



DEUTSCHE STIFTUNG FÜR
INTERNATIONALE RECHTLICHE
ZUSAMMENARBEIT E.V.



Guide on international private law in family matters

**Dissolution of marriage
Parental responsibility
Maintenance obligation
Civil order of protection
Matrimonial property regime**

GABRIELA LUPȘAN
Ph.D Associate Professor



**With financial support from the "Civil Justice"
Programme of the European Union**

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The present Guide was elaborated in the framework of the project “Improving cooperation between judges and public notaries in cross-border civil matters”, implemented by the Ministry of Justice in partnership with the National Union of Public Notaries of Romania, the German Foundation for International Legal Cooperation, the Council of Notaries of the European Union and the National Council of the Italian Notaries.

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„Magic Print” Publishing House, Onești

Publishing House acknowledged by the Ministry for National Education through the National Council of Scientific Research in Higher Education (CNCSIS) – Code 345.

CIP description of the Romanian National Library

LUPȘAN, GABRIELA

Guide on international private law in family matters: Dissolution of marriage – Parental responsibility – Maintenance obligation – Civil order of protection – Matrimonial property regime / Gabriela Lușan, Ph.D Associate Professor; trad: Daciana Popescu Egăroiu. -

Onești: Magic Print, 2014

ISBN 978-606-622-152-8

I. Popescu Egăroiu, Daciana (trad.)

347.61/.64

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**THEME No. 1 - JURISDICTIONAL RULES
CONCERNING THE PRIVATE INTERNATIONAL LAW
AND RULES THAT SETTLE THE CONFLICT OF LAWS
WITH REGARD TO THE FAMILY LAW**

PART I. THEORETICAL PART

CHAPTER I. THE SYNTHESIS OF THE JURISDICTIONAL RULES CONCERNING THE PRIVATE INTERNATIONAL LAW WITH REGARD TO THE FAMILY LAW

1. THE DIVORCE

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 no. 1347/2000¹, (hereinafter called "Regulation") contains uniform rules for determining the rules of jurisdiction between Member States and facilitates the free circulation in the Union of judgments, authentic documents and agreements, establishing provisions on recognition and declaration of enforceability (exequatur) in another Member State.

The criteria for establishing the competence, provided by art. 3 of the Regulation, and related to the habitual residence of one or of both spouses or to their common nationality, have the following character:

- *alternative* and not hierarchical, because their application depends on the applicant's choice, who notifies a court from a Member state, to ensure that the legislation applied in the divorce proceedings will better defend his interests;

- *exclusive*, because the husband who is habitually resident in a Member State or is national of a Member State (or having the "domicile" in the UK or Ireland) cannot be sued for divorce in another Member State than pursuant to this Regulation (art. 6).

Based on art. 3 of the Regulation, the competence in matrimonial matters² belongs to

A. the courts of the Member State in whose territory there is:

- the habitual residence of the spouses, regardless of their nationality;
- the last habitual residence of the spouses, if one of them is living at the time the court is seised in that state;
- the habitual residence of the defendant;
- the habitual residence of one of the spouses if the application of the divorce is in common;
- the habitual residence of the applicant if he or she has resided there for at least one year before the application for divorce;
- the habitual residence of the applicant, if he or she has lived there for at least six months immediately before the application was made and if he or she is either citizen of that state, or, in the case of UK and Ireland, has his or her "domicile" there.

or

¹ Published in OJ L 338 of 23 December 2003, p.1. Regulation shall apply from 1 March 2005 in all EU Member States except Denmark.

² It concerns the applications for divorce, legal separation and annulment of marriage, according to art. 1, paragraph 1, letter a. of the Regulation.

B. the courts from the state of common nationality of the spouses¹ (in the case of UK and Ireland, the Member State on whose territory lies the common "domicile" of both spouses, interpreted according to the law systems from these states).

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The Regulation does not provide the possibility for the spouses to jointly designate the competent court (*except* for the amicable divorce, when the application is common, the spouses are entitled to choose the court from the State of habitual residence of one of them).

Checking its jurisdiction, the court of the Member State has to make use of the following **solutions** provided by the Regulation:

- 1. Declares that it has jurisdiction** and shall continue the trial of the case;
- 2. Declares ex officio that it does not have any jurisdiction**, if it is found that a court of another Member State has jurisdiction (art. 17 of the Regulation);
- 3. In case of *lis alibi pendens***, when it is found that between the same parties there is another application for divorce promoted to a court of another Member State, the date of seising the courts is checked, and as the case may be, the court shall:

- stays ex officio the proceedings until is established the jurisdiction of the other first court that has been seised;
- decline the jurisdiction in favor of the court first seised, if the jurisdiction of the latter has been established (art. 19 paragraph1 of the Regulation).

4. If the defendant *fails to appear*, who is habitually resident in another State than the state of the forum, although he had been notified by subpoena, document of seising the court or a document equivalent regarding the notification or communication, in accordance with Council Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters², the **art. 19** of this european instrument **is applied**, which means that the judgment from the court shall not be issued until it is established one of the following procedures:

- a. the document was notified or communicated to the defendant, according to the procedure provided by the internal law of the Member State where the notification or communication of the actions were addressed, for internal cases, and the

¹ Concerning the *common nationality*, based on competence provided by art. 3 paragraphs 1 letter b of the Regulation, if the spouses have the nationality of the same two Member States, they are able to seise, to their choice, the court of the Member State to which it will be brought for trial the application for divorce, therefore choosing between the jurisdictions of the two Member States. Concerning the interpretation of art. 3 para 1 lit. b) of the Regulation, the Court of Justice of the European Union was called to decide in the case that each spouse has nationality of the same two Member States, namely France and Hungary (Case C-168/2008, Hadidi, judgment of 16 July 2009), acknowledging the fact that the text is against precluding the jurisdiction of the courts of one of those Member States on the ground that there are no other connections between the applicant and this state. On the contrary, the courts of the Member States where the spouses have nationality are competent pursuant to that disposition, the latter being able to seise, to their choice, the court of the Member State where the case will be brought for trial.

² This regulation repealed the Council Regulation (EC) no. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and has been published in OJ L 324 of 10 December 2007. He is binding and directly applicable in the Member States as of the date 13 November 2008. The UK and Ireland participate in the adoption and application of this Regulation. The regulation also applies to Denmark.

- notification or communication took place in due time so that the defendant would be able to prepare his defense;
- b. the document was actually delivered to the defendant or to his residence by another method provided for by regulation, and the delivery was timely because the defendant could prepare his defense.

Subject to these provisions, the court may hear the case and issue a decision, even if has not been received any certificate of notification, communication or delivery, if all the following conditions, specified in Art. 19 paragraph (2) of the *Regulation (EC) no. 1393/2007*, are fulfilled:

- the document was transmitted by one of the methods provided for in this Regulation;
- a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of transmission of the document;
- no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

5. Stays the case if the defendant, who is habitually resident in a State other than the state of forum, does not appear, and there is no relevant evidence that he was put in the position to receive the document of seising from the court or an equivalent document in due time to prepare his defense or that all measurea have been taken for this purpose;

6. The jurisdiction is determined by the internal law of the Member State of the court (according to the **residual jurisdiction**, provided by art. 7 paragraph 1), if pursuant to art. 3 of the Regulation is found that no court of a Member State has jurisdiction¹.

A court of a Member State has jurisdiction if one of the following situations is identified:

- at least one of the spouses has been habitually resident in that Member State for a minimum period of time;
- both spouses have the nationality of that Member State, whether residing in the European Union or in a third country.

If the spouses have different nationalities of some Member States and live in a third State, spouses' access to the court of a Member State depends on the national law of each Member State (as indicated by the residual jurisdiction of art. 7 of the Regulation).

2. PARENTAL AUTHORITY

A. There is no application for divorce pending before the courts of a Member State

The jurisdiction of the courts of a Member State, for solving the applications **on any matter concerning** the parental authority, as they are listed in art. 1 paragraph 2 of Regulation (EC) no. 2201/2003², shall be determined by applying the following rules:

¹ In case **C-68/2007, *Sundelind Lopez***, the Court of Justice of the European Union was asked to rule on the relationship between the rules provided by art. 6 and art. 7 of the Regulation. By Judgment of 29 November 2007, it was held that the art. 7 of the Regulation should be interpreted meaning that, within proceedings for divorce, if the defendant is not a habitually resident in a Member State and is not a national of a Member State, the courts of a Member State can not base on the national law the jurisdiction of hearing the case brought before them, if the courts of another Member State have jurisdiction pursuant to art. 3 of the Regulation.

² The attribution, exercise, delegation, total or partial termination of parental responsibility shall include the following: custody and visiting rights; guardianship, curatorship and similar institutions; designation and functions of any person or body having the responsibility of taking care of the child's person or property, to represent him or

I. The rule of general jurisdiction based on the child's habitual residence in the territory of a Member State, when brought before the court (art. 8). The child's habitual residence corresponds to the place which reflects some degree of integration of the child in a family and social environment, the national court having the mission to establish where is this child's habitual residence, taking into account all relevant circumstances of the case.

The rule of habitual residence of the child is also reinforced by the provisions of **art. 10**, which governs the jurisdiction where **wrongful removal or retention of a child** takes place, meaning that the courts of the Member State where the child is habitually resident, immediately before the border abduction, *shall retain the jurisdiction* until the child has acquired a habitual residence in another Member State and certain additional conditions are met, namely:

- any person, institution or other body having rights of custody has acquiesced in the removal or retention or

- the child has resided in that Member State for at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child, until the child is integrated in his or her new environment and until it was fulfilled at least one of the following conditions:

- a. within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
- b. a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within a year previously mentioned;
- c. a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11 (7);
- d. a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention¹.

The courts from the old habitual residence of the child remain competent even in the case of a request for *modifying a decision with regard to the visiting rights* issued by the court of the State of habitual residence of the child, before being removed, if the following requirement provided by **art. 9**, are collectively met, namely:



- the child to be moved legally from one Member State to another Member State;
- the notification of the court to be made before the expiry of three months from the date of the child's legal move;
- the person entitled to visit has to continue to live normally in this state;
- the person entitled to the visit has not accepted the jurisdiction of the courts of the Member State where the child has new habitual residence.

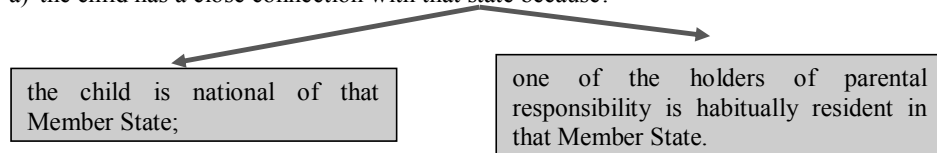
to assist him; placing the child in a foster family or in an institutional care; the child protection measures concerning the administration, conservation or disposal of the child's property.

¹ Article 10 letter b) section 4 of the Regulation has been interpreted by the Court of Justice of the European Union in Case C-211/2010 PPU, **Povse**, judgment of 1 July 2010, in the sense that an interim measure is not a "judgment on custody that does not involve the return of the child" within the meaning of that provision, and cannot justify a transfer of jurisdiction to the courts of the Member State where the child has been wrongfully removed. In practice, such decisions are common when parallel with the divorce proceedings filed in a court of the State of destination, the applicant spouse also files an application for provisional custody of the child, which causes, until the pending judgment, the blockage of any legal step for returning the child to the State of residence.

II. The rules concerning the **prorogation of jurisdiction** which favors a consensual solution (**art. 12 para. 3**)¹.

For the courts of a Member State to have jurisdiction, they must meet the following conditions:

a) the child has a close connection with that state because:



b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties at the time the court is seised;

c) the jurisdiction of the court is in the best interests of the child.

III. The rules concerning **the transfer of jurisdiction** from a court seised of a Member State to a court of another Member State, with which the child *has a particular connection*², considered that it would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child (**art. 15**). In such a situation, the court seised has at hand one of the following solutions:

a) *stays* the case and invites the parties that, within a certain period of time, to introduce a request before the court of that other Member State. According to art. 15 para. (4) of the Regulation, if the court from the other Member State is not seised within the period of time provided by the judgment, the court which has been initially seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14 of the Regulation;

b) requests to the court of the other Member State to exercise jurisdiction within six weeks from the date of its notification³. The first court declines jurisdiction to the court of the State with which the child has a particular connection, which, in turn, check its jurisdiction. If this court does not declare its jurisdiction, the first seised court shall continue to exercise jurisdiction in accordance with art. 8-14 of the Regulation. If the declining is accepted the court initially seised shall declare that does not have jurisdiction.

¹ CJEC, **Case C-656/2013**, judgment of 12 November 2014, according to which the jurisdiction in matters of parental responsibility, prorogued, pursuant to art. 12 paragraph (3) of Regulation no. 2201/2003, in favor of a court of a Member State, seised jointly with a procedure by holders of parental responsibility, ends with a judgment which has become *res judicata* in this case. In this case, the husband is a Spanish citizen, and his wife is a citizen of the United Kingdom, their last common residence is in Spain where the child was born and lived for about five years.

After separating in fact, spouses (who are in different Member States) concluded an agreement concerning the custody and visiting rights for the husband, which they submitted for approval to the court of Spain. Subsequently, the mother invests a court from the United Kingdom with an action under Art. 8 of the Regulation for reducing the program of visits, and the father responds with a claim based on art. 41 and art. 47 of the Regulation. Based on art. 15 of the Regulation, mother addressed the court of Spain, and then, based on art. 8, to a court in the UK, which has made the preliminary question.

² Situations where a child has a particular connection to a Member State are set out in art. 15 paragraph 3 of the Regulation, namely: after notification of the competent court, the child has acquired habitual residence in that State, the child was habitually resident in that State or is a national of that State, or one of the holders of parental responsibility is habitually resident in this State or, finally, the dispute relates to the child protection measures concerning the administration, conservation or disposal of the assets of the child and who is on the territory of this state.

³ It is noted that the art. 15 puts into practice the theory *forum non conveniens*, which was removed under the Hague Convention of 19 October 1996 concerning the jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children and the Regulation Brussels II.

IV. The jurisdiction is determined by **the mere presence of a child** in a Member State in the following cases (art. 13):

- if a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12;
- the child is a refugee or was internationally displaced, because of the major disturbances occurring in his or her country.

V. If no court of a Member State has jurisdiction pursuant to Articles 8 to 13 of the Regulation, the jurisdiction shall be determined by the laws of the Member State (**residual jurisdiction art. 14.**)

B. There is an application for divorce pending before the courts of a Member State

The rule of prorogation of jurisdiction from art. 12 provides that a court seised with a case of divorce, pursuant to the Regulation (art. 3), has also jurisdiction for issues related to the parental authority occurred in relation to the divorce (even if the child is not habitually resident in that Member State) if certain conditions are met, namely:

- at least one of the spouses has parental responsibility in respect of the child;
- the judge verifies if when the court was seised, all holders of parental responsibility accepted the jurisdiction of the divorce court, either by formal acceptance or by unequivocal conduct;
- the jurisdiction of that court is in the best interests of the child.

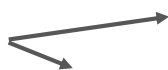
The jurisdiction of the divorce court terminates when:

- the divorce judgment has acquired the authority of res judicata;
- the decision solving the request which concerns parental responsibility has acquired the authority of res judicata;
- the procedure for the divorce case and for that concerning the parental authority has ceased from another reason (annulment of legal action, obsolescence).

C. Prorogation of jurisdiction for provisional or protective measures on the child or his or her assets

Although a court of a Member State has jurisdiction to issue judgement on the merits of the case, the courts from another Member State acquire jurisdiction, according to art. 20 of the Regulation¹, to solve a case with regard to provisional or protective measures on the child or his or her assets, if the following conditions are cumulatively met:

CONDITIONS



There is an emergency;

The persons or assets are present on the territory of this Member State.

¹ CJEC Case C 523/2007, A., judgment of 2 April 2009, according to which the measure of placement of a minor child may be ordered by a national court pursuant to Art. 20 of the Regulation, if the following conditions are met: the measure is urgent; the measure concerns persons present on the territory of the Member State; the measure is temporary. The implementation of the placement measure and its binding nature are determined by national law. After the implementation of the measure, the court is not obliged to refer the case to the court of another Member State. Only if the best interests of the child so require, the court which decided on the placement measure must inform the court of another Member State, either directly or through competent central authority of another State designated pursuant to art. 53 of the Regulation.

Unlike other regulations concerning other matters¹, according to which the provisional and protective measures provided for by the legislation of a Member State may be required even in the absence of an emergency in cause, the art. 20 of the Regulation² imposes the condition of this emergency in cases of matrimonial matters and parental responsibility.

- general rule, the child's habitual residence on the territory of a Member State;
- if the child is habitually resident in a third State, the jurisdiction may belong to the courts of a Member State if the parents have expressly accepted the jurisdiction and this is in the best interests of the child (art.12);
- if the parents disagree, the possibility of bringing an action before a court of a Member State with regard to a child who is habitually resident outside the EU depends, under residual jurisdiction, of the national law of each Member State (Article 14);
- for all other cases, between the signatory states, the provisions of the Hague Convention of 1996 shall be applied (art. 61 letter a. of the Regulation).

3. MAINTENANCE OBLIGATIONS

Jurisdiction of the courts of the Member States of the European Union entrusted with a request that seeks a maintenance obligation (arising from a family relationship, parentage, marriage or affinity) with an international element, is determined according to the provisions of the art. 3-8 of *Council Regulation (EC) No.4/2009 of 18 December 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations*³ (hereinafter called „Regulation”), which contain rules of direct jurisdiction unifying the rules of jurisdiction in matters relating to maintenance obligations.

1. The jurisdiction determined by the choice of the parties

The creditor and the debtor of a maintenance obligation are able to conclude in writing, no later than the date of seising the court, an agreement on the choice of court to designate a particular court or courts of a Member State which has jurisdiction in disputes which have arisen or may arise between them in respect of maintenance obligations.

Parties' choice of court agreement is subject to **limitations** expressly provided by art. 4 paragraph 2.4 of the Regulation, namely:

- the agreement cannot concern the dispute relating to maintenance obligations for a child under 18 years;

- the court or courts designated by the parties must be in one of the following Member States:

- in the State of habitual residence of either one of the parties;
- the State whose nationality has one of the parties;

¹ For example, *Council Regulation (EC) No.4/2009 of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (art.14)*, *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(art.31)* . In the same vein, see also art.31 of the Lugano Convention.

² CJEC, case C- 403/2009 PPU, *Deticek*, judgment of 23 December 2009, according to which if a court of Member State, having jurisdiction under this Regulation to issue a judgment on the merits of the case , has already ruled that the child should be entrusted to the other parent, and the judgment was declared enforceable on the territory of the other Member State, art. 20 of the Regulation does not allow a court of that other Member State to have a provisional measure in matters of parental responsibility by which a child residing in that State to be assigned to one of the parents.

³ Published in OJ L 7 of 10 January 2009.

- for maintenance obligations between spouses or ex-spouses, they can choose between the court having jurisdiction in matrimonial disputes or the court of the State where was the last common habitual residence of the spouses during at least one year.
- must be a relevant connection with the court or courts designated by agreement;
- if the parties have agreed to attribute exclusive jurisdiction to a court or courts of a State that was party to the *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, signed on 30 October 2007 in Lugano, and this is not a Member State, the parties' agreement applies, except for disputes relating to maintenance obligations of a child less than 18 years.

The agreement reached by the parties draws the **exclusive jurisdiction** of the courts of a particular State designated by the parties, unless they agree otherwise.

