Private Law

Brussels II Bis Regulation and the Competence of the Romanian Courts in the Divorce Cases

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Abstract: Jurisdiction competence of the Romanian courts in divorce matters, with an international element was established, before Romania joined the EU, by applying the deposition of article 148-157 of Law No. 105/1992 on private international law relations. The court apprehended with such a request, verifying its competence either officially or fallowing the defendant's invocation of the jurisdiction non-compete exception plead, it was at hand one of two legal solutions, namely: either the rejection of the invoked exception and the statement of competence, a situation which would identify, according to article 20 and 22 of Law no. 105/1992, the applicable law in divorce matters under the aspects of material law, or it would concede the exception and it would dismissed the action, according to article 157 of Law no. 105/1992, as not being under the jurisdiction of the Romanian Court, but under a foreign one. The situation has changed with the ascension of Romania to the EU, when the EU Council regulations took precedence over the national law and they have direct and immediate applicability in the cases that the Romanian courts judge. The new competence of the EU in relation to matrimonial matters determines the Romanian judge to consider two categories of law sources, depending on the connection element (habitual residence of the spouses or at least one of them, joint citizenship) that appears in the case of divorce and it links the trial to the Community area or the extra-communitarian one. The study aims at, among others, analyzing the criteria by which the Romanian courts have their jurisdiction in a divorce case in which the element of foreign origin is related to a EU Member State and the solutions that we have at hand to pass on the jurisdictional non-compete exception and on *lis pendens* exception, presenting in this respect also cases of jurisprudence. Also, there are references to the relation of the regulation with other international / bilateral conventions in divorce matters.

Keywords: jurisdictional competence; habitual residence; incompetence exception; rule; divorce

1. Introduction

Before Romania's EU accession, the provisions of article 148-157, Law no. 105/1992 on regulating the private international law relations[1] indicating the jurisdiction of Romanian courts in divorce matters with an international element.

[1] Published in the Official Monitor of Romania, Part I, no. 245 of October 1, 1992.

Ruling on its jurisdiction, ex officio verified or after a plea invoked by the defendant of the jurisdictional incompetence, the Romanian judge had two solutions at hand, namely: either declared the competence of the court, rejecting it by the conclusion of the invoked exception, that would identify, the incidence of article 20 and 22 of Law no. 105/1992, the law applicable to divorce in matters of material law (the holder of the right to action, the reasons for divorce, divorce effects, etc.), or it could admit the exception, by dismissing the action by decision, as not belonging to the Romanian courts competence, but to a foreign court (article 157 of Law no. 105/1992). (Dumitrache, 1997, pp. 13-20) (Diaconu, 2006)

Once Romania joins the European Union, a number of European Union Council regulations takes priority over the national law and they have direct and immediate applicability in the causes that the Romanian courts judge.[1] Referring to the processes in matrimonial matters, there are the depositions of Regulation (EC) no. 2201/2003 of the European Union Council of November 27, 2003 concerning the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing the Regulation (EC) no. 1347/2000[2], which are directly relevant in the Member States and which take precedence over the national laws.[3]

New powers of European Union in matters of private international law attract a double level of legal sources. In the first level, within the European Union, only between Member States, on the one hand, where national judges become "community" are obliged not only to apply the material community law, but they are also required to apply, in the manner imposed by the Court of Justice in Luxembourg, according to the writings of a doctrinaire (Bobeck, 2008, pp. 1-34), in the second level in a relation of the Member State with the third countries, non EU members.

2. The Determination of the Competent Court in Matrimonial Matters

The provisions of article 3 of Brussels II bis Regulation sets out seven objective criteria by which it is established the jurisdiction of the court, criteria that are neither cumulative nor hierarchical, but alternative, and depend on the choice of the spouses to bring an action for divorce in the courts of the following member states:

[1] The European Community has set itself the objective of creating an area of freedom, security and justice, in which the free movement of persons is insured. For this, there were taken legislative measures on judicial cooperation in civil matters; it was established the principle of mutual recognition of judicial decisions as the cornerstone for creating a genuine judicial area.

