the divorce is governed by the law chosen by the spouses.

1.4. Recognition of divorce by unilateral denunciation

According to the disposition. art. 2.601 of the Civil Code, the act drawn up abroad, which establishes the unilateral will of the man to untie the marriage, without the woman having an equal right, can not be recognized in Romania, unless:

- a) the act was drafted in compliance with all the substantive and formal conditions provided by the applicable foreign law;
- b) the woman freely and unequivocally accepted this way of selling marriage;
- c) there is no other reason for refusing to recognize in the territory of Romania the decision by which the dissolution of marriage was approved in this manner.

1.5. The law applicable to body separation

The determination of the law applicable to the separation from the body is regulated by provision. art. 2,602 of the Civil Code, according to which the law governing divorce also applies to separation from the body.

As an area of application, this law regulates the following aspects:

- the right to demand separation from the body;
- conditions of body separation;
- the effects of body separation.

1.6. The law of divorce law

The law applicable to divorce governs the following aspects:

- the right to divorce proceedings;
- the reasons for divorce (including the possibility of divorce on the basis of spouses consent);
- the effects of divorce on spouses 'relations, namely: spouses' personal relationships; Patrimonial relations between spouses (sharing common goods, joint debts, maintenance obligations between ex-spouses, etc.); Exercise capacity;
- the effects of divorce on parent-child relationships, namely custody of minors, the exercise of parental rights, maintenance obligations, etc. The Court of Justice of the European Union and the European Court of Human Rights have set a number of principles on the international kidnapping of children.[4] The CJEU has confirmed that the child should be returned without delay if the kidnapping occurred. The ECHR also held that once a child was found to have been misled, Member States must make appropriate and effective efforts to ensure the return of the child and that Failure to do so constitutes a violation of the right to family life provided for in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[5]

The determination of jurisdiction in divorce matters and the trial procedure are subject to the law of the forum. Also, the provisional measures and the urgent measures taken by the court are subject to the law of the forum, with procedural problems.

1.7. Jurisdiction over divorce settlement

Council Regulation (EC) Council Regulation (EC) No 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)

Regulation 1347/20001 contains uniform rules for the determination of jurisdictional rules of jurisdiction between Member States and facilitates the free movement within the Union of judgments, authentic instruments and agreements, laying down provisions on the recognition and enforcement of exequatur in another State member.[6]

Based on art. 3 of the Regulation, jurisdiction in matrimonial matters (applications for divorce, legal separation and annulment of marriage, in accordance with Article 1 (1) (a) of the Regulation) belongs to:

A) the courts of the Member State in whose territory he is:

- the habitual residence of spouses, irrespective of their nationality,
- the last habitual residence of the spouses if one of them lives at the date of the court's referral to that State;
- the defendant's habitual residence,
- the habitual residence of one of the spouses if the divorce application is common;
- the plaintiff's habitual residence if he resided there for at least one year before the divorce application was filed;
- the plaintiff's habitual residence if he resided there for at least six months immediately prior to the application and if he is either a national of that State or, in the case of the United Kingdom and Ireland, has "domicile" in that place; or

B) the courts of the Member State of joint nationality of the spouses (in the case of the United Kingdom and Ireland, the Member State in which the spouses' joint domicile is situated, interpreted as meaning the legal systems of those States).

The Regulation does not provide for the possibility for spouses to designate, by their consent, the competent court (with the exception of amicable divorce, when the request is common, the spouses have the right to choose the court in the habitual residence of one of them).

According to disp. 1079 of the Code of Civil Procedure, the Romanian courts are exclusively competent to hear disputes with elements of extraterritoriality from the sphere of personal status related to: 5. Annulment, nullity or annulment of marriage, as well as other litigations between spouses, except those related to buildings located abroad, if at the date of filing the application both spouses reside in Romania and one of them is a Romanian citizen or a stateless person.