2. The jurisdiction without the agreement on the choice of court by the parties

In summary, the rules of jurisdiction established by the Regulation are as follows:

- art. 3 letter a and letter b, according to which jurisdiction lies with the court of the place of habitual residence of the defendant or the creditor¹;
- art. 3 letter c and d, according to which jurisdiction lies with the court of a Member State that has jurisdiction in proceedings concerning the status of the person or parental responsibility when the application on a maintenance obligation is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties².

These rules do not indicate a hierarchy, as the applicant was the one who, by seising a certain court of a Member State has chosen, depending on the situation, one of these jurisdictions specified in art. 3 of the Regulation.

3. The jurisdiction determined by the appearance of the defendant

If the defendant appears before the court hearing the action which concerns the maintenance obligation and does not contest the jurisdiction, then, according to art. 5 of the Regulation, that court may have jurisdiction, unless that jurisdiction derived from other provisions of the Regulation.

4. Subsidiary jurisdiction based on the common nationality of the parties

If no court of a Member State has jurisdiction pursuant to art. 3-5 of the Regulation and no court of a State party to the Lugano Convention has jurisdiction under the provisions of this

¹ The Court of Justice of the European Union has two cases *pending* for a preliminary ruling on the interpretation of art. 3 letter (a) and (b) of Regulation (EC) no. 4/2009. In **Case C-400/2013, Sanders**, the law issues regarding: the jurisdiction of the court to rule on an action concerning a maintenance of obligation to a person resident in another Member State; the legislation of a Member State which requires in this case a transfer of the jurisdiction of the court where the creditor has his habitual residence to the court of first instance of jurisdiction placed to the competent court of appeal. In **Case C-408/2013, Huber** the preliminary question is as follows: art. 28 para. (1) first sentence of the German Law on the recovery of maintenance obligations in relation to foreign countries (hereinafter called "Law on maintenance obligations abroad - AUG"), which provides that where a party is not ordinarily resident in national territory, the decision on applications made on maintenance obligations is taken in the cases provided for in art. 3 letter (a) and (b) of Regulation (EC) no. 4/2009 exclusively by the competent Amtsgericht for the premises Oberlandesgericht where is habitually resident the defendant or the person entitled, is compatible with Article 3 mentioned?

² Italy's Supreme court has asked the Court of Justice of the European Union (**Case C-184/2014**) with the following preliminary question: the application concerning the child maintenance brought in within the procedure of separation of spouses, being ancillary to that action, can be solved both by the court hearing the separation procedure and also by the court ruling the case concerning the parental responsibility, based on the criterion of prevention, or must necessarily be examined by the latter, since the two distinct criteria referred to in (c) and (d) of art. 3 of Regulation (EC) no. 4/2009, are alternatives (meaning that one necessarily excludes the other)?

Convention, then according to art. 6 of the Regulation, jurisdiction lies with the courts of the Member State of the common nationality of the parties.

5. Jurisdiction determined by the forum of necessity

If no court of a Member State has jurisdiction pursuant to art. 3-6 of the Regulation, the courts of a Member State receiving an application for maintenance obligation may, in exceptional circumstances and with the fulfillment of conditions, assume jurisdiction under Art. 7 of Regulation (*forum necessitatis*). To apply the rule of *forum necessitatis*, legal fiction created in private international law for the applicant to have access to justice, the court seised shall make the following checks:

- failure or inability to initiate or conduct proceedings in a third country with which the dispute has a close connection;
- existence of sufficient connection with the Member State of the court seised, such as for example, the nationality of the parties.

Thus, if before the Romanian court hearing an application relating to maintenance obligations the *forum necessitatis* rule is invoked, the jurisdiction of the court is required under art. 1069, paragraph 2 of the NCPC, if the applicant is a Romanian citizen or stateless person domiciled in Romania or legal entity that has Romanian nationality.

6. Procedural limitations

As long as the creditor remains habitually resident in a Member State in which the Regulation applies or in a Contracting State to the *Hague Convention concerning child support abroad for children and other family members*, concluded on 23 November 2007 (hereinafter called "Hague Convention of 2007")¹, in which the judgment was issued, **the action of amending the judgment or of ruling other judgment** cannot be brought before court in any other Member State (art. 8 para. 1 of the Regulation similar to art. 18 para. (1) of Hague Convention of 2007). For this rule, art. 8 paragraph (1) provides **four exceptions**, namely:

- if the parties have reached an agreement on jurisdiction of the courts of the other Member State;
- if the creditor recognizes the jurisdiction of the courts of the other Member State;
- when the competent authority of the State of origin contracting to the Hague Convention of 2007 is unable or refuses to exercise jurisdiction in order to modify the judgment or issue a new judgment;
- when the judgment issued in the State of origin contracting to the Hague Convention of 2007 cannot be recognized or the enforcement cannot be authorized in the Member State in which it is desired to introduce a new legal action in order to obtain a new judgment or amendment of the judgment in question.

7. Jurisdiction for provisional or protective measures

For provisional or protective measures, art. 14 of the Regulation provides for an exception to the rules applicable to the jurisdiction, meaning that the courts seised of a Member State shall have jurisdiction to rule on these measures, even if the courts of another Member State have jurisdiction, under Regulation, to hear the case on the merits.

¹ Approved on behalf of the European Union by Council Decision 2011/432 / EU of 9 June 2011, the Convention was published in OJ L 192 of 22 July 2011.

8. Procedure in case of lis pendens and joinder

In case of lis pendens, the rule is the same: the court of a Member State seised afterwards¹ is obliged to suspend ex officio the proceedings until the first court seised establishes its jurisdiction, because, depending on the decision ruled by this first court, it can decline jurisdiction or proceed to resolve the case (art. 12 of the Regulation²).

Similarly, if in front of the courts of different Member States there are more **related** requests pending³, the court seised afterwards may, based on art. 13 of the Regulation, proceed to one of the following **solutions**:

Stay of proceedings

Declining the jurisdiction to the first court seised, provided that the respective case be of jurisdiction of the first court and if the law of this state allows the joinder of the legal actions.

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The courts of the Member States, seised with an application which concerns a maintenance obligation with an element of foreign origin, must verify whether the application falls within the scope of Regulation:

- the *material* scope of the Regulation (according to Art. 1 paragraph 1 is considering the maintenance obligations arising from a family relationship, parentage, marriage or affinity, without interest to the source and the legal modality that established this relationship);
- the *geographical* scope of the Regulation, meaning that the rules of jurisdiction provided have a direct and universal application in terms of the competent authorities of the Member States of the European Union. Therefore, these rules also apply where the application for maintenance obligations is related to a third country, including a third country which is a contracting state to the *Hague Convention on child support abroad for children and other family members*, concluded on 23 November 2007, approved on behalf of the European Union by Council Decision 2011/432 / EU of 9 June 2011, but which is not a Member State of the European Union;
- the *temporal* scope of the Regulation. As of 18 June 2011, the Regulation applies between EU countries, indicating the art. 75 paragraph 1, in which this date has legal effect only for judicial proceedings, court settlements approved and signed or authentic instruments established after the date of applying the Regulation. The Regulation applies to judgments issued before 18 June 2011, regardless of the home Member State, provided that, for them, the exequatur proceeding was not suppressed.

After this check, the court seised shall establish jurisdiction under the direct jurisdiction rules, laid down in Art. 3-8 of the Regulation.

¹ The date of seising the court is established under Art.9 of the Regulation.

² CJEC **Case C-442/2013, Nagy**. The preliminary question is: can it be considered that there are two requests "between the same parties" within the meaning of art. 12 of Regulation (EC) no. 4/2009, where in one of the applications the child asks an order to oblige the father to pay alimony for past and present, and in a divorce proceeding the father asks to be established the amount of its obligation towards the child maintenance and payment to the mother for the period after divorce?

³ Those actions that are so closely connected that it is necessary to hear and determine them together at the same time in order to avoid the risk of irreconcilable judgments resulting from separate proceedings of trial, are deemed to be related for the purposes of this Regulation.

4. MATRIMONIAL PROPERTY REGIME

A. The jurisdiction of the courts under the Proposal for a Council Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes

In the absence of a legal instrument that would regulate the jurisdiction of the European courts on matrimonial property regimes, hereinafter, we refer to the *Proposal for a Council Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes*, under negotiation at the time of writing this guide¹. According to it, the rules on establishing jurisdiction of the courts in matters of matrimonial regime are as follows:

1. the courts of a Member State seised on a case of succession of one of the spouses, under *Regulation (EC) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and the creation of an European Certificate of Succession*², acquire jurisdiction to deal with matters concerning the matrimonial property regime that are related to the case of succession (art. 3);

2. spouses may agree that the courts of the Member State, whose law has been chosen as the law applicable to matrimonial regime, to have jurisdiction in order to hear matters concerning the matrimonial property regime (exclusive jurisdiction);

3. can become competent to hear cases concerning matrimonial property regime the courts seised with an application for divorce, legal separation or marriage annulment when the jurisdiction of the courts was recognized expressly or unequivocally by the spouses;

4. if no court has jurisdiction pursuant to art. 3-5, jurisdiction lies, consequently, to the courts of the Member State where there is:

- the common habitual residence of the spouses at the time the court is seised;
- the last common habitual residence of the spouses, provided that at least one of them to dwell there at the time the court is seised;
- the habitual residence of the defendant at the time the court is seised;
- the common nationality of the spouses at the time the court is seised (common residence, for United Kingdom and Ireland);
- the state where the defendant is national (or the place where has his residence, for United Kingdom and Ireland).

5. where no court has jurisdiction in application of the Articles mentioned above, the courts of the State in which are registered the movable or immovable assets of one or of both spouses (the court decides only on those assets);

6. the jurisdiction based on *forum necessitatis* (art. 7) states under what circumstances the courts of a State, which are closely connected to the case, acquire jurisdiction over the property consequences, namely:

- no other court has jurisdiction under art. 3-6;
- The legal proceedings may not be initiated or cannot be reasonably carried out or is impossible in another third state.

As regards the rules regarding *lis pendens* (art. 12) and *joinder* (13), they are the same as those under Regulation (EC) no. 2201/2003.

¹ Published by the European Commission on 16 March 2011 COM (2011) 125 final.

² Published in OJ L 201/107 of 27 July 2012. It shall apply as of 17 August 2015 except art. 77 and 78 (applied as of January 16, 2014) and art. 79-81 (applied as of 5 July 2012).

B. The jurisdiction of the courts under the Proposal for a Council Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of registered partnerships In the absence of a legal instrument to know the jurisdiction of the courts on the property consequences of the registered partnerships, we refer to the *Proposal for a Council Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of registered partnerships*¹, under negotiation at the time of writing this guide, which contains rules almost identical to those specified above in matters of matrimonial regimes.

C. Jurisdiction under the Code of Civil Procedure For courts in Romania, the jurisdiction in matters of matrimonial regimes is determined by the rules of jurisdiction of the internal law, who are based in the provisions of the New Code of Civil Procedure.

Referring to the provisions of the New Code of Civil Procedure, the jurisdiction of the Romanian courts is:



- exclusive personal jurisdiction under art. 1078 p.5, in relation to any disputes between spouses, except those relating to property situated abroad, if at the time the application is introduced both spouses are residing in Romania and one of them is a Romanian citizen or stateless.
- exclusive jurisdiction based on the rule of *lex rei sitae* according to art. 1079 p.1, if a dispute with elements of foreign origin concerns properties located in Romania.

5. OTHER MATTERS WHERE HAS NOT BEEN ACHIEVED THE UNIFORMIZATION OF THE JURISDICTIONAL RULES

In the European Union there were no uniform rules of determining the jurisdiction in matters such as, for example, the adoption, filiation, the surname of spouses after divorce, the child's surname, the civil orders of protection, the protection of vulnerable adults. It is noted that some of these are specifically excluded from the scope of the regulations that we have reviewed above (eg, art. 1, paragraph 2, letter a) of Regulation no. 44/2001, art. 1 paragraph 3 letter a.) - letter d) of Regulation No. 2201/2003), which means that the regulating the jurisdiction has remained a matter of the bilateral and multilateral conventions and private international law of each Member State.

Because is not object of our study, in the following we will briefly present each matter:

a) The adoption becomes international, according to art. 52 of *Law no. 273/2004 on legal status of adoption*² when the adopting person or family have habitual residence abroad. Jurisdictional rules are set out in art. 1078 p. 2 of NCPC (New Code of Civil Procedure) and in the Law no. 273/2004 (the Romanian courts having jurisdiction only if the adopted person is resident in Romania and is a national of Romania or stateless), and, where appropriate, in some bilateral conventions to which Romania is a party³.

¹ Published by the European Commission on 16 March 2011 COM (2011) 127 final. By the Senate Decision no. 34 of 30 May 2011, the European institutions were informed that this proposal does not respect the principle of subsidiarity or proportionality. To avoid a negative conflict of jurisdiction, under negotiation there is a system of declination of jurisdiction in favor of the court chosen by the parties by agreement or at the conclusion of the partnership. With regard to the *exequatur* proceeding, as with Regulation (EC) no. 4/2009, art. 22, the recognition of the property consequences of such a decision does not imply recognition of the family relationship that would not be accepted in the executing State.

² Republished in the Official Gazette of Romania, Part I, no. 259 of 19 April 2012.

³ For example, conventions concluded by Romania with Italy on the adoption of minors, with Albania, Czech Republic, Moldova, Serbia, Ukraine.

Also, there are incident the provisions of the *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, concluded at the Hague on May 29, 1993*, ratified by Romania by Law no. 84/1994¹.

b) The filiation is subject, in terms of jurisdiction, either to bilateral conventions or to rules of the internal law, as the case may be. For example, art. 113 paragraph (1) p. 1 of NCPC provides that the applications are within the jurisdiction of the courts from the applicant's residence;

c) The name of the spouses after divorce, as a result of divorce, the jurisdiction over the settlement of the application is given by the applicable rules in divorce matters, so by the Regulation no. 2201/2003;

d) The name and surname of the child are subject to the regulations of the conventional bilateral, in the matter being also incident a number of conventions developed by the International Commission on Civil Status;

e) Civil orders of protection. In terms of jurisdiction, are applicable the rules of the national law of each Member State. Only in terms of recognition of the protection order issued in one state are applicable the provisions of the *Regulation No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters*²;

f) Measures of protection for the adults are object to the *Hague Convention of 13 January 2000 on the International Protection of Adults*, but to which until now Romania is not included.

g) The guardianship and curatorship of the minor, as well as other measures to protect minors, are largely governed by the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children*. The provisions relating to jurisdiction over the cross-border placement can be encountered in Regulation no. 2201/2003.

¹ Published in the Official Gazette of Romania, Part I, no. 298 of October 21, 1994.

² Published in OJ C 113, 18 April 2012, p. 56. In accordance with art. 1 and art. 2 of the Protocol no.22 on the position of Denmark annexed to the TEU and the TFEU; Denmark did not participate in the adoption of this Regulation, it is not bound by nor is subject to its application. Concerning the position of the United Kingdom and Ireland, they have notified their intention to participate in the adoption and enforcement of this Regulation.

CHAPTER II. THE SYNTHESIS OF THE RULES THAT SETTLE THE CONFLICT OF LAWS WITH REGARD TO THE FAMILY LAW

1. LAW APPLICABLE TO DIVORCE

*The 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*¹ (also called Rome III Regulation) has a more limited scope in terms of the Member States among which is operating², establishing special rules, derogatories (but without prejudice to the application of the Regulation no. 2201/2003) in matters of divorce and legal separation, in situations where there is *conflict of laws*. It applies to legal proceedings instituted and agreements referred to in art. 5 and concluded as of 21 June 2012 (art. 17 shall apply as of 21 June 2011). However, this regulation *does not apply* to the following matters, even if they are only preliminary issues in the context of proceedings regarding the divorce or legal separation: the legal capacity of natural persons; the existence, validity or recognition of a marriage; marriage annulment; name of the spouses; repercussions regarding the property consequences of the marriage; parental responsibility; maintenance obligations; fiduciary-deed of trust or successions.

1. According to art. 5 paragraph. (1) of the Regulation, the spouses **may agree to conclude a convention of designating the law applicable** to divorce and legal separation, provided that it is one of the following laws:

- ❖ the law of the State where the spouses are habitually resident at the time the agreement is concluded;
- ❖ 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;
- ❖ the law of the State of nationality of either spouse at the time the agreement is concluded;
- ❖ the law of the forum.

Regarding the agreement designating the law applicable to divorce and legal separation, we make the following clarifications:

- the agreement may be concluded and modified at any time, but not after the court is seised.
- if, however, the law of the forum provides, the spouses may subsequently designate the applicable law even after the court is seised, in which case the court notes the agreement reached during the procedure;
- the agreement shall be in writing, dated and signed by both spouses;
- regarding the existence of certain additional formal conditions relating to the Agreement, they shall be met:

- a. if both spouses, at the date of signing the agreement, are habitually resident on the territory of the participating Member State, and the law of this State requires it, the agreement must meet;
- b. if the spouses, at the date of signing the agreement, are habitually resident in different Member States and the law of those states require different formal conditions, the agreement is valid if it satisfies the conditions provided by any of those laws.

¹ Published in OJ L 343 of 29 December 2010.

² The regulation applies to a number of 15 member states of the European Union.

2. In the absence of a choice by the spouses, the divorce and legal separation are regulated by the following laws, applicable *successively*, in the sense that each assumption excludes the previous one:

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

3. If applicable law under art. 5 or art. 8 of the Regulation does not provide for divorce or does not grant one of the spouses, because of belonging to one of the sexes, the equal access to divorce or legal separation, the **law of the forum** shall be applied.

4. According to art.11 of the Regulation, the *renvoi* is excluded.

5. The public policy of private international law of the forum may cause removal of the application of a provision of the law designated under this Regulation being the law governing the divorce (art. 12).

2. LAW APPLICABLE IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

*The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, adopted at The Hague on 19 October 1996*¹, contains conflictual rules which regulate successively the protective measures, parental responsibility by operation of law and protection of third parties. Once established the jurisdiction of the courts of a Member State of the European Union, these have to identify the applicable law to the parental responsibility² and to protective measures for children³. This law can be:



- ❖ *by general rule*, the law of the state whose authorities have jurisdiction to take such measures of protection (art. 15). In other words, shall be applied the national law of the authorities that have jurisdiction on the matter, according to the Regulation (EC) No. 2201/2003, that is *the law of the state of residence of the child*⁴;

¹ Ratified by Romania by Law no. 361/2007, published in Official Gazette no. 895 of 28 December 2007. The act implements Council Decision 2003/93 / EC of 12 December 2002 authorizing Member States, in the interest of the Community, to sign the Hague Convention of 1996, published in the Official Journal no. L 48 of 21 February 2003.

² It is taken into consideration the attribution, exercise, delegation, restriction or termination of parental responsibility. According to art. 2 paragraph 7 of Regulation nr.2201/2003 the term "parental responsibility" shall mean all rights and obligations conferred to an individual or a legal person under a judgment, a provision laid down by law or an agreement in force for a person or property of a child. This includes in particular custody and visiting rights.

³ These measures concern in particular, custody and visiting rights; guardianship, curatorship and similar institutions; designation and functions of any person or body who is responsible to handle the child's person or his property, representing or assisting the child; placement of the child in a foster family or in an institutional care; supervision by public authorities of the child care provided by any person to whom it was entrusted; administration, conservation or disposal of the child's property.

⁴ There is a complete correlation between jurisdiction and legislation.

❖ *exceptionally* and only if the protection of the person or of property of the child requires it, the authorities may apply or take into account the law of the State with which the situation presents *the closest connection* (Art. 15, paragraph 2);

❖ in case of *mobile conflict of laws*, the law of the Contracting State in which was established the new residence of the child, for the conditions of application of the measures taken in the initial state of residence of the child (art. 15, paragraph 3) and for the exercise of parental responsibility (art. 17).