[2] Published in the Official Journal of the European Union no. L 338 of 23 December 2003.

[3] This regulation is applied to all member states, except for Denmark, which has not adhered to Maastricht Treaty.

the spouses (regardless their nationality) have their habitual residence;[1] in which they had their last habitual residence, if one of them lives in that state at the date of the notification; in which either spouse has his habitual residence, if the request for divorce is common; in which the defendant has his habitual residence, the claimant has his habitual residence, if he had resided there for at least a year before any action was brought to the court; the plaintiff has his habitual residence, if he had resided there for at least six months before making application and to be a national citizen of that member state; they are both citizens[2] (in whose territory lies the common "domicile" in the case of Great Britain and Ireland).

After analyzing these criteria, it results that habitual residence (article 2 points a) has become competitive liaison factor with the citizenship (article 3 lit. b), being placed by the Regulation in the center of a structure of competence which mobilizes all member courts and it gives to the forum of habitual residence of the spouses a special dimension in determining the jurisdiction of courts within the European Union. The competences provided in article 3 have an exclusive feature if one spouse has his habitual residency in a Member State or he is part of such State (article 6). It was also confirmed by the European Communities Court of Justice in Luxembourg in the case Sundelind[3] Lopez from November 29, 2007.

Let us take for example the Romanian citizens, married and settled in Italy, in order to find out in which circumstances it becomes the competence of the Italian judge and of the Romanian one.

An Italian court has jurisdiction to hear the application for divorce, if the spouses have their habitual residency in Italy, if their last habitual residency was in Italy and one of the spouses still lives in Italy, if the defendant is resident in Italy, if the application for divorce is common and at least one of the spouses still lives in Italy, if the applicant is resident in Italy for at least a year before any action is brought; if the plaintiff is an Italian citizen and has residency in Italy for six months before the application or, finally, if both spouses are of Italian nationality.

A court in Romania may be competent in the given example, only in four cases, namely: both spouses, Romanian citizens, file for divorce by agreement of will in terms of article 38 paragraph 2 of the Family Code and any of the spouses is habitual resident in Romania; the defendant returned from Italy and lives in

[1]The concept of "habitual residence" was defined in a decision of the French Court of Cassation of 15 December 2005 as the place where the person concerned has established through his will, housing stabilizes, the permanent center or usual. Such a definition is closer to the concept of habitual residence of the home.

[2] In connection with common citizenship, based on the competence provided by article 3, paragraph 1, letter b of the Brussels II Regulation, if the spouses have the nationality of two Member States of the European Union, they can choose between the jurisdictions of two states (Court of Cassation of France, Civil Cass. 1, April 16, 2008).

[3] *Revue critique de Droit international prive*, 2008, note by E. Galant.

Romania; the applicant returned to Romania where he has his habitual residence at least six months before presenting the demand; both spouses have Romanian citizenship.

One can easily observe that there are several courts that are equally competent to deal with divorce proceedings, without any hierarchy between them based on the residence or nationality of the spouses. The applicant is the one who, in order to obtain a favourable decision for dissolution of marriage and whose movement is facilitated within the EU, assesses the seven criteria of competence and chooses one of them.

We may consider another example where a husband is an Italian citizen, the wife, a Romanian citizen and the couple has established their habitual residence in Spain. After several years, the wife wants to divorce. Under the article 3 of Brussels II bis Regulation, the couple can only file for the divorce proceedings in the courts of Spain, because in this state the spouses have their habitual residence. His wife can not inform the courts of Romania invoking the Romanian citizenship, since article 3 requires the condition of common citizenship of spouses.

In the event that the litigation is a private international law with an international element, belonging to any of the Member States of the European Union, a court from Romania informed with a divorce action proceeds ex officio to the verification of its competence under the article 3-5 of Brussels II bis Regulation, and if the answer is positive, they proceed to the case. If the Romanian court is not competent, but another court of another Member State, according to article 17, the action for divorce is dismissed as not being the competence of the Romanian courts. However, there may be a situation where the Romanian court may declare oneself competent, according to the national law, if, following the incidence of article 3-5 of the regulation, no court of a Member State has jurisdiction.