According to disp. 1081 of the Code of Civil Procedure, Romanian courts are also competent to hear and divorce applications, if at the date of filing the application the applicant has been resident in Romania for at least one year;

2. The main provisions contained in Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

2.1. The context of the adoption of the Regulation as a form of enhanced cooperation

In accordance with Article 81 of the Treaty on the Functioning of the European Union, the Union shall adopt measures in the field of judicial cooperation in civil matters having cross-border implications. When families are separated, such cooperation is needed, especially to give children a secure legal environment to maintain relationships with persons who have parental responsibility over them and eventually live in another Member State. ¹⁴

On 17 July 2006, the Commission presented its proposal for a draft regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and the introduction of rules on the law applicable to matrimonial matters.

At its meeting on 5 and 6 June 2008 in Luxembourg, the Council found that there was no unanimity on the proposal and that there were difficulties that made it impossible to reach unanimity. The Council has determined that the objectives of the proposal can not be achieved within a reasonable time by applying the relevant provisions of the Treaties.

On 12 July 2010, the Council adopted Decision 2010/405 / EU authorizing enhanced cooperation in the area of divorce and separation from the law.

Subsequently, Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia addressed a request to the Commission to establish a form of cooperation between them Strengthened in the area of applicable law in matrimonial matters. On 3 March 2010, Greece withdrew

¹⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) 1347/2000, Bruxelles, 15.4.2014 COM (2014) 225 final.

its request. The 14 states have adopted Regulation (EU) no. No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (which entered into force on 21 June 2012).

On 21 November 2012, the Commission adopted Decision 2012/714 / EU confirming Lithuania's participation in enhanced cooperation in the area of the law applicable to divorce and legal separation. That Decision provides that Regulation (EU) 1259/2010 shall apply to Lithuania from 22 May 2014.

On 27 January 2014, the Commission adopted Decision 2014/39 / EU confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation. This Decision provides that Regulation (EU) 1259/2010 shall apply to Greece as from 29 July 2015.

By Decision no. 1366/2016, the Commission confirmed Estonia's participation in enhanced cooperation in the area of divorce law and legal separation.

The Regulation is a tool for implementing enhanced cooperation between participating Member States, containing immediately applicable uniform rules for the resolution of legal relations with the foreign matter. [7]

Under Article 328 (1) of the Treaty on the Functioning of the European Union, a form of enhanced cooperation once opened is open to the participation of all Member States, subject to any conditions of participation laid down in the authorization decision. It shall also remain open to the Member States at all times, subject, in addition to the above-mentioned conditions, to the acts already adopted within it.[8] In accordance with Article 331 TFEU, non-participating Member States retain the right to join the enhanced cooperation established.

The Commission and the Member States participating in this enhanced form of cooperation shall ensure that they promote the participation of as many countries as possible.

The provisions of the Regulation are binding in their entirety and directly applicable in the participating Member States only, in accordance with the Treaties.

Enhanced cooperation allows a group of at least nine Member States to implement measures in one of the areas covered by the Treaties, within the framework of the non-exclusive competences of the Union.

2.2. Structure and content of the Regulation

The Preamble of the Regulation presents a very comprehensive statement of reasons, containing 30 arguments on the need to adopt this legal act. In summary, these arguments refer to the need to enhance legal certainty, predictability and flexibility in international matrimonial proceedings.

The provisions of the Regulation respect the fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union, in particular the provisions of Article 21, which prohibit any discrimination based on sex, race, color, ethnic or social origin, genetic characteristics, language, religion or belief, Political or any other kind, membership of a national minority, wealth, birth, disability, age or sexual orientation.

The regulation contains 30 articles, structured on four chapters, as follows:- Chapter I - contains provisions related to "Scope, relation to Regulation (EC) No. 2201/2003, universal definition and application";- Chapter II - contains "Uniform Rules on the law applicable to divorce and separation from the body";- Chapter III - contains 'Other Provisions'; - Chapter IV - contains "Final Provisions".

2.3. Scope of the Regulation

A. - The scope of the Regulation is set out in Article 1, according to which the provisions of the Regulation apply to divorce and separation from the body in situations where there is a conflict of laws¹⁵.