Regarding **the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority**, is applicable to the:

- a. law of the State of the habitual residence of the child (art. 16 para. 1);
- b. the law of the State where the child was habitually resident at the time the act takes effect, whether by an agreement or unilateral act was decided the attribution or extinction of parental responsibility (art. 16 para. 2);
- c. in case of *mobile conflict of laws*, the law of the State where the child has established new residence is applicable *for the attribution of parental responsibility by operation of law to a person* who does not have yet such responsibility (Art. 16 paragraph 4).

The universality of the Convention is resulting from art. 20, according to which the provisions on applicable law apply even if the law designated by them is, as appropriate:

- *the law of a contracting State*¹;
- *the law of a non-contracting State*, in which case we can encounter **two situations** (art. 21 para. 2):

a. if the conflict rules of this State designate the law of another non-contracting State, that applies its own law, then the law of the latter State is applied (the renvoi is accepted):

b. if the law of this State is not recognized as being applicable, the law of the child's residence is applied.

An important statement: the court may remove the designated law if the enforcement of that law would be contrary to **public policy** and to best interests of the child (art. 22).

3. LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

By Decision no. 2009/941 / EC of 30 November 2009, the European Community signed the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*², so that between Member States the conflict of laws relating to maintenance obligations, which are based on a family relationship, kinship, affinity, including a maintenance obligation towards a child regardless of the marital status of the parents, shall be settled according to this instrument³.

¹ The term "law" is considering, according to art. 21 paragraph 1, the law of a State, except the rules applicable to the conflict of laws.

² Published in OJ L 331 of 16 December 2009. The 2007 Hague Protocol entered into force in the relationship between the Member States of the European Union as of 18 June 2011 and the relationship between the European Union and third countries as of 1 August 2013.

³ To the provisions of this Protocol refers and art. 15 of Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations. Also, according to art. 2612 of the Romanian Civil Code, the law applicable to maintenance obligation is provided by the regulations of EU law on the matter.

1. The law applicable to the maintenance obligation between parents and children

- ❖ the general rule according to which is applied the law of the Member State where the creditor is habitually resident (art. 3);
- ❖ if under the general rule, the child cannot obtain maintenance from the debtor, the *law of the forum* shall be applied (art. 4, paragraph 2);
- ❖ if the application was submitted to a court in the State where the debtor has his habitual residence, the *law of the forum* shall be applied, except the case when by applying this law, the child cannot obtain maintenance from the debtor, then the law of the State, where the creditor is habitually resident, shall be applied (art. 4 paragraph 3);
- ❖ if by applying the above rules the child cannot obtain maintenance from parents, shall be applied *the law of the State whose common nationality have both the creditor and the debtor*.

2. The law applicable to the maintenance obligation between spouses and former spouses¹

In order, the court being seised with an application on maintenance obligations between spouses or former spouses, shall apply the following rules:

- ❖ the general rule according to which the applicable law is the law of the creditor's habitual residence (art. 3);
- ❖ *the special rule according to which the law of the state that has a closer connection with the marriage is applied (especially the law of the last common habitual residence of the spouses)*, in the event that one party does not agree with the scope of the general rule (art. 5).

3. The law applicable to the maintenance obligation between other creditors and debtors

For other categories of creditors and debtors of maintenance (besides parents and children, spouses and ex-spouses), the law applicable to maintenance obligations is determined by the court seised by the following rules:

a) *the general rule* according to which the maintenance obligation is governed by the law of the state where the creditor is habitually resident (art. 3). The law so determined may be removed if the maintenance creditor invokes *the special rule on defense* (art. 6), in the event that neither the law of the state of habitual residence of the debtor and nor the law of the State where the parties have common nationality (as the case may be) does not establish such a maintenance obligation as far as the debtor is concerned.

b) the special rule of art. 4 according to which, in case of the maintenance obligations of persons other than parents, and persons who have not attained the age of 21 years, the applicable law may be one of the following, depending on the specific situation:

- *the law of the forum*, if the creditor is unable to obtain maintenance from the debtor under the general rule; The law of the forum so determined may be removed if the maintenance creditor invokes *the special rule on defense* (art. 6), in the event that neither the law of the state of habitual residence of the debtor and nor the law of the State where the parties have common nationality(as the case may be) does not establish such a maintenance obligation as far as the debtor is concerned.
- *law of the common nationality of the parties*, if the creditor cannot obtain maintenance under the laws mentioned above.

4. The agreement designating the applicable law to maintenance obligations

The convention designating the law applicable to maintenance obligations is permitted in all cases, except the situations specified in art. 8 paragraph 3, namely:

¹ The same rules apply to similar institutions of marriage (eg, forms of registered partnership), provided that they are recognized in the internal legal system of the Member States.

- the creditor is a person under 18 years;
- the creditor is a person that "because of deficiency or insufficiency of personal capacity, he unable to defend his or her own interests."

Parties may at any time conclude an agreement on the law applicable to maintenance obligation, choosing one of the laws expressly mentioned in art. 8, paragraph 1, namely:

- ❖ the law of any State of which either party is national at the time of the designation;
- ❖ the law of the State of the habitual residence of either party at the time of designation;
- ❖ the law designated by the parties as applicable, or the law in fact applied, to their matrimonial regime;
- ❖ the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation;

In the event that the court hearing an application for a maintenance obligation finds that the application of the law designated by the parties in their agreement would produce "manifestly *unfair or inequitable consequences*" for either party, then does not apply it, subjecting the maintenance obligation to the law identified by the application of art. 3- 6 of the Protocol.

5. The choice of an applicable law in the sense of a special proceeding

The creditor and the debtor may agree that, *expressly and prior to the onset of a special proceeding*, the law of the state, where this proceeding shall be applied, is to govern the maintenance obligation.

6. Renvoi

The renvoi is excluded under art. 12 of the Protocol which means that the internal law of the state is applied as it was designated by the parties' agreement or by the dispositions of the Protocol.

7. Public Policy on Private International Law

In a case if the court finds that the effects of the law court established under the Protocol are contrary to the public policy of private international law, then, under Article 13 of the Protocol, may disapply that law. The law applicable to the legal relationship before the Court shall be the law of the forum.

4. LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES

1. The law applicable to the matrimonial property regime according the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes

The matrimonial regimes were left outside the scope of Regulations (EC) no. 44/2001 and no. 2201/2003, as there is currently no legal instrument to regulate them.

At European level was achieved a project *the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes*¹. According to this proposal, which was under negotiation at the time of preparation of this guide, as it was approved with amendments by the European Parliament legislative resolution of 10 September 2013², the rules concerning the designation of the applicable law on matrimonial regime are as follows:

¹ Published by the European Commission on 16.03.2011- COM (2011) 125 final.

² The text can be found at: www.Euoparl.europa.eu/sidesgetDoc.do?

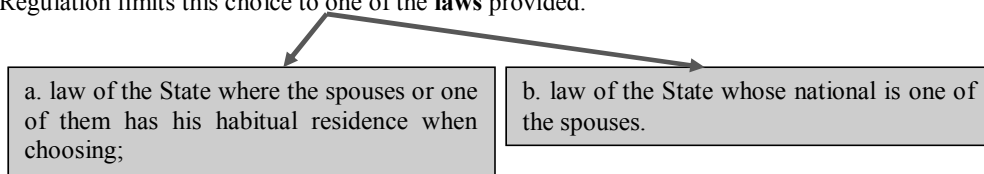
I. Based on the principle of *autonomy of will*, the law applicable to the matrimonial property regime¹ is designated by the spouses or future spouses through a convention subject to the fulfillment of some formal conditions. This choice is limited to the following laws expressly provided by art. 16:

- ❖ law of the State where the spouses (future spouses) or one of them has his common habitual residence at the time of concluding the agreement;
- ❖ law of the State whose national is one of the spouses at the time of concluding the agreement

II. If the spouses have not concluded an agreement on choice of applicable law for the matrimonial regime, the law is determined by the habitual residence or nationality of one or both spouses, as appropriate, according to art. 17:

- ❖ the law of the State where is the common habitual residence of the spouses at the time of their marriage, respectively where the spouses choose their common habitual residence after the marriage; or, failing that,
- ❖ the law of the State of the spouses' common nationality at the time of their marriage or, failing that,
- ❖ the law of the State with which the spouses jointly have the closest connections, taking into account all the circumstances, in particular the place where the marriage was celebrated.

Although the spouses, during marriage, can change anytime they want the law applicable to the matrimonial property regime, basically having effects only in the future, the Proposal of Regulation limits this choice to one of the **laws** provided:



2. The law applicable to the matrimonial property regime under the provisions of the Romanian Civil Code

By the **convention** concluded before marriage, when getting married or during the marriage, the spouses may choose that their matrimonial regime to be governed by the following laws expressly provided by art. 2590 Civil Code:

- ❖ law of the State where one of the spouses has his habitual residence at the date of choosing;
- ❖ law of the State whose nationality has either one of the spouses at the date of choosing;
- ❖ law of the State where they establish their first habitual residence after the marriage celebration.

In the **absence of such a convention**, the matrimonial regime is subject according to art. 2592 of the Civil Code *to the law applicable to the general effects of the marriage*, which means that by locating objectively, one of the following laws is identified:

¹ The law applicable to matrimonial property regime, either by agreement of the spouses or by the objective localization made by the court, concerns all property of the spouses (art. 15). Also, this law applies whether or not is the law of a Member State (Art. 21).

- ❖ law of the State where is the common habitual residence of the spouses;
- ❖ law of common nationality of the spouses in the absence of the common residence of the spouses;
- ❖ law of the State where the marriage was celebrated.

There is *one exception* to the application of the law designated by locating objectively, namely: the law of the place where is the residence of the family is applied for the rights of the spouses over the dwelling of the family and the status of the legal documents concerning it.

Changing the law applicable to matrimonial property regime can occur anytime during the marriage by signing a convention with the following and by meeting the following conditions regarding the new law chosen by the spouses:

- ❖ to be one of those provided by law;
- ❖ is applied for the future, unless the spouses agree otherwise, and without harm to the interests of third parties.

Note: the regulation of the conflict of laws in matrimonial property regimes established by the New Civil Code is a faithful transposition of The Hague Convention of 1978 and of the Proposal for a Regulation.

3. The law applicable under the Convention on the law applicable to matrimonial property regimes done at The Hague on March 14, 1978

The provisions of this Convention shall apply as of 1 September 1992 only in France, Luxembourg and the Netherlands (Austria and Portugal signed the Convention), even if the nationality or habitual residence of the spouses or the law applicable under them are not those of a Contracting State.

The choice of the law applicable to the matrimonial property regime is done according to the following rules:

I. spouses have the right to choose one of the following laws listed by art. 3:

- ❖ law of the State whose nationality has one of the spouses at the moment of choosing;
- ❖ law of the State in which either spouse has his habitual residence at the moment of choosing;
- ❖ law of the first State where one of the spouses will establish a new habitual residence after marriage.

II. In the absence of choice, the law applicable to the matrimonial property regime shall be designated by the rule of the objective connection (art. 4), being one of the following:

- ❖ law of the State where the spouses have established the first habitual residence;
- ❖ law of the State whose common nationality have the spouses, if the spouses are in one of the following situations:
 - the State of the common nationality has made a statement in favor of its internal law, if it is a third country whose conflict rules refer to the common nationality law;
 - the spouses have not established, after marriage, the first habitual residence in the same State.
- ❖ the law of the State with which they are most closely connected, if the spouses are of different nationalities and after marriage they have not established habitual residence in the same State.

There is one **exception**: whether or not there is a conclusion of a convention to choose the law applicable to matrimonial property regime, the spouses can understand that the present and

future immovable assets to be subject to the law of the State where they are located (*lex rei sitae*).

III. Regarding the amendment during marriage of the law applicable to the matrimonial property regime, the convention provides two situations:

- ❖ *voluntary amendment* (art. 6), whether or not the designation of the applicable law is arising from an objective or subjective connection. The spouses can choose only one of the following laws:
 - law of a State whose nationality has one of the spouses at the time of designation;
 - the law of the State in which either spouse has his habitual residence at the time of designation.
- ❖ *automatic amendment* of the law applicable to the matrimonial property regime in favor of the law of the state where both spouses are habitually resident (art. 7). This amendment occurs in the following situations:
 - starting from the moment the spouses have established their habitual residence in the State whose common nationality they have or from the moment they acquire this nationality;
 - if this habitual residence of the spouses, after the marriage, lasted more than 10 years;
 - starting from the moment they establish in this State their habitual residence, if the matrimonial property regime was subject to the law of the State of common nationality, when they have not established on the territory of the same State their first habitual residence after marriage.



5. OTHER MATTERS WHERE HAS NOT BEEN ACHIEVED THE UNIFORMIZATION OF THE RULES WITH REGARD TO THE APPLICABLE LAW

At the level of the European Union has not been achieved the uniformization of the rules that determine the law applicable to matters such as: adoption, filiation, the surname of spouses after divorce, the child's surname, civil orders of protection, protection of vulnerable adults. It is noted that some of these are specifically excluded from the scope of the regulations, which means that the applicable law is indicated either by bilateral and multilateral conventions, if any, or by the rules of private international law of each Member State.

Because it is not object of our study, hereinafter we will present briefly each matter:

- a) The law applicable to international adoption is indicated by *Law no. 273/2004 on the procedure of adoption*,¹ de and the *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993*;
- b) Filiation is subject, in terms of jurisdiction, either to bilateral conventions or to rules of internal law, as appropriate. For example, art. 113 paragraph (1) item 1 of NCPC provides that applications are within the jurisdiction of the courts from the applicant's residence;
- c) The law applicable to the surname of the spouses after the divorce is indicated by the rules of the bilateral conventions or by the rules of private international law;
- d) The name and surname of the child are subject to the rules of bilateral conventions, in matter being incident, and a number of conventions developed by the International Commission on Civil Status;

¹ Republished in the Official Gazette of Romania, Part I, no. 259 of 19 April 2012.

- e) Civil orders of protection. The applicable law to the protection order is indicated by the rules of the national law of each Member State. Only in terms of recognition of the protection order issued in one state are applicable the provisions of the *Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters*¹
- f) Measures of protection for the adults are object to the *Hague Convention of 13 January 2000 on the International Protection of Adults*, but to which until now Romania is not included.
- g) The guardianship and curatorship of the minor, as well as other measures to protect minors, are largely governed by the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children*.

¹ Published in OJ C 113, 18 April 2012, p. 56. In accordance with art. 1 and 2 of the Protocol no.22 on the position of Denmark annexed to the TEU and the TFEU; Denmark did not participate in the adoption of this Regulation, it is not bound by nor is subject to its application. Concerning the position of the United Kingdom and Ireland, they have notified their intention to participate in the adoption and enforcement of this Regulation.

CHAPTER III.

THEORETICAL ASPECTS WITH REGARD TO OBTAINING THE CONTENT OF THE FOREIGN LAW THROUGH THE EUROPEAN NOTARIAL NETWORK AND THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTER

In order to obtain the content of foreign law in a case *pending* in civil and commercial matters, the Romanian court appeals, where appropriate, to the following instruments:



- ✓ European Judicial Network in civil and commercial matters (hereinafter called EJN), created by Council **Decision no. 2001/470/EC** of 28 May 2001¹ and amended by **Decision no. 568/2009/EC** of the European Parliament and of the Council of 18 June 2009², *if the foreign law concerns a Member State of the European Union*;
- ✓ European Convention on Information on Foreign Law, signed in London on 7 June 1968³, *if the foreign law belongs to a Member State of the European Union (all Member States are Parties to this Convention), or not member of the European Union, but signatory to the Convention (for example, Switzerland, Turkey, Ukraine)*;
- ✗ Art. 27-28 of Law no. 189/2003 *on international judicial assistance in civil and commercial matters*⁴ and art. 2562 of the Civil Code, *the when foreign law belongs to a third country.*

According to art.2 of Decision no. 2001/470/EC, **the structure** EJN is the following⁵:

1. The contact points designated by each Member State (by the Order of the Minister of Justice **no. 1929 / C / 22.05.2014**, were named two points of contact for Romania, under the Ministry of Justice);
2. courts and central authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial cooperation in civil and commercial matters;
3. the liaison magistrates to whom Joint Action 96/277/JAI of 22 April 1996⁶ applies and who have responsibilities in cooperation in civil and commercial matters;
4. any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member States;

¹ Published in the Official Journal of the European Union, L 174/25 of 27 June 2001. The website of the Network is: <http://ec.europa.eu/civiljustice/>.

² Published in the Official Journal of the European Union, L 168/35 dated 30 June 2009. As of 2011, this decision applies to all EU Member States except Denmark.

³ By H.G. no. 153/1991 (published in the Gazette. No. 63 bis of 26 March 1991), Romania acceded to this Convention and the Protocol to the Convention, signed in Strasbourg on 15 March 1978. Under the Convention of London, we can get much more detailed information than by the EJN.

⁴ Republished in the Official Gazette no. 543 of 5 August 2009.

⁵ The Romanian Judicial Network in cooperation in civil and criminal matters is regulated by GEO no. 123/2007 on certain measures to strengthen the judicial cooperation with the Member States of the European Union (published in Official Gazette no. 751 of 6 November 2007), approved with amendments by Law no. 85/2008 (published in the Gazette. No. 292 of 15 April 2008) and subsequently amended by Law no. 35/2012 (published in the Gazette. No. 204 of 28 March 2012). The membership of the national network was updated by Order of the Minister of Justice no. 1929 / C / 22.05.2014.

⁶ The action on a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union.

5. professional associations representing legal practitioners at national level in the Member States and which are directly involved in the application of Community and international instruments concerning judicial cooperation in civil and commercial matters (especially lawyers, notaries, bailiffs)¹.

➡ Based on the provisions of art. 3 paragraph (2) letter b and art. 8 of the Decision. 2001/470 / EC², **the procedure of a Romanian judge for obtaining** the information about the content of the foreign law³ applicable in a case that he needs to solve, is the following:

1. The judge addresses to the person who is the contact point in Romania in the EJN. The contact point provides full support on elaborating the application for information concerning the foreign law and on establishing the most appropriate direct contacts between the foreign authorities and the courts¹;

2. The national contact point transmits the application to the contact point of the foreign state, who must respond no later than 15 days (the term may be extended at most 30 days, the applicant being informed of this extension);

3. the answer of the contact point of the foreign state on the required content of the domestic law shall be quickly transmitted, by the most appropriate technological means made available by each Member State, to the contact point of Romania¹, who in turn, makes it available to the judge.

The information contained in the reply **shall not be binding for the judge or the contact point** (art. 5 paragraph 2 letter c. of Decision no. 2001/470 / EC). If, within a reasonable time, the content of foreign law cannot be determined, the judge, based on art. 2562 par. 3 of the Civil Code, **shall apply the Romanian law** as *lex causae*.

The work undertaken by EJN does not affect the activity of the central authorities of the Member States, carried out under other Community or international instruments relating to judicial cooperation in civil and commercial matters, such as:

- ✓ Regulation (EC) no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents);
- ✓ Council Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between courts in the taking of evidence in civil or commercial matters.

We take as example several legal provisions:

✓ Art. 53-58 of *Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial*

¹Member States shall communicate to the Commission the name and address of the authorities mentioned, the means of communication, language skills, specific functions within the network, the responsibilities of each contact point. The roles and tasks of the contact points are expressly provided for in art. 5 of the Decision.

²"Especially when it is applicable the law of another Member State, the courts or competent authorities may apply to the Network for information on the content of that law."

³According to art. 253 of the NCPC, the court may take cognizance ex office of the law of a foreign state, provided that it is invoked. Regarding the proof of the foreign law, the texts refer to the provisions of the Civil Code on the content of foreign law (art. 2562).

matters and the matters of parental responsibility governs the cooperation between central authorities in matters of parental responsibility. Thus, art. 53 provides that each Member State shall designate one or more central authorities to assist with the implementation of this Regulation, the central authorities shall communicate information on national laws and procedures and take measures to improve the application of this Regulation and the strengthening of its cooperation, being used for this purpose the Romanian Judicial Network in Civil and Commercial Matters.