Since there may be more competent bodies, equally (article 19), (Clavel, 2009, p. 45) the Brussels II bis Regulation has sought to avoid parallel actions for divorce, filed in courts of different Member States and obtain irreconcilable legal judgments. We could witness a real race between the plaintiff and the defendant, held in the courts of two Member States, having the advantage the one where there was first brought before the court. That is why it is important to determine first court hearing, according to article 16 of the Regulation. Unlike the concept of "habitual residence" which should be common to all Member States, the concept of "the jurisdiction of the first seized" is determined by the domestic law of each Member State. According to the Romanian Civil Procedure Code and the Rules of Procedure of the courts, approved by Resolution no. 159/2004 of the Superior Council of Magistracy, filing lawsuit (at court registry or send by mail, courier or

fax) is what triggers the civil trial (Tăbârcă, 2005, p. 373-the next) and showing the court first seized.[1] (Moneger, 2009, p. 206)

3. On the Exception of Lack of the Romanian Courts Jurisdiction in Cases of Divorce

Whenever litigation occurs in an international element, the Romanian judge is to determine the jurisdiction of the Romanian court. Any discussion on the cause exceeds the legal framework of civil trial, as long as the court is obliged, under the provisions of article 158 and the next of the Civil Penal Code, **to check its competence,** at the request of one of the party or ex officio. (Les, 2010, p. 292-296) At this time there is a difference, in the sense that if the international element links the cause of the divorce to the residence, citizenship, domicile of spouses or other facts of another Member State of the Union, there are applicable the provisions of Brussels II bis Regulation, and if there is a link with a non EU member, they are governed by the rules of procedural law contained in chapter XII of the **Law no. 105/1992** on the regulation of private international law (article 148 and the next), according to which the competence of the Romanian courts in settling lawsuits where foreign elements may occur, it may be, if necessary, an exclusive or alternative one, then, retaining the jurisdiction, it is implemented article 607of the Code of Civil Procedure, in order to determine the **territorial jurisdiction** of Romanian courts, and ultimately, it has to answer the question of what material law will it apply to the court, thus determining the appliance of the material law rules contained in article 20 and article 22 of Law no. 105/1992.

a) **incorrect application of the Brussels II bis Regulation**. In a case of divorce[2], where the spouses, one is a Romanian citizen and the other is a Syrian citizen, got married and lived in Syria, the judge invoked ex officio the exception of lack of jurisdiction competence of the Romanian courts. (Tabarca, 2001, p. 134-148)

The divorce application made by the applicant, a Romanian citizen, returned to Romania with more than one year prior to the referral to court, was rejected as not being the competence of the Romanian courts, because there was considered in this case the provisions of article 1 paragraph 1, letter a from Brussels II bis Regulation. However, as noted also the Iasi Court, annulling the sentence and sending the case for retrial, the court considered, wrongly, that the regulation is incident, since Syria is not an EU member state, being incident the depositions of Law no. 105/1992.

[1] In the case in which the two courts were notified the same day, if one spouse can prove the referral time, it is the task of the other to remove the exception of pending proceedings, showing that thee was an earlier referral to court (cass 1/11 June 2008, *Revue critique de Droit international prive*, 2008, note of Ancel B. p. 859).

[2] Iasi Court, Civil sentence no. 5/5 January 2009 issued in file no. 13.435/245/2008, unpublished.