These provisions do not apply to the following matters, even if they are only preliminary issues in the context of divorce or separation proceedings:

- a) legal capacity of natural persons;
- b) the existence, validity or recognition of a marriage;
- c) annulment of the marriage;
- d) the spouse's names;
- e) the consequences of the marital effects of the estate;

¹⁵ On the meaning of some terms used in the Regulation, Article 3, called "Definitions", contains the following legal qualifications: a) "participating Member State" means a Member State participating in a form of enhanced law enforcement applicable to divorce And severance under Decision 2010/405 / EU or a decision adopted in accordance with the second or third subparagraph of Article 331 (1) of the Treaty on the Functioning of the European Union; B) "court" means all authorities of participating Member States competent in matters falling within the scope of the Regulation.

- f) parental responsibility;
- g) maintenance obligations;
- h) fiduciary / fiduciary act or succession.

B - Relationship with Regulation (EC) No. 2201/2003

- In that regard, Article 2 states that its provisions are without prejudice to the application of Regulation (EC) No. No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. [9]

C - Universal application of the regulation

Article 4 provides that the law designated under the provisions of the Regulation applies whether or not the law of a participating Member State is applicable.

D - Relationship with international conventions in force

Regarding the relationship between the provisions of the Regulation and the international conventions in force, .art 19 establishes the following:

- a) Without prejudice to the obligations of the participating Member States under Article 351 of the Treaty on the Functioning of the European Union, the Regulation shall not affect the application of international conventions to which one or more participating Member States are parties at the date of adoption of this Regulation or, Pursuant to the second or third subparagraph of Article 331 (1) of the Treaty on the Functioning of the European Union, of the decision governing the conflict of laws on divorce or separation from the body.
- b) However, the provisions of the Regulation prevail, in relations between the participating Member States, on conventions concluded exclusively between two or more of them, insofar as those conventions concern matters governed by the Regulation.

E - Time and space application of the regulation

Entry into force and date of application of the Regulation are matters governed by the provisions of Article 21, which stipulates that it shall enter into force on the day following its publication in the Official Journal of the European Union.[10]

As regards the Member States participating in the enhanced cooperation under a decision taken in accordance with Article 331 (1) The second or third subparagraph of the

Treaty on the Functioning of the European Union, this Regulation shall apply from the date indicated in that Decision.

The Regulation is binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

In art. 20 provides for a revision clause to the Regulation to the effect that the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation by 31 December 2015 and every five years thereafter. The report shall be accompanied, where appropriate, by proposals for its adaptation.

To this end, the participating Member States shall inform the Commission of the relevant elements of the application of the Regulation by the courts.

In art. 18 contain transitional provisions according to which the Regulation applies to legal actions brought and agreements concluded from 21 June 2012. However, an agreement on the choice of applicable law concluded before 21 June 2012 is also applicable, provided that Comply with Articles 6 (on Consent and the Validity of the Fund) and 7 (regarding formal validity)

The Regulation is without prejudice to agreements on the choice of applicable law concluded under the law of the participating Member State in whose territory the court seised is before 21 June 2012.

2.3. Uniform rules on the law applicable to divorce and separation from the body

A - The choice by the parties of the law applicable to divorce and separation from the body

According to disp. 5 paragraph 1 of the Regulation, spouses may agree to designate the law applicable to divorce and separation from the body, provided that it is one of the following laws:

- a) the law of the State in the territory of which the spouses are habitually resident at the date of conclusion of the agreement; or
- b) the law of the State in the territory of which the spouses have their last habitual residence, provided that one of them is still resident at the date of conclusion of the agreement; or

c) the law of the State of nationality of one of the spouses at the date of conclusion of the agreement; or

d) the law of the forum.

The agreement designating the applicable law may be terminated and amended at any time but not later than the date of referral to the court (Article 5 paragraph 2).

According to Article 5, paragraph 3, where this possibility is provided for by the law of the forum, spouses may also designate the applicable law before the court in the course of the proceedings. In this case, the court takes note of the consent of the spouses, in accordance with the law of the forum.

- Consent and substantive validity of the agreement

Article 6 of the Regulation lays down that the existence and validity of an agreement on the choice of law or any clause thereof shall be determined by the law which would govern it under this Regulation if that agreement or clause were to be valid. However, in order to establish that he has not given his consent, one of the spouses may invoke the law of the country where he has his habitual residence at the time of the referral to the court, if it is apparent from the circumstances of the case that it would not be reasonable to establish The effect of its conduct in accordance with the law referred to in paragraph 1.