✓ Art. 70 of *Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* requires Member States to provide in the EJN a range of information to be made available to the public, from which are listed below:

- a description of the internal laws and procedures concerning maintenance obligations;
- a description of how the effective access to justice is guaranteed;
- a description of the internal rules and procedures concerning enforcement, including limitations on enforcement, in particular protection rules of the debtor and limitation or prescription terms.

✓ Art. 15 of *Law no. 36/2012 on several measures necessary for the implementation of EU regulations and decisions and instruments of private international law in the field of maintenance obligations* provides that, in the case of applying the foreign law, under the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, the official content of foreign law is obtained at the request of the court, through the Ministry of Justice or in a manner otherwise provided by law.

Regarding the **European Notarial Network (ENN)**, established by a judgment of 11 October 2006 of the Council of the Notariats from the European Union, it became operational between 22 Member States of the European Union as of 1 November 2008, the main objective being to become a platform of communication between notaries from the Member States for handling specific cross-border cases, ensuring cooperation between notaries.

The activity ENN also concerns:

The creation of a directory of notaries from EU:
www.annuaire-des-notaires.eu

The creation of a web portal:
 - “Succession in Europe”: www.successions-europe.eu
 and
 - “Couples in Europe”: www.coupleseurope.eu

PART II.

PRACTICAL CASES WITH SETTLEMENTS INCLUDED

CHAPTER I.

PRACTICAL CASES FOR DETERMINING THE JURISDICTION

1. CASES FOR NOTARIES

CASE No. 1. Divorce through the consent of the spouses. Spouses of different nationalities and common residence in a Member State. Jurisdiction of the notary public.

Spouses of different nationality (Romanian and French) married in Romania and common resident in France, go to a notary in Romania with an application for divorce by agreement.

Does the notary from Romania have jurisdiction to settle the application for divorce?

In case of divorce through the consent of the spouses with an element of foreign origin, the jurisdiction of the notary public is given by the combined application of the following texts:

- art. 3 of 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, because, according to art. 2 pt. 1, the term "court" means all competent authorities in the Member States in matters falling within the scope of the Regulation. However, in Romania, according to art. 375 NCC, the notary public and the officer of civil status have jurisdiction over divorce, along with the courts;

- art. 137 paragraph (2) of Law no. 36/1995 on public notaries and notary activity, which provides that "before checking the territorial jurisdiction, the notary public will check if the law applicable to the divorce for the marriage required to be dissolved by the application received is the Romanian law". In other words, in a strict sense interpretation of this text, the theoretical conclusion would be that the law applicable to divorce would attract, if necessary, the jurisdiction or non-jurisdiction of the notary public, in matters of amicable divorce.

Let us continue the logical-legal reasoning: in this case, the connecting elements (foreign nationality of one of the spouses and the spouses residing abroad) attract the provisions of Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in an area of the law applicable to divorce and legal separation,¹ entered into force on 21 June 2012 for the 14 participating countries (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia), to which was added, from 22 May 2014, also Lithuania.

According to art. 5 of the Regulation (EU) no. 1259/2010, the notary public would check if the spouses have concluded a convention to choose the law applicable to the divorce². There are two hypotheses that should be taken into consideration:

1. There is a convention to choose the law applicable to divorce, this law being as the case may be:

a. *The Romanian law.* The notary public shall verify if the choice of law applicable to divorce, made by the spouses, was done in compliance with the provisions of the art.5 paragraph (1) of the Regulation (EU) No.1259/2010, meaning that reported to the data of the case, the law chosen by the parties must be one of those mentioned by the legislature. However, being a law

¹ On 12 July 2010 the Council adopted Decision 2010/405 / EU authorizing enhanced cooperation in the area of legislation applicable to divorce and separation between the 14 Member States of the European Union.

² Regarding the formal requirements that must be met by this Convention, see the following case.

of the State of nationality of either spouse, the Romanian law fits the situation provided by art. 5 paragraph (1) letter c. of this Regulation;

b. *The foreign law.* Although this law, the law of the State where the spouses reside, is designated by the spouses, within the regulation, to govern the divorce, it cannot draw the jurisdiction of the Romanian notary public in matters of divorce. Only in terms of registering the application for divorce (done at the insistence of the spouses), the notary public shall issue the conclusion to reject the application under Art. 277 letter a. of the Regulation implementing the Law on public notaries and notary activity no. 36/1995¹.

It requires clarification: based on the provisions of art. 5 paragraph (2) of *Regulation (EU) No. 1259/2010*, which entitle spouses to enter or modify the agreement designating the law applicable to divorce at any time, but not after the date of application for divorce, there is a solution to attract the jurisdiction of the public notary from Romania, if the spouses have chosen the foreign law, namely: the spouses to amend the existing agreement, by choosing the Romanian law as law applicable to divorce.

2. There is no convention to choose the law applicable to divorce, situation in which the notary public appeals to art. 8 of *Regulation (EU) No. 1259/2010*. In this case, as long as the spouses neither have their habitual residence in Romania, nor have the same nationality, the only way to attract the applicability of the Romanian law and therefore the jurisdiction of the notary public, would be that, prior to filing for divorce at the office notary, the spouses to enter into an agreement designating the Romanian law. This possibility is implicit in the provisions of the art. 5 paragraph (2) of the Regulation, which entitle spouses to enter or modify the agreement designating the law applicable to divorce at any time, but not subsequent to filing for divorce.

Finally, we think that we would see a reversal of the rules on the matter, meaning that establishing the international jurisdiction of the authorities (in this case, of the notary public), would depend, in this case, of the identification, in advance, of the law applicable to divorce. However, determining the law applicable to any report with element of foreign origin is always a subsequent operation to determining the international jurisdiction concerned.

The territorial jurisdiction of the notary public is given by the two factual circumstances: (the place of concluding the marriage or by the last family residence).

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1. In the event that, in this case, *the marriage would have been concluded in France or in another state*, the public notary asks the spouses to give the marriage certificate issued by the Romanian authorities (if the marriage certificate was transcribed in the civil records of Romania, under art. 41 paragraph 3 of *Law no. 119/1996 on civil status*² or if the marriage was made at the diplomatic missions or at the Romanian consular offices from abroad). Otherwise, if the marriage certificate issued by the Romanian authorities is submitted, it is necessary that, previously, the spouses to obtain from the Romanian authorities the transcription of the marriage certificate.

Regarding the *place of marriage*, element that attracts the territorial jurisdiction of the notary office, this is the town in whose civil status registry was transcribed the marriage certificate, respectively the municipality Bucharest for marriages concluded at diplomatic missions or consular offices (art. 75 of *Law no. 76/2012 for the implementation of the new Code of civil Procedure*).

2. By binding the jurisdiction of the notary public of the law applicable to divorce, whether this law has been chosen by spouses or has been determined by the notary public using art.2600

¹ Republished in the Official Gazette no. 479 of August 1, 2013.

² Republished in the Official Gazette of Romania, Part I, no. 339 of 18 May 2012, amended by Law no. 213/2013, published in Official Gazette no. 397 of July 2, 2013.

of NCC, the Romanian legislator wanted the notary public to apply exclusively the Romanian law, respectively the provisions of the New Civil Code, both to the divorce and to its effects.

3. Based on art. 39 of *Regulation (EC) no. 2201/2003*, at the request of either spouse, the notary public, the competent authority in matters of divorce, issues a *divorce certificate*¹, using the standard form shown in Annex I to this Regulation. According to art. 21 of *Regulation (EC) no. 2201/2003*, the certificate issued by the notary public office, as the competent authority, shall be recognized in the other Member States.

CASE NO. 2. Spouses with Romanian nationality residing in a Member State. Divorce by agreement. The existence of minor children. Jurisdiction of the notary public.

The spouses, nationals of Romania residing in Italy, married in Italy, go to a notary office of Romania for the dissolution of marriage by agreement.

Does the notary public have jurisdiction to proceed to the dissolution of marriage by following the notarial procedure?

The jurisdiction of the notary public in the case of amicable divorce with element of foreign origin is given, firstly, by art. 2 point 1 and art. 3 of *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*. Although the public notary belongs to the state of the common nationality of the spouses, the application of art. 137 paragraph (2) of *Law no. 36/1995 on public notaries and notary activity*, according to which "before checking the territorial jurisdiction, the notary public will check if the law applicable to the divorce for the marriage required to be dissolved by the application received is the Romanian law" imposes the conclusion according to which only if the law applicable to divorce is the Romanian law, than the notary public has jurisdiction to settle the divorce application jointly filed by spouses.

In this case, the application of the *Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in an area of the law applicable to divorce and legal separation* is given, on the one hand, by the existence of habitual residence of the spouses abroad, and on the other hand by the fact that Romania, as a state of common nationality of the spouses, and Italy, as state of residence of the spouses, are Member States participating in the Regulation.

Since this is a marriage concluded abroad, the notary public verifies whether the parties have made the transcription of the marriage certificate in civil records of Romania (which attracts the territorial jurisdiction of the notary office) and if, before filing for divorce, the spouses have signed a Convention on choice of law applicable to divorce. We identify the following situations:

1. There is a convention by which spouses have chosen the law applicable to divorce, in which case the notary public shall proceed to two categories of verifications:

a) Verifications on the formal requirements of the Convention, according to art. 7 of *Regulation (EU) No. 1259/2010*, as it may have concluded in one of the following states:

- *in Romania*, where under the Romanian law (art. 2599 NCC), the Convention should be concluded in writing, signed and dated by the spouses;
- *in Italy*, where the spouses are habitually resident at the date of the agreement, in which case, if the Italian law provides for additional formal requirements apply, these conditions are applied (art. 7 paragraph 2);

¹ In common language, this document is called "international certificate of divorce".

- *in other State*, if at the date of the agreement only one of the spouses is habitually resident in a participating Member State(for example, one of the spouses was resident in a participating Member State- Belgium, and the other was resident in a non-participating Member State-Netherlands, the agreement being concluded in Netherlands) in which case the additional formal requirements under the laws of Belgium must be met (art. 7 paragraph 4).

b) What is the law chosen by the spouses as applicable to divorce? The spouses have chosen ,with this title, one of the following laws:

- *the Romanian law*, in which case the notary public, verifying if this law is among the hypotheses listed on art. 5 paragraph (1) of the *Regulation (EU) no. 1259/201* declares to have jurisdiction;
- *the Italian law*, as the law of the State of habitual residence. Such a hypothesis does not attract the jurisdiction of the Romanian notary public, the spouses being able to change the understanding, agreeing that Romanian law is applicable to divorce, which produces consequences on the jurisdiction of the notary.

2. When the spouses went to the notary public, **there was no convention on choice of law applicable** but prior to filing for divorce at the notary's office, the parties conclude such an agreement by which they choose the Romanian law as the law applicable to divorce. Consequence: only by doing so, the jurisdiction of the Romania notary public is attracted for settling the application of divorce by agreement.

3. When the application for divorce is submitted, **there is no convention on choice of law applicable**, which means that within the scope of art. 3 letter b of *Regulation (EC) no. 2201/2003* and art. 8 letter c of *Regulation (EU) No. 1259/2010*, **as long as the spouses have common nationality and it is Romanian**, a notary public from Romania has jurisdiction to hear the application for divorce by agreement of the spouses.

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1. Based on art. 39 of *Regulation (EC) no. 2201/2003*, at the request of either spouse, the notary public, as the competent authority in matters of divorce, issues a divorce certificate¹, using the standard form shown in Annex I to this Regulation.

2. In the event that from the marriage resulted minor children, and they are not in Romania, but habitually resident in Italy, the notary may be hindered by the existence of two problems (related to the juvenile hearing and to the submission of the social psychological investigation report), which may determine the notary to refuse the registration of the application for divorce. We believe that there are solutions to solve these problems:

- *the juvenile hearing* is required if the child has reached the age of 10 years. We believe that there is no impediment for the spouses to bring their minor child to the notary public in Romania, since they are required to be personally present not only when filing for divorce (except for spouses represented by attorney-in-fact with special and authentic power of attorney) but also at the date fixed for settling the application (after the expiry of 30 days from the date of filing for divorce).
- *obtaining social investigation* from the competent authority abroad. However, for this it should be disposed an international rogatory commission under the conditions o the *Council Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between courts in the taking of evidence in civil or commercial matters*, but **it does not apply to notaries**. Please note that in the Commission they are **working on a proposal for amending the Regulation (EC) no. 1206/2001**, in order to allow notaries to obtain such evidence.

¹ In common language, this document is called "international certificate of divorce".

3. In the event that the spouses, both citizens of an European Union Member State (for example Belgium), residing in Romania, go to the notary public from Romania to get an amicable divorce, the jurisdiction of the notary is given by choosing the Romanian law as the law applicable to divorce, being also incident for this case the provisions of the art. 3 paragraph (1) letter a, sentence I of the *Regulation (EC) no. 2201/ 2003*.

CASE NO. 3. Child born out of wedlock. Romanian nationality / of a Member State. Residence in Romania / in a Member State. Jurisdiction of the notary public. Authentication of the understanding between the parents concerning the child.

The unmarried parents of a minor child go to a notary public with a request to legalize their agreement concerning the exercise of parental authority, establishing the dwelling, the program of visits and the contribution of each for the expenses of growth, education, teaching and professional training of the child.

In the following cases, does the notary public have jurisdiction to authenticate such an agreement between the parents?

HYPOTHESIS I. The child is a national of Romania and resides in Romania, the father being national of an European Union Member State, residing in that State, and the mother has Romanian nationality.

Since this is an application which concerns the exercise of parental authority, in relation to the connecting elements – the *foreign nationality of one of his parents and his habitual residence in an EU Member State*, on the one hand, and on the other, *the child's habitual residence on the territory of a Member State*, in this case, are incident the provisions of *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*.

The notary public is an authority within the meaning of the term "court", as defined in art. 2 pt. 1 of the Regulation, having jurisdiction in matters of parental responsibility, which fall within the scope of the Regulation. Moreover, the authentic instruments and agreements between the parents are treated as "judgments" by Regulation (Art. 46) and may be enforced under the same Regulation.

Given this hypothesis, because the minor child is habitually resident in Romania at the time of the notary public is notified, the latter can, according to art. 8 paragraph (1) of Regulation, conclude the Convention between parents regarding the exercise of parental authority in common, the decision on the child's residence, the program of visits and the contribution of each parent to expenses of growth, education, teaching and professional training, under the law applicable to the report.

HYPOTHESIS II. The child is a national of Romania, is not habitually resident in Romania but lives with his mother in the territory of a Member State where they have taken up residence. Father is national of a Member State and lives in Romania.

We believe that the prorogation of jurisdiction under Art. 12 paragraph (3) of the Regulation should also apply to the notary public, as authority having jurisdictions equivalent to those of a judge (see art. 2 pt. 2 of the Regulation). Therefore, the notary public has the jurisdiction to authenticate the understanding of the parents on parental responsibility in proceedings other than those for divorce, legal separation, nullity of marriage, when the conditions imposed by the European Instrument are met:



- the child has a close relationship with Romania, especially because one of the holders of parental responsibility is habitually resident here (in this case the father) or the child is a Romanian citizen (as in this case);
- the jurisdiction of the authority was expressly accepted by the parties (condition achieved as long as both parents went to a notary office with an

application that requested the authentication of their agreement related to parental responsibility), and this is in the best interests of the child (condition left to be appreciated by the competent authority, in this case, the notary public).

However, by applying this text to the hypothesis presented, results that the notary public has the jurisdiction to authenticate the convention of the parents concerning the parental authority¹.

HYPOTHESIS III. The child has the nationality of a Member State, was born abroad and neither parent has Romanian nationality (eg, both have French nationality and their habitual residence in Romania, being employed as teachers in an educational institution from Romania).

The jurisdiction of the public notary in matters of authentication parents' agreement (who are nationals of a Member State and residing in Romania) regarding the child is conferred only on the criterion of habitual residence of the child, under the hypothesis presented in Romania (art. 8 of the Regulation).

Otherwise, *if the child's habitual residence is not in Romania*, but in a Member State (eg in France, where the child lives with paternal or maternal grandparents) the jurisdiction is given only if, in relation to art. 12 paragraph (3) of the Regulation, the notary public believes that the prorogation of his jurisdiction is in the best interests of the child. If so, the authentic document of the Romanian public notary is to be recognized and enforced in the Member State where the child is habitually resident, in France, in our example.

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In all cases, at the request of the person concerned, the notary public shall issue a certificate under Art. 39 of Regulation (EC) no. 2201/2003, using the standard form is given in Annex II, as "*judgments on parental responsibility*".

CASE NO. 4. Spouses nationals of Romania residing in a Member State. The separation of property regime. Liquidation of the chosen matrimonial regime. Jurisdiction of the notary public.

The spouses are nationals of Romania, residing in Italy, they were married in Italy and chose the separation of property matrimonial regime. During the marriage they have acquired property in Romania. They go to the notary public in Romania to liquidate such matrimonial regime chosen.

Does the notary public from Romania have jurisdiction to draw up the act of liquidation of separation of property regime chosen by spouses during their marriage in Italy?

On the occasion of concluding the marriage in Italy, the spouses chose the separation of property regime *by a simple statement to the officer of civil status*, method provided by the law of the place (Art. 162 Italian Civil Code). This choice of the matrimonial regime is clear from the marriage certificate issued by the Italian authorities and that subsequently, according to art.

¹ In practice, some problems may occur when both spouses, nationals of Romania, reside in the same Member State and agree to get a divorce by notarial means in Romania, saying that they reside in the country. By their agreement, the minor has the residence established at his mother's. Later, after returning in the Member State, the former spouses no longer agree, in the sense that the mother sends the child in Romania, and the father, arguing that the child's habitual residence is in that Member State, may submit an application to the foreign court for establishing the residence in that Member State, for exercising the parental authority, a request for returning the child etc.

41 paragraph (3) of *Law no. 119/1996 on civil status registers* is entered in the Romanian civil status records, with the same statements (The rule of *locus regit actum* is valid both for the act of marriage and also for the chosen matrimonial regime).

Regarding the applicable law of this regime, in the absence of an European instrument, it is indicated by Italian law, which states that if the spouses have not made an express choice of this law, the law of common nationality of the spouses is applied (i.e. the Romanian law), and failing that, the law of the place where the matrimonial life is localized (i.e. the Italian law).

In this case, under art. 2592 and art. 2589 of NCC, according to which, in *the absence of choice of law applicable to the matrimonial regime*, this is subject to the law of common habitual residence of the spouse, and failing that, the law of the common nationality of the spouses,¹ the public notary states that, firstly, shall be applied the Italian law, which refers to the Romanian law, as common national law of the spouses.

In conclusion, noting that the Romanian law, as common national law of the spouses is applicable, the notary public has the jurisdiction to proceed to liquidate the regime of separation of property chosen by spouses during the conclusion of their marriage in Italy. In these circumstances, the liquidation of the separation of property regime is made under the provisions of the new Romanian Civil Code.

¹These conflictual rules settle the conflict of laws, designating the jurisdictional law to govern the legal relationship with element of foreign origin, such determined law system being *lex causae*, being the law system with which the connection is established through the contact point.