The lack of jurisdictional competence exception of the Romanian courts, invoked ex officio by the Iasi Court, is not grounded according to Law no. 105/1992 on the regulation of private international law and the facts (according to birth certificate issued by the civil service in Iasi, the parties got married in Syria, their marriage was also registered in the Romanian civil status documents; the applicant is a Romanian citizen residing in Romania, and the defendant, Syrian citizen, residing in Syria; during their marriage, the spouses have lived in Syria and the applicant did not requested the establishment of the residence abroad; at the moment of informing the Romanian Courts and also during the trial proceedings, the applicant has proved that she actually lives in Romania more than a year), so that it should have been removed. We appreciate that the court competent to settle the divorce, as it was not necessary for this competence to be exclusive, being sufficient that, under any of the article 149-151 of the Law no.105/1992, they would consider that the competence belongs to the Romanian court.[1] According to article 150, item 1 of Law no. 105/1992, the Romanian courts are competent to judge lawsuit between persons that have their residence abroad, for acts or facts of civil status recorded in Romania, if at least one party is a Romanian citizen. The more so, since in this case, one party is a Romanian citizen and had and keeps having the residence in Romania.

Compared to the legal text and to the linking elements, the Romanian citizenship of one spouse, registered the civil status act in Romania, and the home to one of the spouses is in Romania, the Romanian courts are competent to solve this issue.

We must make clear the fact that, in this case, the court can not apply the article 151, point 5 of Law No. 105/1992, as this piece of legislation that relates to where the Romanian courts have exclusive jurisdiction (in the sense that only them have the jurisdiction) to judge the trials of international private law relations. Also, there can not be used as an argument for the admission of exception for lack competence for the Romanian courts nor the depositions of article 20 and 22 of Law no. 105/1992 (which indicates the law applicable to divorce in terms of the material law and not of the procedural one) or article 607 of Code of Procedural Civil Law, which include rules of material law, applicable only after the Romanian court has verified its jurisdiction. From this point of view, some solutions of the published cases, in the truncated collections of judicial practice[2] and annotated codes,[1] are not

[1] Divorce action where one spouse is a Romanian citizen is for the Bucharest District 1 Court, where both spouses are domiciled abroad, namely in the U.S., and the marriage was registered in Romania (article 150 section 1 and article 155 of Law no. 105/1992). See Supreme Court of Justice, Civil Division No. 3295 of 3 September 2003, published by Roxana Trif (2006). *Excepţia de necompetenţă în procesul civil. Practică judiciară*. Bucharest: Hamangiu, no. 176, p. 350, & *Dreptul* no. 5/2004, pp. 201-202.

[2] Pitesti Court of Appeal, in December. Civil no. 1739/2004, in E. Roşu (2007). *Dreptul familiei. Practică judiciară. Hotărâri C.E.D.O.* Bucharest: Hamangiu, n. 20, pp. 50-53. The court incorrectly

legal, making the confusion between the two categories of rules, giving priority to the provisions of material law, and not to, as it is according to the law, the procedural law.

In conclusion, article 150, point 1 of Law no. 105/1992 according to which, if the case is of the Romanian courts' competence the lawsuits between the physical entity that lives abroad for acts or facts of civil status recorded in Romania, where at least one party is a Romanian citizen, it is an incident in question, the more this piece of legislation applies, if one of the parties in the trial is a Romanian citizen and domiciled in Romania. So, by applying the article 150, point 1, of Law no. 105/1992, the Romanian courts are competent, and out of these, according to article 607, third thesis of Code of Procedural Civil Law, the Iasi Court has jurisdiction because the plaintiff is domiciled in Romania and the defendant is abroad. As regards the law applicable to divorce, in terms of personal and property relations between spouses, it is applied the article 22 and 20 of Law no 105/1992, and this is the Romanian law, as long as the spouses have different nationalities and no common residence.

b) **the application of Brussels II bis Regulation of divorce cases in which Romanian citizens and their spouses are habitually resident in Italy.** In one case,[2] the Court dismissed the appeal presented by the applicant against the sentence, which the court upheld the exception of general lack of competence, invoked by the defendant, and dismissed the action as not being the Romanian courts' jurisdiction, directing the parties to the competent court in Italy territory which both parties reside. The Judicial court held, first, that this exception is of public order and that it can be invoked until the closure of the debates, and secondly, it reported the facts (the marriage ended in Italy during 2006, wife resident in that State since 1998, marital domicile established in Italy, both parties live in Italy at the time of the referral to court, September 22, 2007, being represented in the Romanian court by lawyers with special and authentic proxy, based on Article 614 of Code of Procedural Civil Law, they never had the common domicile in Romania), in this case, it should be applied article 3, paragraph 1, letter a of the Brussels II bis Regulation, having an exclusive competence under the article 6 of the Regulation.