- Formal validity of the applicable choice of law agreement

According to disp. 7 of the Regulation, the choice of law applicable to divorce and separation is concluded in writing, dated and signed by both spouses. Any communication in electronic form that allows the durable recording of the agreement is considered to be a written form.

However, where the law of the participating Member State in which both spouses have their habitual residence at the date of conclusion of the agreement provides for additional formalities in the case of such agreements, these conditions shall apply.

If, at the date of the agreement, spouses are habitually resident in different participating Member States and if the laws of those States lay down different formal conditions, the agreement is valid from the point of view of the form if it satisfies the conditions laid down in any of those laws.

If, at the date of the agreement, only one spouse is habitually resident in a participating Member State and that State provides for additional formal conditions for such agreement, those conditions shall apply.

B - Establishing the applicable law in the absence of the expression of the parties' option

In the absence of a choice of applicable law, divorce and separation are governed by State law:

- a) in the territory of which the spouses have their habitual residence at the date of referral to the court; [11]Or, otherwise;
- b) in the territory of which the spouses were habitually resident, provided that that period had not ended more than one year prior to the referral to the court, as long as one of them still resided at the date of the referral to the court ; Or, failing that;
- c) the nationality of which is held by both spouses at the date of referral to the court; Or, otherwise;
- d) where the court is seised.

C - The law applicable to the transformation of divorce from the body

In the case of divorce transformation, the law applicable to divorce is the law that applied to separation from the body unless the parties agreed otherwise.

However, if the law which applied to the separation from the body does not provide for the divorce to be converted, the applicable law shall apply in the absence of expressing the parties' option, unless otherwise agreed.

D - Law enforcement of the forum

According to art. 10 of the Regulation if the law applicable under Articles 5 (the law chosen by the parties under Article 5 (1) or 8 (applicable law in the absence of the parties' choice) does not provide for divorce or does not grant to one of the spouses , Because of their belonging to one of the sexes, equality of access to divorce or separation from the body, the law of the forum applies.

E - Settlement of conflicts of laws in special situations

By disposition. Contained in Articles 13-16 of the Regulation, conflicts of laws are resolved in the following situations:

- Conflicts of divergence between national laws (Article 13 of the Regulation);

- Conflicts in the case of Member States with two or more territorially applicable law systems (Article 14);
- Conflicts in Member States with two or more systems of law - interpersonal conflicts (Article 15);
- Internal Conflict (Article 16)

a) Settlement of conflicts in case of differences between national laws

None of the provisions of the Regulation obliges courts of a participating Member State whose law does not contain provisions on divorce or does not consider that marriage to divorce proceedings to be divorced as a result of the application of the provisions of the Regulation.

b) Conflict resolution for Member States with two or more territorially applicable law systems

Where a State comprises several territorial units, each with its own legal system or a set of rules on matters governed by the Regulation:

- any reference to the law of such a State shall be construed, for the purposes of determining the law applicable under the provisions of the Regulation, as referring to the law in force in the relevant territorial unit;
- any reference to habitual residence in that State relates to habitual residence in a territorial unit;
- any reference to nationality concerns the territorial unit designated by the law of that State or, in the absence of relevant rules, the territorial unit for which the parties have opted or, in the absence of the option, the territorial unit with which one of the spouses or both have the closest links.

c) Conflict resolution for Member States with two or more systems of law - interpersonal conflicts

In respect of a State which has two or more systems of law or systems of rules applicable to different categories of persons in matters governed by the Regulation, any reference to the law of such a State concerns the legal system determined by the rules in force in that State. In the absence of such rules, the legal system or system of rules with which one of the spouses or both have the closest links applies.

d) Non-application of the provisions of the Regulation to internal conflicts

A participating Member State in which the rules governed by the Regulation are subject to systems of law or systems of different rules is not required to apply the provisions of the conflict of laws regulation exclusively concerning such systems of law or systems of different rules.

- Exclusion of resignation

Where the provisions of the Regulation provide for the application of the law of a State, the concept of law encompasses the rules of law in force in that State, with the exception of the rules of private international law.

- Invoking public order

The application of a provision of the law designated under the provisions of the Regulation can only be eliminated if such application is manifestly incompatible with the public policy of the forum.

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