2. CASES FOR JUDGES

CASE NO. 1. Divorce proceedings involving juveniles. Minors' residence from abroad. Hypotheses. Exception of lack of jurisdiction for the Romanian courts. International *lis pendens*. Absence of the defendant at the hearing. *Returning home from a Member State of the European Union, the husband files an application for divorce at a court from Romania, requesting the dissolution of marriage, the joint exercise of parental authority on the minor children from the marriage, to set their residence at his home in Romania (minors remained with the defendant at the former family residence from the Member State), to establish the contribution of each parent for the expenses of growth, education, teaching and professional training of the children and a program of visits for the defendant.*

HYPOTHESIS 1. *Legally summoned in the State of residence (Italy, for example), the defendant files a statement of defense (declaring that agrees with the jurisdiction of the Romanian courts and with the dissolution of marriage by agreement) and a counterclaim, in which she requests to establish the children's residence at her home in Italy, with a program of visits and to oblige the applicant to pay alimony for minors.*

In this case, do the courts of Romania have jurisdiction?

The litigation brought before the court presents an element of foreign origin, which attracts the application of the *Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (hereinafter called "Regulation"). With regard to **divorce**, on the one hand, according to art. 3 paragraphs (1) letter b of the Regulation, the courts of the state of common nationality of the spouses have jurisdiction, so the courts of Romania, on the other hand, the defendant, having the habitual residence in a Member State (Italy in this case) cannot be sued in courts of another Member State (Romania, in this case) than under Art. 3, 4 and 5 of the Regulation (which are exclusive).

That is, the seised Romanian court has international jurisdiction for the settlement of the divorce and the counterclaim (art. 4 of the Regulation), and because the defendant does not have residence in the country, the local jurisdiction belongs to the court in whose jurisdiction the applicant has his dwelling [art. 914 paragraph (1) the last Sentence of NCPC].

In respect of claims relating to **parental authority**, ancillary to the action of divorce (in this case, the exercise of parental authority, establishing the dwelling of minors, right of visiting), they fall under the provisions of art. 8 and art. 12 of the Regulation.

Although the rule in matters of parental authority is provided by art. 8 of the Regulation-which connects the jurisdiction of a court of a Member State with the child's habitual residence in the territory of that state- in question, finding that children are residing in Italy and that the requirements imposed by art. 12 of Regulation are met, the Romanian court **shall proceed to the prorogation of jurisdiction**. The court finds the following circumstances:

- at least one parent exercises parental authority for the children (in this case the defendant);
- the parties, as the holders of parental authority have expressly accepted the jurisdiction of the Romanian courts, the applicant by filing the divorce and the defendant by the statement of defense;
- the best interests of the child require the retention of jurisdiction of the Romanian court, which declares to have jurisdiction, under Art. 12 of the Regulation.

According to art. 1 paragraph (3) letter e. of the Regulation, **the maintenance obligation between parents and children** do not fall under the provisions of this European instrument. However, the competent court under this Regulation shall also have jurisdiction to decide on the maintenance obligation, by applying Art. 3 letter d. of *Council Regulation (EC) no. 4/2009 of 18*

December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, which provides the following: „ It has jurisdiction to rule on maintenance obligations in Member States: ... d) a court having jurisdiction pursuant to the law of forum in proceedings concerning parental responsibility, where the application on a maintenance obligation is ancillary to those proceedings, except the cases in which the jurisdiction is based solely on the nationality of one of the parties”.

HYPOTHESIS II. Legal summoned in the State of residence (Italy), the defendant files statement of defense and invokes the exception of lack of jurisdiction for the Romanian courts on the basis of art. 3 paragraph (1) letter a, the second sentence of Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, because the last habitual residence of the spouses was in Italy, and the defendant and the minor children from the marriage still live there. What will be the solution of the Romanian court?

The case submitted for trial presents an element of foreign origin, which attracts the application of Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter called "Regulation").


In matters of **divorce**, the provisions of art. 6 of the Regulation establish the exclusive nature of the jurisdiction specified in art. 3-5, which means that in this case, the defendant cannot be called before the courts of another Member State, i.e. Romania, than under Articles 3, 4, 5. Also the criteria of jurisdiction listed on art. 3 are alternatives, which means that none shall prevail over the other. In this case, since spouses have Romanian nationality, the Romanian courts have jurisdiction under art. 3 paragraph (1) letter b. of the Regulation.

The jurisdiction of the courts regarding applications whose object is the **parental authority**, ancillary to divorce proceedings (in this case, the exercise of parental authority, establishing the dwelling of minors, the right of visits) is governed by art. 8 and art. 12 of the Regulation.

In this case, in the *absence of habitual residence of the children* in Romania, a situation that would attract under general rule laid down in art. Regulation 8 the jurisdiction of the courts of Italy, the court finds that art. 12 of the Regulation allows the *prorogation of jurisdiction* in any matter relating to parental responsibility in favor of the courts of the Member State that are exercising jurisdiction on an application for divorce, only if several conditions are met, namely:

- at least one parent exercises parental authority for the children (in this case the defendant);
- the jurisdiction has been accepted expressly or unequivocally by the spouses and by the holders of parental responsibility, at the date of seising the court (in this case, by the statement of defense filed, the defendant has not accepted the jurisdiction of the Romanian courts);
- the best interests of the child require the retention of jurisdiction of the Romanian court.

In these conditions, although art.12 of the Regulation introduces a limited possibility for seising the court of a Member State where the child is not habitually resident, justified by the fact that the problem occurs during the divorce proceedings pending, the Romanian court finds that **by not being accepted the jurisdiction of the Romanian courts by the defendant**, the prorogation cannot be realized. Therefore, she has two options:

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- the Romanian court accepts the **exception of non-jurisdiction**, considering that the courts of the State of the last habitual residence of the spouses (given that one of them still resides there, that is the defendant), which is also the State of residence of the children, have international jurisdiction, based on art. 3, paragraph (1) letter a and art. 8 of the Regulation, and rejects the application for divorce.



- **exceptionally**, the Romanian court may consider, on the one hand, it has only jurisdiction in divorce matters, on the other hand, believes that the court of another Member State (Italy), to which children **have a special connection is better placed to deal with requests relating to parental responsibility**¹ and that this is in the best interests of the child.

Consequently, either on its own initiative or at the request of a party, the Romanian court shall proceed according to art. 15 paragraph (1) of the Regulation:



- stays the proceedings of the ancillary applications of divorce regarding the parental responsibility and invites the parties that, within a fixed period of time, to submit an application to the court of Italy. Regarding the application for divorce, the court proceedings continue. If the court of Italy is not seised within the date fixed by the Romanian court, the latter continues to exercise jurisdiction pursuant to art. 8-14 of the Regulation;

- requires the court of Italy to exercise jurisdiction within six weeks from the date of its notification (the case can be sent only with the consent of at least one of the parties) in which case the Romanian court shall decline jurisdiction. If the court of Italy declares to have no jurisdiction, the Romanian court continues to exercise jurisdiction pursuant to art. 8-14 of the Regulation.

1. Referring to art. 12 of the Regulation, it is noted the fact that the rules on prorogation of jurisdiction provided by this text favor a consensual solution of the spouses, thereby avoiding the settlement of the application of divorce and of the application regarding the parental responsibility by courts of different Member States.

2. It is up to the judge to assess and interpret the conditions to be met, especially those relating to "*jurisdiction has been accepted expressly or otherwise unequivocally*", "*the jurisdiction is in the interest of the child*", "*child has a substantial connection with that Member State*" [art. 12 paragraph (2) and (3) of the Regulation].

3. The transfer of jurisdiction to a court better placed, according to art. 15 of the Regulation, is also left at the discretion of the judge, who decides in this case, especially considering the best interests of the child. In practice, difficulties may arise with regard to the length of time during which the court requested from the other Member State where the case is transferred (in our example, the court of Italy) informs the Romanian court about the acceptance or non-acceptance of the jurisdiction.

HYPOTHESIS III. Legally summoned in the State of residence (Italy), the defendant files statement of defense and invokes the exception of international *lis alibi pendens*, stating that pending on the foreign court is registered her application for legal separation. How will proceed the Romanian court and what will be the solution?

Being a dispute with an element of foreign origin in matters of divorce and both parties are residing in the territory of the Member States of the European Union, the parties also being nationals of Romania, this case attracts the application of *Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (hereinafter called "Regulation").

¹ For the transfer to a court better placed to hear the case, art.15 , paragraph (3) of the Regulation provides: "*The child is considered to have a special connection with a Member State if that Member State: a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; b) is the former habitual residence of the child; c) is the place of the child's nationality;; d) is the habitual residence of a holder of parental responsibility; e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.*"

The Romanian court is obliged to examine ex officio its own jurisdiction, according to art. 17 of the Regulation, on the one hand, and on the other hand, in this case are incident the provisions of the art.19 of the Regulation which provide the following: *paragraph (2) “Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.”. Paragraph. (3) “Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favor of that court.”*

That being the case, the Romanian court pronounces on the exception of lis pendens and it shall make the following verifications:

1. the existence of *triple identities of parties, object and cause in the applications filed for the Romanian and the foreign court*. The eventual discussions can take place in relation to the application of legal separation submitted by the defendant to the foreign court, situation in which the Romanian judge verified if, according to the foreign law, such an application is or not a preliminary stage for the ruling of divorce, as it is in Italy and Spain, for example (it is taken into consideration the existence of the triple identity);

2. the two actions on the dockets of the courts of different states to be *pending*;

3. the existence of predictability concerning the recognition of the judgment pronounced by the foreign court in Romania [condition which, although expressly provided by art. 1075 of NCPC, we believe that it is not necessary to be checked in matters of divorce, since the Regulation establishes automatic recognition of judgments pronounced on the matter, in a Member State- to see art. 21 paragraph (1) and art. 24 of the Regulation. Moreover, art. 1075 of NCPC is applicable only in situations that are not governed by the European Union law, art. 1064 of NCPC reaffirming the priority of the international law and of the European Union before the national law];

4. *verification of the moment when the foreign court has received the application for divorce (legal separation), according to art. 16 of the Regulation*. Compared to the case data, the hypotheses that the judge may face are the following:

Hypothesis	Consequence
a. It is proven that the court of the other Member State was first seised .	The Romanian court <i>shall stay ex officio the proceeding</i> until the jurisdiction of the court first seised is established.
b. It is proven that the court of the other Member State was first seised, and it has already declared its jurisdiction for the case brought before (of divorce, legal separation or marriage annulment), means that it is entitled according to art. 12 paragraph (1) and (2) of the Regulation to rule on any matter relating to parental responsibility.	The Romanian court is to "decline jurisdiction" in favor of the first court, according to art. 19 paragraph (3) of the Regulation, the settlement pronounced being that of rejection of the application submitted by the applicant, on the grounds that it does not fall under the Romanian jurisdiction. We mention that the applicant has the opportunity to bring divorce proceedings to the court first seised of the other Member State.
c. The Romanian court was first seised.	The Romanian court verifies if it has jurisdiction, pronouncing one of the following solutions: - <i>the Romanian courts do not have jurisdiction</i> , situation in which, according to art. 17 of the Regulation, the exception of lis alibi pendens and the exception of non-jurisdiction are accepted and the application of the applicant is rejected. At the same time, it is expressly provided that the party who has filed the action to the Romanian court should have the opportunity to promote the action at the court seised from the other Member State. - pursuant to art.3 paragraph (1) letter b of the Regulation,

	the dispute <i>belongs to the jurisdiction of the Romanian courts (both spouses having Romanian nationality)</i> , in which case the exception of <i>lis pendens</i> is rejected and the case is retained for trial, going on to identify the law applicable to divorce, to the taking of evidence and finally to the judgment of the case on the merits, with the delivery of a judgment that is to be recognized in the other Member State.
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We mention that one of the reasons for which was created the Regulation, binding on all Member States of the European Union was that, in the interests of the harmonious administration of justice, *to provide a clear and effective mechanism for resolving cases of international lis pendens*, in order to minimize the possibility of concurrent proceedings in the Member States and to avoid ruling irreconcilable judgments in two Member States. This mechanism is governed by art. 19 of the Regulation.

The modality by which the Romanian court can find out information about the other case submitted for trial in the Member State, as well as the the moment when that court was seised, is left at the discretion of the judge, who, according to the data of the case, may choose a way considered by him to be the most adequate from the ones provided by the instruments of the matter. Thus, he has the following possibilities:



1. to address a request for information to the **Ministry of Justice**, International Law and Judicial Cooperation Department, as Central Authority (Art. 53 of the Regulation);
2. to contact one of the **two national contact points** of the European Judicial Network in order to obtain information;
3. to address directly to the **foreign court**, if this is known.

In this case, as shown in the submissions of the parties and the documents submitted (including information received directly from the foreign court, as a result of the measures taken by the Romanian judge who faxed the request of information related to the application of divorce filed by the defendant in Italy), the court considered that both spouses, nationals of Romania, had the last habitual residence abroad, in a Member State (the wife still having the actual residence there along with the minors from the marriage), and pending at the foreign court there is registered an application for legal separation, where the court ruled positively on its jurisdiction.

That is, given the existence of two identical applications by parties, object and cause, **an application for legal separation** submitted to the court of another Member State (Italy) which declared to have jurisdiction, and **an application for divorce** pending on the Romanian courts, the latter being later seised, the solution is to reject the request of the applicant, because it does not belong to the jurisdiction of the Romanian court, pursuant to the *art. 19 paragraph (3) of Regulation (EC) no. 2201/2003*.

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Regarding the application of **art. 19** of the Regulation, the Court of Justice of the European Union mentioned in a case¹ that the *rule on lis pendens does not apply* if the first court of a Member State is seised on the matter of parental responsibility only to take provisional measures pursuant to **art. 20 of the Regulation**, and the second court of the other Member State is seised with an application which concerns the same thing, but on the merits, the latter court having jurisdiction to hear the case on the merits.

¹ Case C- 296/10 Purucker II, rep. 2010, p. I-11163.

HYPOTHESIS IV. Legally summoned, the defendant fails to appear. How will the court proceed?

If the defendant fails to appear at the hearing, based on art. 18 of the *Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*, the Romanian court must verify if the defendant, who has the residence in Italy, has been put in the position to receive the request for summons and the subpoena in order to ensure her defense or if all measures have been taken for this purpose. For this verification, in this case shall be governed by the provisions of art. 19 of *Regulation (EC) no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)*¹.

The judge may give judgment even if no certificate of service or delivery has been received, if the following conditions provided by the *Regulation (EC) no. 1393/2007*, are fulfilled:

- the document was transmitted by one of the methods provided for in this Regulation;
- a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;
- no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

In such a case, the court finds that the defendant was duly summoned, that she was communicated at her residence of Italy the judicial documents necessary to her defense, but she failed to appear in the court of Romania.

The Romanian court verifies its international jurisdiction and may fall under the provisions of the art. 12 paragraph (1) of the *Regulation (EC) no. 2201/2003*, which provides that the courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce shall have jurisdiction in any matter relating to parental responsibility connected with that application where, at least one of the spouses exercises parental responsibility in relation to the child and the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

The only problem is raised by the interpretation of the expression "*express and unequivocal acceptance of the jurisdiction by the holders of parental responsibility*". Could the lack of invocation of exception of jurisdiction and the beginning of the discussions on the merits of the process be included in such a situation? The court's lack of invocation of exception of jurisdiction is not the equivalent of an unequivocal acceptance, but the judge, based on his active role, should include this issue in the discussions of the parties.

Therefore, the prorogation of jurisdiction provided by art.12 of the Regulation can be retained if, although regarding the exception of lack of jurisdiction of the Romanian courts, invoked ex officio and brought about in the discussions of the parties, *the defendant has not expressed in written her position and also failed to appear before the Romanian court*, the Romanian court considers that it is in the best interests of the minors from this case to declare its jurisdiction.

¹ The Romanian court communicates the judicial documents directly to the receiving authorities of the Member States of the EU, by sending a copy of the application of communication to the Ministry of Justice for registration. Pursuant to art. 36 of the *Law no. 189/2003 on international judicial assistance in civil and commercial matters*, the court accesses the specialized Internet page of the European Commission and consults the contact points of the European Judicial Network in civil and commercial matters.

In the scope of *Regulation (EC) no. 2201/2003*, the provisions of **art. 12** concerning the prorogation of jurisdiction prevail over the art. 1066-1067 of the NCPC, given the exclusive nature of jurisdiction provided by the Regulation in matters of divorce and best interests of the child.

CASE NO. 2. Residual jurisdiction of the Romanian courts in matters of divorce

The applicant, who has Romanian nationality with domicile/residence abroad in a Member State of the European Union, files an action of divorce in a court of Romania, requesting that, in opposition to the defendant, who is national of a Member State (for example Spain), with the same domicile/residence, to rule the dissolution of marriage concluded in Romania.

Do the courts of Romania have jurisdiction to settle the divorce application?

Verifying its jurisdiction, after taking evidence, the court found the following:

- spouses have common habitual residence in a non member State of the EU (for example, Turkey);
- third State law, where the spouses reside, provides rules of jurisdiction based solely on the nationality of the State concerned, which means that the courts of that State have no jurisdiction to settle divorce applications made by foreigners, as in this case;
- verifying the jurisdiction of the court according to the criteria established by art.3 paragraph (1) letter a. of the *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*, it is found that, on the one hand, the spouses did not have another habitual residence that the one from the third State, therefore, in this case, the last residence of the defendant cannot be established. On the other hand, although the applicant was at one time habitually resident in Romania, the jurisdiction of the Romanian court cannot be held, not being fulfilled the condition provided by art. 3 paragraph (1) letter a, Fifth Sentence of the Regulation.

In such a situation, the Romanian judge applies the art. 7 paragraph (1) of the Regulation, according to which “*Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.*” Therefore, based on residual jurisdiction, the Romanian court applies *lex fori*, being incident the dispositions of the art. 914 paragraph (2) of NCPC. Thus, if the spouses have concluded an agreement of choice of the court (a certain court from Romania, for the example, the one from the place in which the marriage was concluded), then this acquires territorial jurisdiction. Otherwise, in the absence of the agreement on choice of the forum, the jurisdiction lies within the 5th District Court of Bucharest, pursuant to art.914 paragraph (2), Second Sentence of the NCPC.

In conclusion, as long as none of the spouses lives in Romania, and according to the European rule provided by art.7 of the Regulation, the Romanian courts have jurisdiction, the following procedure is that, in order to establish the jurisdiction, the Romanian court hearing a divorce action, has to apply directly the specific rule of the Regulation, in conjunction with art.914 paragraph 2 of NCPC.

1. For the hypothesis of the amicable divorce application, solving the problem of jurisdiction of the Romanian courts from Romania is made identically as in the case no.1
2. Assuming that the spouses (one of them has Romanian nationality) live in different third states and the residence of only one of them is not sufficient to establish international jurisdiction on matter of divorce and neither can be established the jurisdiction of the last habitual residence of the spouse or spouses, the solution that can be adopted by the Romanian court seised for the divorce proceedings by the husband of Romanian nationality is given by the residual jurisdiction, which leads to the application of the art. 914 paragraph (2) of NCPC.

CASE NO. 3. Provisional measures on minors that are in a Member State. The jurisdiction of the Romanian courts.

By the summons, the applicant requested that, under Art.919 of NCPC, the court to rule by the presiding judge's order on establishing the domicile of the minors from the marriage, who are currently in Italy, until the final settlement of his action for divorce promoted in Romania. In the reasoning of the application, the applicant states that he got married in Romania, his wife also having Romanian nationality, and then they settled in Italy, where the children were born. A few months ago, the applicant was banished by his wife from the common residence from Italy and returned to Romania. Convinced that the marriage relationships cannot continue, the applicant registered on the dockets of the Romanian courts the application for divorce and the present application of presiding judge's order, so that the dwelling of the children to be established at his residence from Romania. By filing the statement of defense, the applicant invoked the exception of lack of jurisdiction of the Romanian courts.

What will be the solution of the court?