held the exception of lack of Romanian courts jurisdiction under article 607 Code of Procedural Civil Law, since the spouses are Romanian citizens and have common residence abroad in Italy, and the marriage ended in Romania. Referring to the arguments presented in our material, before Romania joined the European Union, the court could not to reject a Romanian citizen action for divorce settlement, but as the Supreme Court ruled in a case (Supreme Court, civil and industrial section, decision no. 3295 / 2003 (Red, 2007, n. 21, p. 52), to to grant jurisdiction to the District Court of Bucharest. See the meaning of the Supreme Court decision no. 299 / 6 February 2003 the Court of Appeal in (Stănescu, 2008, no. 33, pp. 149-152).

[1] Court verdict, civil, no. 2810/ December 19, 2001 (Titian, Constantin & Cârstea, 2007, no. 7, p. 97).

[2] Civil Decision no. 113/21 in January 2009 marked the file no. 17853/245/2007, unpublished.

In another case,[1] the cause of divorce presented on 1 November 2007 by his wife, a Romanian citizen residing in Italy, through a special proxy agent was legally suspended by the Romanian court, under article 3, paragraph 1 letter a, of the Regulation no. 2201/2003, until it will be established the jurisdiction of the first seized court, on 16 May 2007, a legal separation action, given by the Court of Teramo, Italy. Romanian court has described the two actions: for divorce and legal separation, as being "dependent actions" that are brought before courts from different member states.

In another case[2], although the court in Romania, seized in 2006 for divorce, admitted on April 17, 2007 the claim, and dissolved the marriage of the spouses (initially, Romanian citizens become, one stateless, the other an Austrian citizen), after the abolition of the sentence on appeal and resending the case back to court, it admitted the exception of judged authority (Lozneanu, 2003, pp. 227-265) raised by the defendant on the ground that on the 4th September, 2007 by a court order issued by a court in Austria, final and irrevocable, it was accepted the divorced action presented by the wife and therefore their marriage dissolved. Although according to article 3 of the Regulation it is stated that settlement of divorce proceedings comes into the jurisdiction of both courts of the Member State of residence and also of those of Member State's nationality, by the article 19 regulating the position of applying for divorce between the same parties before courts of different Member States, in order to avoid the contradictory judgments, and according to article 21, the judgments passed in a Member State shall be recognized in other Member States without having to resort to any legal proceedings.[3]

4. Conclusions

After analyzing the published and unpublished cases of the courts, it results that the last ones mentioned above have a very difficult task, but also a courageous one. After decades of isolation and implementing priority the national law in a litigation with an international element, which concerns a divorce case, it has arrived the moment of applying directly by the Romanian judge of the community regulations, which accompany the "federalization of the European judicial area" (Ancel & Muir-Watt, 2006, p. 157) and that, in this paper, interested the jurisdiction of the courts.

[1] The end of Bucharest District 1 Court, May 12, 2008. (Lupaşcu & Cristus, 2009, n. 65, p. 228)
[2] Bucharest District 1 Court, Civil sentence No. 12.527/2008. (Lupaşcu & Cristus, 2009, n. 57, pp. 184-187)
[3] The principle is the full recognition of divorce granted in a Member State allowing a transcript of it in Romanian civil status registers one or in another Member State, without any procedure (Article 21 paragraph 2 of the Brussels II *bis* Regulation).

The work of community legislative construction and the community doctrine and also the national law continues to identify and improve the regulatory mechanisms of complex family relationships in the context of unifying the judicial jurisdiction with the regime of circulating the legal decisions within the European Union.

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