Even if the exception of lack of jurisdiction of the Romanian courts hadn't been invoked, the court is obliged that, ex officio, based on art. 1070 of NCPC, to verify its international jurisdiction, so that, then, under the hypothesis of rejecting the exception of lack of jurisdiction of the Romanian courts, to proceed verifying the internal jurisdiction, under Art. 131 paragraph (1) of NCPC. In this case, based on the submissions of the parties and the documents submitted, the court found the following situation:

- the parties are nationals of Romania, who lived with their minor children in Italy, where all have their residence (proved by documents issued by the Italian authorities)
- due to disagreements, the applicant returned to Romania, and the defendant remained in Italy with the children, these attending their school courses from that State. Therefore, the habitual residence of the children- element according to which the jurisdiction of the court is established- is in Italy, children having no other point of connection with Romania, except the nationality;
- each party promoted an application for divorce as applicant, the husband in Romania, and the wife in Italy.

The applicant requests the court to take urgent and temporary measure regarding the minors, while the legal relationship submitted for trial, presenting an element of foreign origin (the defendant and the children residing abroad), attracts the applicability of *Regulation (EC) no. 2201/2003 of the EU Council on jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*.

According to art. 1 paragraph (1) letter b. of the Regulation, it applies whatever the nature of the court civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility. The provisions of art. 8 of the Regulation assign to the jurisdiction of the courts of a Member State the applications on parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. Reported to

the facts of the case (the minors were born and are residing in Italy , being under care and supervision of the mother from the moment of separation of the parties, the actual separation occurred in Italy, the defendant did not accept the jurisdiction of the Romanian court neither in this case nor in the one of divorce), is excluded the application of the art. 9, 10 and 12 of the Regulation. The prorogation of jurisdiction, governed by art.12 in conjunction with art. 3 of the Regulation, cannot be retained, since it operates in the two situations covered by art. 12 paragraph (1), which are not present in this case.

Regarding the art. 20 paragraph (1) of the Regulation (*“In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.”*), it cannot be interpreted in conjunction with art. 3, as long as the latter text governs the jurisdiction in matters relating to divorce, legal separation and annulment of marriage and the incidence of art. 8 paragraph (2) of the Regulation was excluded. Just placing in the assumption of art. 12 of the Regulation would have led to a prorogation of jurisdiction for the Romanian court.

Also, art. 20 of the Regulation cannot be considered in this case to attract the jurisdiction of the Romanian courts, because the minors for whom is requested the provisional and urgent measure of establishing the dwelling, are not in Romania, condition expressly required by this text. In these circumstances, the court will consider that **the exception of lack of jurisdiction of the Romanian courts is well-founded**, admits it and, consequently, rejects the application of the applicant as not falling under the jurisdiction of the Romanian courts, the decision being subject only to appeal [art. 132 paragraph (4) NCPC].

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Regarding the application of *art. 20 of the Regulation* in a case¹ which concerned the matter of *child abduction*, the Court of Justice of the European Union stated that the court of the Member State where the child has been abducted cannot adopt a provisional measure of entrusting the child, who is on the territory of one of the parents, if a court which has jurisdiction has already ruled a decision according to which the child has been provisionally entrusted to the other parent before the abduction, and that judgment was declared enforceable on the territory of the first Member State.

CASE NO. 4. Application of child custody who has been wrongfully retained by one of the parents in the territory of a Member State. Habitual residence of the child in Romania. Jurisdiction of the Romanian courts.

The Romanian court has been vested with an application for child custody, submitted under conditions of the Art. 10 of the Regulation (EC) no.2201/2003, the applicant being the husband, national of Romania with the habitual residence in Romania, and the defendant being the wife, national of Romania with the residence in Italy. In the reasoning of his application, the applicant stated that he agreed with his wife that their son, of 9 years old, to travel to Italy and live at her residence for one month during the summer holiday, with the defendant's obligation of ensuring the return of the minor in the country on 20 August 2014, in order to prepare for the start of school classes. This understanding has been enshrined in an authentic document, the applicant giving, at the same time, to the defendant a power of attorney for accompanying the child to and from Romania. Since at the end of the stay in Italy, the defendant failed to fulfill the obligation assumed on the return of the child in the country, the applicant has promoted the present action, considering that the minor is wrongfully retained in Italy and requesting his custody. Also, the applicant states that he has made efforts through the competent authority of

¹ Case C-403/09 PPU Deticek, Rep. 2009, p. I-12193.

Romania to the courts of Italy, as the Member State where the child was wrongfully retained, so that these rule on the application for return based on the provisions of the Hague Convention of 1980.

Does the Romanian court have jurisdiction to rule on the application of custody made by the applicant?

The litigation submitted for trial presents an element of foreign origin, which attracts the application of the *Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (hereinafter called, „*Regulation*”). Pursuant to art. 60 letter e of the Regulation, this instrument prevails over the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as far as the latter concerns the matters governed by the Regulation. Pursuant to art. 62 paragraph (2) of the Regulation, the Hague Convention of 1980 continues to be effective between the Member States which are contracting parties thereto, according to art. 60, which means that its effects relate to matters not governed by the Regulation.

1. In this case, the actual situation of the child attracts the qualification “child’s wrongful removal or retention”, pursuant to art. 2 p. 11 of the Regulation. Therefore, the child’s removal or retention becomes wrongful where:

a) *“it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention”;*

b) *“provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility”.*

Therefore, **in this case**, based on the documents submitted, the court finds the following:

- *the habitual residence of the child(of 9 years old) is in Romania. The child lives with his father and attends the classes at a school from the country;*

- *lack of a judgment* showing a possible split of parental authority [either on the basis of Art. 42 of the Family Code, in force until the entry into force of the New Civil Code or under art. 506 of NCC reported to art. 31 paragraph (2) index 5 of Law no. 272/2004 on the protection and promotion of the rights of the child] and that the dwelling of the child was established at one of the parents, which leads to the provisions of art. 483 paragraph (1) in relation to art. 503 and art. 496 of NCC, according to which the parents jointly exercise parental authority and decide together about the child’s residence and any change of residence cannot be achieved except by consent of the parents or by judgment (art. 497 of NCC).

- *although the child’s removal in Italy was legal, being made on the agreement of the parents, as is apparent from the authentic documents submitted by the applicant, it became a wrongful retention* when, after the expiry of the child’s stay on holiday at the residence of his mother, so agreed by the parties, the defendant failed to fulfill the obligation, depriving the applicant of the rights he had as holder of parental responsibility.

2. In order to verify the jurisdiction in this case, given that the application concerns a child who has been **wrongfully retained by one of the parents**, in this case, the defendant mother, the court seised makes application of the art.10 of the Regulation, which provides that the courts of the Member State where the child is habitually resident immediately before the cross-border abduction retain jurisdiction over parental authority until the child has acquired a habitual residence in another Member State and certain additional conditions have been met.

Therefore, to ensure a real connection between the child and the Member State exercising jurisdiction, the Regulation establishes as primary criterion the child's habitual residence. In this case, the jurisdiction or lack of jurisdiction of the Romanian courts depend on the child's habitual residence, located in Romania (the date of referral to the court) or Italy (the date of trial).

HYPOTHESIS NO. 1. The child has not acquired habitual residence in Italy, which produces positive effects on the jurisdiction of the Romanian courts.

In this case, the right of custody is exercised jointly by both parents of the child, in accordance with the applicable Romanian New Civil Code in question, which means that none of the two can unilaterally decide on changing the child's residence in another state, imposing for this, either the express consent of the other parent (which does not exist in the case) or the approval of the court that has jurisdiction (which is missing in the case). In the conditions under which the defendant does not prove that the child has taken up residence in Italy, the Romanian court has jurisdiction to deal with the application for custody of the child wrongfully retained in Italy by the defendant.

Regarding the term „*habitual residence of the child*”, the Romanian judge shall have as example some judgments ruled in cases by the Court of Justice of the European Union¹, in which were offered guidelines for interpretation, stating that this expression used in art. 8 and art. 10 of the Regulation means the place which reflects some degree of integration by the child in a family and social environment and that the national court has jurisdiction to establish the habitual residence of the child, taking into account all the circumstances specific to each individual case.

HYPOTHESIS NO. 2. The child has acquired habitual residence in Italy and the holders of parental authority approved the abduction, which attracts the non jurisdiction of the Romanian courts.

HYPOTHESIS NO. 3. The child has acquired habitual residence and lived in Italy for at least one year after the moment when the applicant found out or should have found out the place where the child was and the child integrated in his new environment, being met at least one of the following conditions:

- a) the applicant did not submit to the competent Italian authorities an application for return of the child wrongfully retained in Italy, within one year after learning where the child was or should have known the place where the child was located;
- b) the applicant (to whom the child was entrusted) withdrew his application for return of the child submitted to the Italian authorities and did not file another application within the term of a year previously provided;
- c) there is a judgment of non-return of the child ruled by a court in Italy which has been transmitted to the competent Romanian court, but no party has requested the Romanian court to examine the case within the term established by art.11 paragraph (7) of the Regulation;
- d) there is a judgment on custody that does not involve the return of the child, ruled by the Romanian court, as a forum where the child was habitually resident immediately before his wrongful retention.

¹ See Case C-497/10 PPU Mercredi, Rep.2010, pI-14309; Case C-523/2007, A, Rep. 2009, p. I-02805. If the dispute concerns a child of young age who lives for a few days in a Member State where he was moved from the State of habitual residence, the national court is the one that determines the child's habitual residence, taking into account all the circumstances such as: age of the child; geographical origins and family of the mother; duration; regularity, conditions and reasons for the stay on the territory of a Member State and for the family's move to that State; the child's nationality; place and conditions of schooling; linguistic knowledge; the family and social relationships of the child in that State. If the application of these criteria would lead to the conclusion that the child's habitual residence cannot be established, the court seized will apply art. 13 of the Regulation, which means that the jurisdiction is determined on the basis of the criteria of the child's presence in a Member State.

In these circumstances, the Italian courts have jurisdiction, *the Romanian courts declaring that do not have jurisdiction.*

CASE NO. 5. Parental authority. Fraud against the law in private international law by changing the point of connection.

The applicant, having Romanian nationality, has vested a court of Romania with an application through which she has requested in contradiction with the defendant, national of France residing in France, the exclusive exercise of parental authority on the child born out of wedlock, recognized by the father, the setting of the child's dwelling at the mother and the obligation of the defendant to pay alimony.

The defendant filed a counterclaim and a statement of defense, claiming that although according to art. 2611 of NCC and art. 5 paragraph (1) of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the protection of children concluded at The Hague on 19 October 1996, the judicial authorities of the State of the habitual residence of the child have jurisdiction to take measures for protecting the person or his property, which would attract the jurisdiction of the Romanian courts, in this case, this attribution being made fraudulently, because taking into account the applicant's departure to France and the child's birth in Romania, the point of connection was changed fraudulently, only to be attracted the jurisdiction of the Romanian court.

What will be the solution of the Romanian court?

1. With respect to the legal grounds of the jurisdiction of the Romanian court

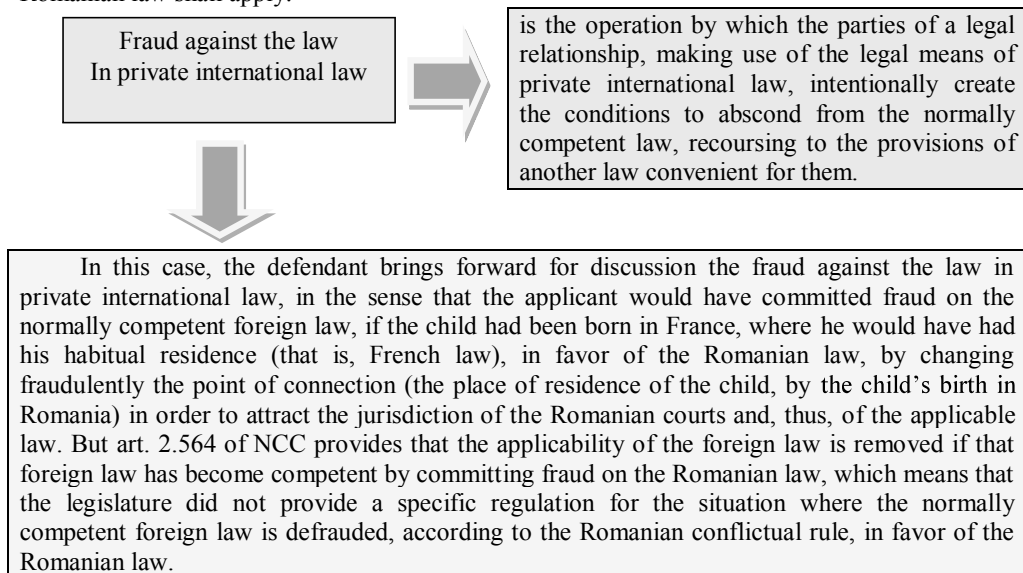
In the present case are not incident the dispositions of the art. 5 of the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the protection of children completed at the Hague on 19 October 1996*, since according to art. 61 of the *Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (hereinafter called „*Regulation*“), where the child concerned has his or her habitual residence on the territory of a Member State (as in this case), this regulation shall apply in relation to *Hague Convention of 1996*. In these circumstances, the jurisdiction of the Romanian courts is investigated under the provisions of the *Regulation* and not of the *Hague Convention of 1996*, which means, that, according to art.8 of this *Regulation*, the courts of a Member State have jurisdiction in matters of parental responsibility when the child is habitually resident in that Member State at the time the court is seised. For the ancillary application regarding the alimony, is incident the art. 3 letter d. of *Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, which provides the following: “*In matters relating to maintenance obligations in Member States, jurisdiction shall lie with: ... d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.*”

In other words, in this case, the court which has jurisdiction pursuant to the law of the forum in matters of parental authority, acquires jurisdiction also for settling the application on granting alimony.

2. With regard to the application of fraud against the law in private international law

Along with public order, the fraud against the law is a legal way by which the court removes the foreign law that would be applicable to the litigation as a result of falling under the conflictual Romanian rule. The provisions of art. 2564 paragraph (1) of NCC provide that the application of the foreign law is removed if that law has become competent by committing fraud

to the Romanian law, and in the case of removing the applicability of the foreign law, the Romanian law shall apply.



Verifying **the conditions of the fraud against the law** in private international law, based on the objective circumstances mentioned above, it appears that they are not fulfilled if:

- the change of point of connection was not fraudulent, the applicant proving with medical documents that the birth in Romania was recommended by the specialists doctors from France (given the fact the parties were no longer living together, the applicant would have been deprived of the moral and emotional support necessary in such a situation, support that she could find only in Romania, in her family of origin) and with official documents according to which her stay visa in France was on the verge of expiry, given the fact that she had also lost her job;
- the applicant's intention was not to circumvent the French law, from proving the objective circumstances presented above, the court cannot retain such an attitude;
- the result obtained by giving birth to the child in Romania should have been illegal, which is not the case, since both systems of law (the Romanian and the French one) establish the same rules, with minor nuances, on matters of parental responsibility.

In these circumstances, in this case, the court finds that it cannot retain the fraud against the law in private international law, the courts of Romania having international jurisdiction.

In addition, the court may retain an aspect, namely: its jurisdiction is also based on the presence of the child (art. 13 of the Regulation), when the child's habitual residence cannot be established (which is not the case here) and the jurisdiction cannot be deduced by applying the art. 12, which cannot be applied because the jurisdiction of the Romanian court was not accepted by the defendant. The grounds of competence established by the Regulation on parental responsibility are designed according to the child's best interests and, in particular, to the criterion of proximity. Therefore, firstly, the courts of the Member States where the child is habitually resident have jurisdiction, except some cases of change in the child's residence or pursuant to an agreement between the holders of parental responsibility. In this case, the court must rule on the following issues:

1. In the absence of an express provision, can be accepted the fraud of the foreign law? The New Civil Code sanctions expressly the fraud on the Romanian law in favor of the foreign law, taking the provisional tradition of art. 8 paragraph (1) letter b and art. 2 din of *Law no. 105/1992 on the regulation of private international law* (repealed).
2. Can the fraud against the law be accepted on matters of jurisdictional competence? Does the fraud against the law require the voluntary use of a rule of conflict of jurisdiction, because the court with jurisdiction according to the Regulation applies its national law? By changing the connection point is reached **the determination of a certain jurisdictional competence** and the possibility to benefit from the law under which rules a particular court. However, in this case, by changing the connection point, the birth in Romania, determine the international jurisdiction of the Romanian courts, which attracts the application of the national law of the State where the court belongs, according to art. 15 paragraph (1) of the 1996 Hague Convention.

CASE NO. 6. Application of matrimonial property regime liquidation. Choice of court convention. Exception of lack of jurisdiction of the Romanian courts

Previous to marriage in Romania, the parties have made an agreement of separation of matrimonial property, designating the German law as the law applicable to matrimonial property regime, and a choice of the German forum convention. During the marriage, the spouses have acquired immovable property in Romania, on which his wife, national of Romania and residing in Germany, has vested a Romanian court with an application of matrimonial property regime liquidation and partition by court, the defendant being national of Germany and residing in Germany. By filing a statement of defense, the defendant invoked the exception of lack of jurisdiction of the Romanian courts.

What will be the solution of the Romanian court?

1. Solution according to the provisions of the New Code of Civil Procedure

In the absence of an European instrument on the matters of matrimonial property regimes, the jurisdiction is established by the rules of jurisdiction of the internal law. Thus, according to art. 1079 point 1 of the NCPC, the Romanian courts have exclusive jurisdiction to hear disputes with elements of foreign origin on properties located in Romania.

With regard to the defendant's defense according to which, previously, the spouses have concluded a convention on choice of the forum (a German court), this is removed for the following reasons: it is real that the parties may, on matter of heritage, to agree on the competent court to judge the current litigation or eventually, coming from a report with foreign origin[art. 1067 paragraph (1) NCPC], as it was proven, in this case, by submitting the authentic document which shows that the spouses have chosen the jurisdiction of a German court, but this convention is not effective when the jurisdiction of the Romanian courts is exclusive (art. 1081 of NCPC). In these circumstances, as the immovable properties to which makes reference the application for summons are located in Romania, which attracts the exclusive jurisdiction of the Romanian courts, on the one hand, and, on the other hand, the choice of court convention is inoperative, it follows that the exception of lack of jurisdiction invoked by the defendant to be rejected, the Romanian court having exclusive jurisdiction to judge the present litigation.

2. Solution under the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes În ipoteza în care va fi adoptată, Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes, the solution of the Romanian court will be the following: since the choice of forum convention is permitted by the Regulation (art.4) the court shall verify if the law chosen by the parties as the law applicable to matrimonial property regime belongs to the state whose courts represent the designated forum. In this case, it appears that the parties have chosen both the German law and the German forum, which attracts the international lack of jurisdiction of the Romanian courts.

CHAPTER II. PRACTICAL CASES WITH RULES THAT DETERMINE THE SETTLEMENT OF THE CONFLICT OF LAWS

1. CASES FOR NOTARIES

CASE NO. 1. Child born in/out of wedlock residing in a Member State or in Romania. Parents with different nationalities and residences. Authentic Convention on parental authority, dwelling of the child, visiting program

The parents of a minor child go to a notary public with a request of legalizing their agreement on the exercise of parental authority only by one of them, on establishing the dwelling of the minor and a visiting program for the parent to whom the child does not live.

What is the law applicable in this situation and how will the notary public proceed?

HYPOTHESIS I. The minor is a child born in wedlock, residing in Romania, the father being national of a Member State of the European Union, having residence in that State or in another Member State, and the mother is national of Romania.

In order to designate the law applicable to this legal relationship with an element of foreign origin, the notary public appeals to the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, adopted at The Hague on 19 October 1996*, according to which, as a general rule, shall apply the national law of authorities having jurisdiction on the matter, according to the *Regulation (EC) no. 2201/2003*, that is the **law of the state of residence of the child**.

In this case, although the minor has parents with different nationalities, residing in different states (for example, the father is a national of Germany and residing in Spain), what is important for identifying the applicable law is the **residence of the child**. Therefore, if the child is residing in Romania, the notary public applies the Romanian law on parental authority, respectively the provisions of the New Civil Code and of the *Law no. 272/2004 on the protection and promotion of the rights of the child*¹.

Based on the provisions of art. 486 and 496 paragraph (3) of NCC, according to which the guardianship court decides whenever there are disagreements between parents relating to the exercise of parental rights or the fulfilling of parental duties or to the determination of the child's dwelling, means that the notary public can authenticate the **convention of the parties** relating to their minor child, respecting the mandatory provisions of the Romanian law.

Thus, according to art. 503² in relation to art. 397³ of the NCC, the rule on the matter is the joint exercise of parental authority by the parents over their minor child. Also, according to art. 31p paragraph (2) index 4 of the *Law no. 272/2004 on the protection and promotion of the rights of the child*, a parent cannot waive the parental authority, but he or she can reach an agreement

¹ The law was republished in the Official Gazette, Part I, no. 159 of March 5, 2014, republished under art. V of Law no. 257/2013 amending and supplementing Law no. 272/2004 on the protection and promotion of the rights of the child, published in the Official Gazette of Romania, Part I, no. 607 of 30 September 2013, the texts being renumbered.

² Art. 503 NCC provides: The exercise of parental authority: (1) Parents shall jointly and equally exercise parental authority. (2) Compared to third parties in good faith, any of the parents that meet alone the current act in order to exercise the rights and fulfill the parental duties is presumed to have the consent of the other parent.

³ Art. 397 NCC: The exercise of parental authority by both parents: After the divorce, the parental responsibility belongs to both parents, unless the court decides otherwise.

with the other parent regarding the way of exercising the parental authority, under art. 506 of NCC.

In other words, the notary public cannot authenticate the agreement of the parents regarding the exclusive exercise of parental authority by only one of them, as it is the attribute of the guardianship court which may order for this purpose, only for good reasons (art.31, paragraph 2, index 5 of the Law no.272/2004 lists the following circumstances as serious reasons: alcoholism, mental illness, drug addiction, violence against the other parent or against the child or convictions for crimes of human trafficking, drug trafficking, crimes about sexual life, crimes of violence) and taking into account the best interests of the child (art. 398 NCC). Accordingly, the notary public, applying the Romanian law, notes the agreement of the parents only if it means the joint exercise of parental authority.



- Regarding the *dwelling of the minor*, prevails the agreement of the parents who decide with whom **should the child live**. Therefore, by the authentic convention, the parents can decide that the minor live with one of them, and only in case of misunderstanding, the guardianship court decides (art. 16 index 2 of the *Law no. 272/2004* and art. 496 paragraph 3 of NCC). In our example, the dwelling of the house may be agreed by the parents either at the mother, in Romania, or at the father, in Spain.
- Regarding the *personal connections between the child and the parent* with whom the child does not live, are incident art. 262 paragraph (2) of NCC, art. 14 and art. 17 of the *Law no. 272/ 2004*, which means that only in the case of disagreements between the parents the guardianship court shall decide, therefore the notary public being able to conclude a convention of the parents for this purpose.



HYPOTHESIS II. The child's parents are not married.

If the child's born out of wedlock parents, of different nationalities or of common nationality, do not live together, each living in different Member States or in the same Member State, the way of exercising the parental authority is established only by the guardianship court, according to art. 505 paragraph (2) of NCC, being applicable by resemblance the provisions regarding the divorce, respectively, the court decides that the exercise of parental authority to belong only to one of the parents, by respecting the best interests of the child, according to art. 398 of NCC. The other parent preserves the right to watch over how the child is raised and educated as well as the right to approve an eventual adoption of the child. In our case, we consider that the notary public can draw up and authenticate the agreement of the parents about the joint exercise of the parental authority, the determination of the dwelling of the child to one of the parents, as well as the visiting program.

HYPOTHESIS III. The child is a national of Romania, is not habitually resident in Romania, but lives with his mother in the territory of a Member State, where they have established their residence. The father has the nationality of a Member State and lives in Romania.

After having established that the notary public has jurisdiction, based on art. 12 paragraph (3) of the *Regulation (EC) no. 2201/2003*, to authenticate the agreement of the parties on parental responsibility, in other proceedings than those for divorce, legal separation, nullity of marriage, when certain conditions imposed by the European instrument are met, it appears that the law applicable in this case is the Romanian law. That is, according to the provisions of the new Romanian Civil Code, the notary public will confirm through an authentic document the agreement of the parents who reside in different States of the European Union and which concerns the following aspects:

- the joint exercise of parental authority over the child residing in a Member State;
- establishing the dwelling of the child to one of the parents¹;
- establishing a visiting program for the parent with whom the child does not live.

CASE No. 2. Parents with different nationalities. Child born out of wedlock residing in Romania or in a Member State of the European Union. Notarial convention on maintenance obligation between parent and child.

The father of a child born out of wedlock has the nationality of a Member State and lives abroad, and the mother has Romanian nationality and resides in Romania. These go to the notary public from Romania to conclude a convention related to the following issues:

1. The choice of the debtor's law as the law applicable to the maintenance obligation between parents and child..

How will the notary public proceed?

1. Since this is a maintenance report with an element of foreign origin, in this case are incident the provisions of the *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations*, stating that the term "authentic instrument" has the meaning specified in art. 2 point 3 of the *Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, namely:

- "authentic instrument" {
- a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which relates to the signature and the content of the instrument, and has been established by a public authority or other authority empowered for that purpose;
 - an arrangement relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them.

In these circumstances, the notary public cannot conclude a convention by which the parents designate as law applicable to the maintenance obligation the law of the debtor, because this convention, according to art. 8 paragraph (3) of the *Hague Protocol of 2007*, is not permitted if the creditor is minor. Thus, the notary public is obliged to give legal efficiency to the rule provided by art.3 of the Protocol, according to which is applied the law of the Member State where the **creditor is habitually resident**, which means:



a. the Romanian law, if the minor is habitually resident in Romania;

b. the law of another Member State if the minor is resident in that State.

2. What will be the amount and manner of the maintenance obligation enforcement? How will the notary public proceed?

¹The attribution, exercise, delegation, total or partial termination of parental responsibility shall include the following: custody and visiting rights; guardianship, curatorship and similar institutions; designation and functions of any person or body having the responsibility of taking care of the child's person or property, to represent him or to assist him; placing the child in a foster family or in an institutional care; the child protection measures concerning the administration, conservation or disposal of the child's property.

2. The amount and manner of the maintenance obligation enforcement are issues over which the child's parents reach an agreement, the notary public having the right to verify if this agreement is according to the applicable law and respects the best interests of the child. For example, if the maintenance obligation is governed by the Romanian law, the provisions of art. 529¹, art. 530² and 533³ of NCC are applicable, the parties being able to establish the direct enforcement or by payment of an alimony determined in money, in fixed amount or as a percentage share, paid in regular installments, at a certain moment.

3. *Is it possible to waive the payment of the alimony? How will the notary public proceed?*

3. Art. 515 of NCC expressly provides that no one may waive in the future his right to maintenance. Other is the situation provided by art. 533 paragraph (3) of NCC, according to which the notary can authenticate the agreement of the parties that the maintenance to be enforced by early payment of a lump sum that would cover the maintenance needs of the creditor over a longer period of time or throughout the entire period in which the maintenance is due, to the extent that the maintenance debtor has the necessary means to cover this obligation.

CASE NO. 3. Authentic unilateral act for designating the guardian. The choice of foreign law applicable to guardianship. The foreign law applicable to guardianship.

In a notary's office appears a national of a Member State (for example Italy) residing in Italy to authenticate an unilateral act by which designates his brother as guardian of the child.

It is possible that by this act the parent also chooses a particular law (Italian law) to govern the guardianship of the minor?

Both *Regulation (EC) no. 2201/2003*, art. 1 paragraph (2) letter b., and the *1996 Hague Convention*, art. 3 c, list the **guardianship** among the measures of protection of the person and property of the child, which fall under these legal instruments. Given that the notary public has the power to authenticate such a **unilateral act**, the question is whether the parent may choose the law applicable to guardianship. The problem is solved by interpretation of Articles 15 to 22 of the *Hague Convention*, which establishes **the rule of enforcement of national law authority**, so in the example, the Romanian law. However, according to art. 114 of NCC, the parent may designate, by unilateral act or through a contract of mandate, authenticated, the person to be appointed as guardian of his children.

Moreover, art. 15 paragraph (3) of the *1996 Hague Convention* provides that if the child's habitual residence changes to another Contracting State (for example, the child moves with his parents in Germany), the law of that State applies, from the moment the situation is changed, to the conditions of application of the measures taken in the State of the former habitual residence. In these circumstances, what is very important is the moment when the unilateral act produces its legal effects, namely, at the death of the parents or of the single parent of the child.

¹ Art. 529 of NCC: The amount of maintenance: (1) Maintenance is due according to the needs of the one who asks it and the means of which has to pay. (2) When maintenance is owed by a parent, it is set to a quarter of his monthly net income for one child, a third for two children and a half for three or more children. (3) The amount of maintenance due to children, along with maintenance due to other persons, by law, cannot exceed half of the monthly net income of the one who is obliged.

² Art. 530 of NCC: (1) maintenance obligation is enforced in kind, by providing the basic needs and, where appropriate, the costs for education, teaching and training. (2) If the maintenance obligation is not enforced freely in kind, guardianship court decides its enforcement by paying alimony, established in money. (3) The alimony may be set as a fixed amount or a percentage of the net monthly income of the person who owes maintenance.

³ Art. 533 of NCC: Payment of alimony: (1) the alimony is paid in regular installments, within the deadlines agreed by the parties or, failing their agreement, to those established by court order. (2) Even if the maintenance creditor has died during a period corresponding to an installment period, the maintenance is due entirely for that period of time.

Theoretically, we believe that the notary public is bound by the law of the child's residence, which being the Romanian law it cannot be replaced by another law, based on the autonomy of will (i.e., in this case, the parent cannot choose the Italian law, as the law applicable to the guardianship). Therefore, if between the date of the authentication of the unilateral act and the date of the parent's death occurred changes regarding the child's habitual residence, the law of the State where the child is located shall govern the guardianship, according to art.15 paragraph (3) of the Convention. Or, this law may also be the law of a non Contracting State, according to art. 21 of the Convention, which may refer to the law of another non Contracting State, which applies its own law.

CASE NO.4. Convention on choice of law applicable to the matrimonial property regime. Matrimonial convention. Future spouses have different nationalities and residences in different Member States.

Prior to marriage which is to be concluded in Romania, the future spouses, one of which has Romanian nationality, the other being national of a Member State (for example, is national of Germany), with habitual residence in Romania or abroad, in a Member State of the European Union, go to the notary public from Romania to conclude a convention on choice of law applicable to the matrimonial property regime and a matrimonial convention by which they choose a certain matrimonial property regime.

The notary public must settle the following problems imposed by the case?

1. Is the convention on choice of law applicable to the matrimonial property regime submitted to certain formal requirements as a condition of validity?

The formal requirements of the convention on choice of law applicable to the matrimonial property regime are submitted to the provisions of the art. 2591 paragraph (2) and art. 2594 of NCC, which means that must be fulfilled the conditions imposed either by the law applicable to the matrimonial regime (for example, the German law), or by the law of the place where it is concluded (the Romanian law), according to the rule *locus regit actum*. In this case, the notary public applies the Romanian law, respectively, the provisions of the art. 330 of NCC, according to which must be fulfilled the formal requirements established as a condition of validity for the matrimonial convention (authentic document, personal presence of the future spouses or, in case of conventional representation, attorney-in fact with special and authentic power of attorney, with predetermined content).

2. What are the substantive conditions of the Convention on choice of the law applicable to the matrimonial property regime?

The law chosen by the parties as applicable to the matrimonial property regime governs the validity conditions (substantive conditions) of the Convention, except the capacity of the parties which, according to art. 2593 paragraph (1) of NCC is subject, as the person's marital status, to the national law, unless by special provisions is otherwise specified (art. 2572, paragraph 1 of NCC).

For example, the minor's failure to conclude a matrimonial convention remains an element of protection of him, attracting the application of the personal law. For the minor national of Romania, according to art. 377 of NCC, the notary public verifies if all the conditions are met, related to:

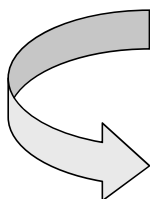
CONDITIONS

1. matrimonial age (16 years);
2. obtaining the guardianship court authorization;
3. consent of the legal guardian.

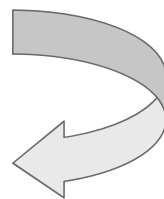
3. The notary records the law applicable to the matrimonial property regime as it is designated by the parties or proceeds to verify the "admissibility" of this law, through the conflictual rules? In other words, may the future spouses choose any law they want or the notary public applies the art. 2590 of NCC?

Based on the provisions of art. 9 of the *Law no. 36/1995 on public notaries and notary activities* according to which the notary public has the obligation to verify the documents processed by him "so that it did not contain clauses contrary to law and morality, to ask and give explanations to the parties over the content of these documents, to make sure that they understand the meaning and that they have accepted the effects", lead to the conclusion that, when drawing up a convention on choice of the law applicable to the matrimonial property regime, the notary public has to verify if the law chosen by the future spouses is one of those listed in art. 2590 of NCC. Next, we present **two examples**:

a. the future spouses have Romanian nationality residing abroad in a Member State of the European Union (Italy) and wish that, by the Convention concluded at the notary public of Romania, to choose the law of another state (Belgium) as the law applicable to the matrimonial property regime. Verifying the habitual residence of the future spouses and their nationality and noting that there is no point of connection with the Belgian law, the notary public shall mention in the content of the convention the declaration of the future spouses, according to which, after marriage they will establish their habitual residence in Belgium. Such a declaration, expressly mentioned in the convention, attract the legality of choosing the law of the Belgian state, according to art. 2590 paragraph (1) letter c¹ of NCC. **What are the effects of such a choice?**

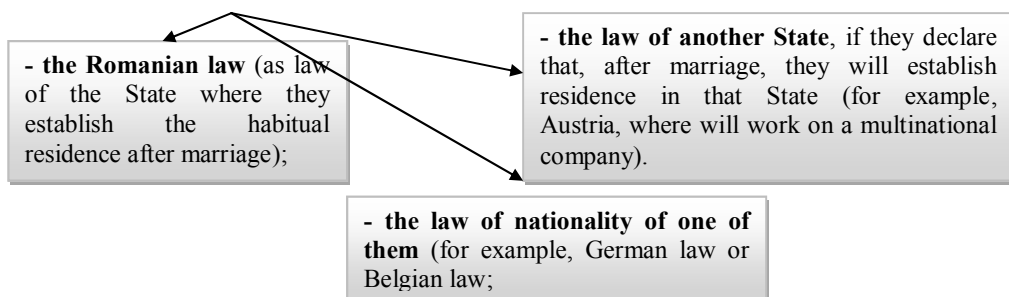


If later, after the celebration of the marriage, the spouses have not established the first habitual residence in Belgium, they cannot rely on the content of the agreement concluded at the notary public in Romania, following that the law applicable to matrimonial property regime to be determined by an objective location thereof.



b. the future spouses have foreign nationalities, one of them or both having domicile or residence in Romania (their marriage is concluded in Romania under art. 24 of *Law no. 119/1996 on the acts of civil status*). In order to designate the law applicable to the matrimonial property regime, they can **choose** between:

¹ The spouses may choose the law of the State where they establish their first common habitual residence after marriage.



4. Is it possible that in the content of the convention the notary public to give efficiency to the provisions of the Convention on the law applicable to matrimonial property regimes concluded at Hague on March 14, 1978?

Convention on the law applicable to matrimonial property regimes concluded at Hague on March 14, 1978 is universal, applying even if the nationality or habitual residence of the spouses or the law applicable under subsequent articles are not of a Contracting State (France, Luxembourg, the Netherlands). Or, in the case where, for example, both future spouses are French nationals or Dutch (which attracts their national law) and marry in Romania and will reside after marriage in Romania or France, they can choose the law applicable to the matrimonial property regime under the Convention. But if it is applied art. 3 paragraphs 3-4 of the Convention, the notary public may note the fact that the future spouses designate:



- the French law as law applicable to the matrimonial property regime (choosing the regime of the separation of goods),
- *lex rei sitae*, for the immovable properties of Romania (which takes effect in terms of matrimonial regime because according to the Romanian law, these immovable properties will be subject to the legal regime of community of property).

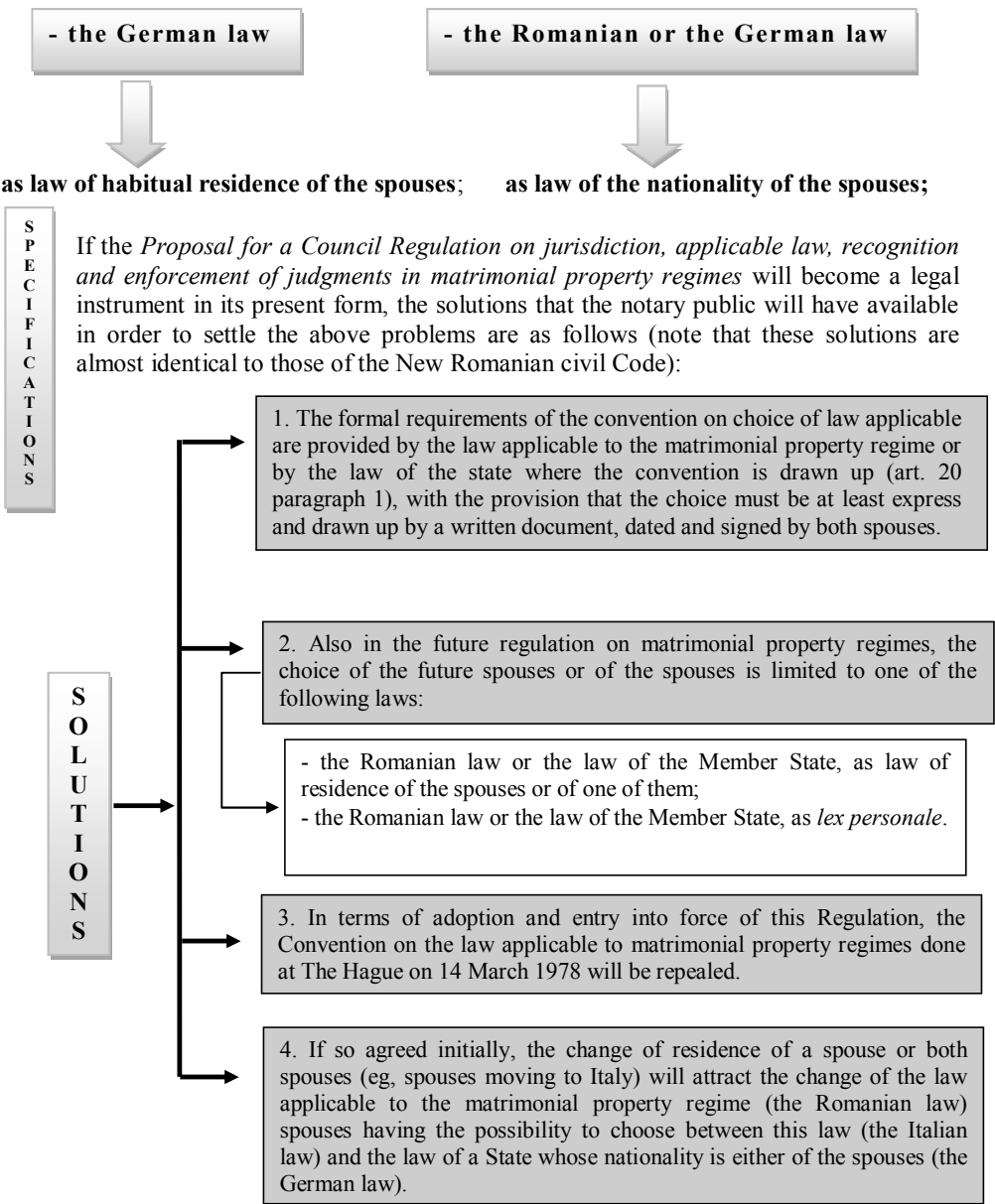
5. Is subject to change the law chosen by the future spouses by the convention concluded at the notary public in Romania due to the change of nationality or residence of the spouses?

By the authentic document, future spouses have chosen a law to govern their matrimonial property regime (i.e the Romanian law). This law remains applicable regardless of the changes occurred in nationality or habitual residence of the spouses (art. 2595 NCC). In other words, the Romanian legislator has not laid down the rule of automatic mutability of the law applicable to the matrimonial property regime whenever there are changes of the connection points, in particular, changes concerning the habitual residence of the spouses or their nationality. In conclusion, the law originally designated as the law applicable to the matrimonial property regime does not change automatically as a result of the changes occurred in nationality or habitual residence of the spouses. It can be changed only by another convention of the spouses of choosing another law.

6. Assuming that the spouses, nationals of Romania and residing abroad (for example, Germany), married in Romania and subject, in the absence of a matrimonial convention, to the legal regime of community, go to the notary public of Romania in order to change the matrimonial property regime and to conclude a convention on choice of the law applicable to the new matrimonial property regime.

How will the notary public proceed?

According to art. 369 of NCC, only after **one year** from the marriage, the spouses may replace the existing matrimonial property regime to another or to modify it. For this, the notary public proceeds based on the art. 355 paragraph (1) of NCC to the liquidation of the community of goods regime by notary authentic document, then concludes *a matrimonial convention of separation of goods*. By a separate document or within the matrimonial convention, the notary public records the agreement of will of the spouses concerning the designation of the new law to govern the matrimonial property regime chosen. Under these conditions, the **new law** can only be one of those provided by art. 2590 NCC, namely:



2. CASES FOR JUDGES

CASE NO. 1. Application for divorce based on the husband's exclusive fault. Compensatory allowance. Convention on choice of law applicable to divorce. Objective localization of the applicable law.

A court of Romania is vested with an application of divorce by which the applicant, returning home from a Member State, requests the dissolution of marriage based on the husband's exclusive fault, that the common surname to be kept, that the defendant to be obliged to pay a compensatory allowance. In the reasoning of the application, the applicant states that the marriage was concluded 21 years ago in Romania, during faculty period, from the marriage resulted a child, currently major and student at a foreign university, that during marriage she took care of raising and educating the child, of the housekeeping and the household, that supported her husband in his career, that they lived in Romania, than in Netherlands for four years and finally, in France for eight years. Two years ago, the defendant initiated an affair, which led to the change of his behavior in the family, verbal and physical violence, and in the end, the applicant was banished from the family residence, having to return in the country.

Legally summoned in France, the state of residence, the defendant files not only a statement of defense by which accepts the international jurisdiction of the Romanian courts, but also a counterclaim, by which he requests the dissolution of the marriage based on the exclusive fault of the applicant and that she should take again the surname she had before marriage.

What is the law applicable in this case?

After being solved the problem concerning the jurisdiction of the Romanian courts, the **law applicable to the divorce** shall be determined. Therefore, the judge applies the *Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in an area of the law applicable to divorce and legal separation* (hereinafter referred to as *Regulation Rome III*¹), because Romania and France are the Member States participating to this legal instrument.

Firstly, it is verified, if, at the moment of seising the court, there is or there is not between the parties a convention on choice of the law applicable to divorce, the following hypotheses being possible:

1. There is no such convention, situation in which, if the law of the forum allows it, the spouses can designate the law applicable to divorce also after seising the court (art. 5 paragraph 3 of the Regulation Rome III). Since *lex fori* is the Romanian law, in this case are incident the provisions of the art. 2598 paragraph (2) of NCC, according to which the parties may enter into such an agreement by no later than the first hearing at which the parties were duly summoned.

Therefore, the court invites the parties that, until the first hearing, to conclude an agreement of designating the law applicable to divorce that would meet the requirements provided by art. 2599 of NCC (in written form, signed and dated by the spouses).

a. Spouses have the opportunity to choose one of the laws specified in Art. 5 paragraph (1) of Regulation Rome III, which, based on the case data, can be:



- **the French law**, as law of the State where the spouses had their last common habitual residence, the defendant still residing there;
- **the Romanian law**, as *lex personale* for both parties².

¹ Published in OJ L 343 of 29 December 2010.

² If the spouses choose another law applicable to divorce, it is removed by the court if does not meet the hypotheses listed in art. 5 paragraph (1) of Regulation Rome III.

Once chosen the law, it becomes mandatory for the court (except for the situations provided by Art. 10 and Art. 12 of the Regulation Rome III), the divorce proceedings to be settled by the Romanian judge based on:



- **the Romanian law** (New Romanian Civil Code)
- **the French law** (French Civil Code). In case of the latter version, in order to know the content of the foreign law, the Romanian judge shall inform by the European Judicial Network in civil and commercial matters or by the London Convention of 1968.

b. If the parties fail to conclude an agreement designating the law applicable to divorce, the **court shall make an objective localization of the law**, by resorting to art. 8 of the Regulation Rome III, which contains successive rules:

- a. the French law**, as the law of the last common habitual residence of the spouses, with the cumulative fulfillment of two conditions, namely:
- the defendant to still reside in France;
 - the seising of the court with divorce proceedings to be made by the applicant before reaching a year from the date of her departure from the common habitual residence located in France.

otherwise,

- b. the Romanian law**, as law of common nationality of the spouses.

2. There is a convention for the designation of the applicable law, concluded years ago by the spouses, these choosing one of the following laws:



- **the Dutch law**, since at the date of concluding the agreement, the spouses were habitually resident in the Netherlands (which means that it is applied the law of a Member State of the European Union non participating at the Regulation Rome III, hypothesis allowed by art. 4 of the Regulation);
- **the French law**, if at the date of concluding the agreement the spouses were habitually resident in France;
- **the Romanian law**, as law of common nationality of the spouses.

The law chosen by the parties or determined by the court by interpretation of the conflictual rules of the Regulation Rome III applies to the grounds for divorce, being excluded its application, according to art. 1 paragraph (2) of the Regulation, for settling the requests ancillary to divorce concerning:

- name of the spouses;
 - patrimonial effects of the marriage;
 - maintenance obligations
- } **are subject to the conflictual rules applicable to the Romanian legal system**

It is important the law applicable to divorce for its effects. For example, the compensatory allowance¹ has a different regime in Romania than in France.

¹ The provisions on compensatory allowance (conditions, forms, modification, termination) are included in the New Romanian Civil Code in Articles 390-395.

CASE NO. 2. Amicable divorce. Convention on choice of law applicable to divorce. Foreign law. Compensatory allowance

The spouses, nationals of Italy and residing in Romania, addresse to a court in Romania with a joint application by which they request the dissolution of the marriage concluded two years ago in France, the wife to keep the surname, to establish a compensatory allowance in favor of the wife in the amount of 500 Euro per month. The applicants attach the convention concluded on 22 June 2012 by which they have chosen the French law as the law applicable to divorce.

What is the law applicable to divorce?

The aspects which are verified by the Romanian court and which lead to the settlement of the case are as follows:

1. Date of conclusion of the convention on choice of law applicable to divorce

Since this date is subsequent to the date of 21 June 2012, are incident the provisions of the *Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in an area of the law applicable to divorce and legal separation* (hereinafter referred to as *Regulation Rome III*), according to art. 18 paragraph (1) of this European instrument.

2. The formal requirements of the convention on choice of law applicable to divorce

Therefore, the judge investigates if the French law, as law of the state where the spouses were habitually resident at the time of concluding the agreement, provides additional formal requirements in case of these agreements, than the requirements imposed by art. 7 paragraph (1) of the *Regulation Rome III*.

If the answer is negative:



for example, the foreign law requires the authentic document, and the spouses have concluded the agreement through a document under private signature), the Romanian court shall remove the parties' agreement and localize the law applicable to divorce, according to art. 8 of the *Regulation Rome III*, which means that the **Romanian law** shall be applied, as law of the State where the spouses have their habitual residence.

Going forward, as a result of the Romanian law enforcement, we find that the **compensatory allowance** does not have legal support in Romania, since, according to art. 390 of NCC it is granted only if:

a. the duration of marriage was at least 20 years;

+

b. the divorce is ruled based on the husband's exclusive fault.

In these circumstances, the Romanian court rejects the agreement of the spouses on compensatory allowance.

If the answer is positive:



The Romanian court is bound by the Convention of the spouses to choose the law applicable to divorce.

3. The law chosen by the parties to be applicable to divorce

Question: does the law chosen by the parties to be applicable to divorce comply with the rules laid down in art. 5 of the Regulation Rome III?

Answer: if the spouses were residing in France at the time the agreement is concluded, that this is effective, the law chosen by the parties being among the solutions provided by legislature.

4. The content of the French law

Romanian judge shall inform through the European Judicial Network in civil and commercial matters on the following aspects of French law:



- if the amicable divorce is permitted and if there are special circumstances in which it is obtained (for example, suppose that there is the provision in the foreign law according to which the amicable divorce is possible only if from the marriage conclusion had been 3 years, which means that, in this case, the amicable divorce is not permissible, since the marriage of the applicants lasted two years. We consider that under art. 10 of Regulation Roma III, the judge can apply the law of the forum which allows the amicable divorce irrespective of the marriage duration (art. 374 of NCC¹), while for the compensatory allowance shall be applied the law chosen by the spouses;
- If the institution of compensatory allowance is regulated and if there are circumstances of its existence related to the spouses' fault, marriage duration etc. (art. 270-281 of the French Civil Code).

5. Pronouncement of judgment

By pronouncing the judgment, the court shall apply one of the solutions mentioned above, depending on the data of the case.

CASE NO. 3. Application of divorce submitted by the applicant residing in Romania. The defendant and the minor of the marriage are residing in a Member State. The law applicable to applications ancillary to divorce.

The applicant, national of Romania and residing in Romania, has vested the Romanian court with an application for divorce requesting the joint exercise of parental authority on the minor resulted from the marriage, to set his dwelling to the home from Romania, to establish an alimony in favor of the child. Legally summoned in the state of residence (Spain, for example), the defendant, who has dual nationality (Romanian and Spanish), not only files a statement of defense by which accepts the international jurisdiction of the Romanian courts, but also a counterclaim, by which requests to be established the dwelling of the minor at her home from Spain, with a visiting program and to oblige the applicant to pay alimony in favor of the minor. What is the law applicable in this case and what solution issues the court?

Under the provisions of the *Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (hereinafter referred to as, Regulation) are settled the problems of jurisdiction not only for *divorce* (art. 3 paragraph 1 letter b.), the courts of the state of common nationality of the spouses have jurisdiction, but also for the application concerning *parental authority* (art. 8 and art. 12, in this case the court retains the prorogation of jurisdiction), the Romanian court retaining that in this case has jurisdiction.

We proceed to the second stage, in which must be identified, in turn, *the law applicable to divorce* (over which, we no longer insist because the hypotheses are those analyzed by us at case no.1 from the present chapter, the solution being related to the existence or non existence

¹ The divorce through the judicial consent of the spouses may be pronounced irrespective of the marriage duration and whether there are or not minor children from the marriage.

of the convention on choice of law applicable to divorce), *the law applicable to parental authority* and *the law applicable to maintenance obligation* between parents and minor children.

In relation to the law applicable to parental authority, this is indicated by the same Hague Convention, which, according to art. 15, indicates the national law of the authority having jurisdiction in the matter, which is the Romanian law or the provisions of the New Civil Code. To decide on the minor's home, the Romanian court has numerous rules of evidence, including:



- social investigations at the parties' dwelling (for the defendant, shall be ordered an international letter rogatory);
- hearing the minor (also by international letter rogatory);
- testimonial evidence (for the witnesses of Spain the court may order their hearing by letter rogatory);
- documents;
- interrogations of the parties.

Pronouncement on this head of claim is based on the appreciation of the rules of evidence through the child's best interests, taking into account the criteria listed on art. 2 paragraph 6 of the *Law no. 272/2004 on the protection and promotion of the rights of the child*¹.

Finally, the law applicable to the maintenance obligation is governed by the *Hague Protocol of 23 November 2007 on the law applicable to maintenance Obligations* and in which it is expressly stated that any agreement between the creditor and the debtor shall be stopped, when the first is under 18 years old. In these circumstances, the law of the State of habitual residence of the creditor shall be applied, which is the Spanish law.

CASE NO. 4. Modification of visiting program. Child residing in a Member State. Applicable law

Through the divorce judgment pronounced by a Romanian court, the marriage was dissolved, was decided the exclusive exercise of parental authority of the mother, establishing the minor's home at the mother's dwelling from Romania and obliging the father to pay alimony in favor of the minor. After the divorce, the ex-wife and the minor child go to France where they establish their residence. The former husband, who remained in Romania, addresses the Romanian court with an application to modify the visiting program for his daughter, because the conditions envisaged in the sentence of divorce changed, when the court also ruled on the ancillary application regarding the visiting program.

What law is applied in this case?

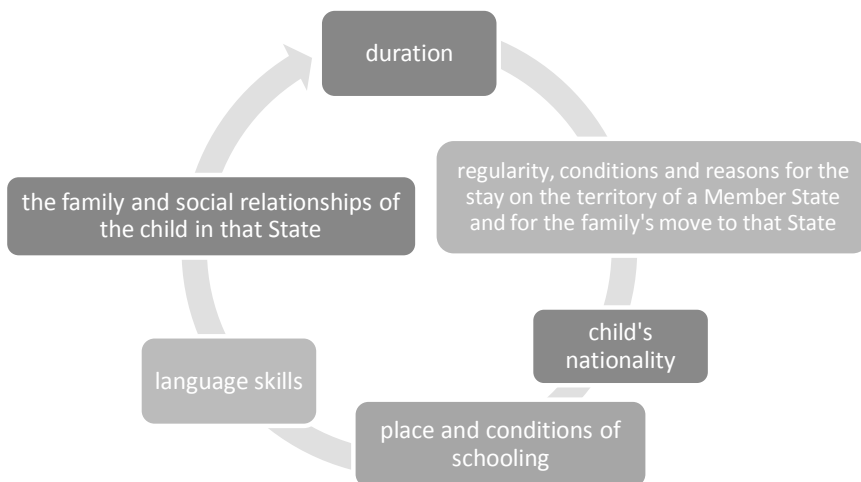
In the event that the Romanian court has jurisdiction based on art. 9 paragraph 1 of the *Regulation (EC) no. 2201/2003*, since in this case it concerns a legal move of the child in a Member State, in order to find the law applicable in this case, we resort to the provisions of the *Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures child protection, adopted at The Hague on 19 October 1996*. Therefore, according to art. 3 letter b of this Convention, the right of access which means including *"the right to take the child for a specified period, in a place other than his habitual*

¹ Article 2 paragraph (6) of Law no. 272/2004 on the protection and promotion of the rights of the child states:

In determining the best interests of the child are taken into account at least the following: a) the needs of physical and psychological development, of education and health, of security and stability and belonging to a family; b) the child's opinion, depending on the age and maturity; c) child's history, having regard, in particular, the situations of abuse, neglect, exploitation, or any other form of violence against the child and the potential situations of risk that may arise in the future; d) the capacity of the parents or of the persons that will handle the child's growth and care to meet his or her specific needs; e) maintaining personal relationships with persons to whom the child has grown relationships of attachment.

residence" falls within the scope of this European instrument and the court will determine where is the child's habitual residence.

Therefore, based on the documents submitted, the submissions of the parties, the social investigations, the court considers where is the place which reflects some integration of the child in a social and family environment, taking into account the following **criteria**:



Regarding the law applicable to the visiting program for the applicant father, art. 15 of the Convention provides the national law of the authorities, which means the Romanian law.

If the application for modifying the visiting program is submitted after the term of 3 months from the removal of the child to France, which also attracts the modification of the jurisdiction of the Romanian court, the applicable law will be the French one.

The Romanian court has to solve the problem of hearing the child, if she has reached the age of 10 years. She will be heard through international letters rogatory by the competent authorities of the State of residence, under *Council Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between courts in the taking of evidence in civil or commercial matters*.

CASE NO. 5. Law applicable to maintenance obligations. Major child completing his education. The creditor's residence in a Member State.

A court of Romania is vested with an application for establishing the alimony, the applicant being a child of 20 years old, national of Italy residing in Belgium, where is attending the courses of an university, and the defendant is his father, residing in Romania. In the reasoning of the application, the applicant states that he is a child of the marriage, both parents being nationals of Italy, and after his mother's death, his father remarried and lives with his family in Romania, where he makes a lot of money.

I. What is the law applicable to the maintenance obligation?

After the court has verified its jurisdiction based on art. 3 paragraph (1) letter a. of the *Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, finding that the court of the place of the defendant's habitual residence has jurisdiction, the law applicable to maintenance obligation shall be determined, according to The Hague Protocol of 23 November 2007.

Stages:

1. Verification of **the existence and validity of the convention on choice of the law applicable** to the maintenance obligation. Since this is a creditor who is over 18 years old, art. 8 paragraph (3) of the Hague Protocol allows concluding a convention, which may be one of the laws mentioned in art. 8 paragraph (1), namely:



- **the Italian law**, as *lex patriae* for the parties;
- **the Belgian law**, as the law of the State of the habitual residence of the applicant;
- **the Romanian law**, as the law of the State of the habitual residence of the defendant;
- **the Austrian law**, if the parties have jointly owned property situated in Austria (i.e the applicant's parents bought during the marriage a holiday house in the resort Salzburg)

For the validity of the convention, it is verified if it was made in writing, dated and signed by the parties, also accepting any medium whose content is accessible, so that it could be used for subsequent reference.

2. **If there is no convention prior to seising the court**, the parties may expressly designate that in this case, based on art. 7 paragraph (1) of the Hague Protocol, **the Romanian law** to be the law applicable to maintenance obligation, which attracts the application of the provisions from the New Civil Code.

3. **If there is no convention on choice of the law** applicable to maintenance obligation, the Romanian court will locate this law, which may be:



- **the Belgian law**, as law of the state of residence of the creditor (art. 3 of the Hague Protocol);
- **the Romanian law**, as the law of the forum if the creditor is unable to obtain maintenance from the debtor under Belgian law (art. 4 paragraph 2 of the Hague Protocol);
- **the Italian law**, as the law of common nationality of the parties (art. 4 paragraph 4 of the Hague Protocol)

4. **The scope of the law chosen or appointed** to govern matters relating to maintenance obligation is indicated by art. 11 of the Hague Protocol.

II. In the absence of a convention between the parties, the applicant requests the application of the Belgian law in this case, and the defendant requests the Romanian law. What will be the law that the Romanian court will apply?

The rule in matters relating to maintenance obligation is provided by art. 3 of the Protocol, which indicates the law of the State of habitual residence of the creditor as the law applicable to the maintenance obligation. Therefore, the Belgian law will indicate the following:



- where, to what extent and from whom the creditor may request maintenance (i.e, art. 203 and art. 336 of the Civil Code represent the legal grounds for the child's request, who is completing his education, the maintenance obligation existing between him and his parents);
- the extent to which the creditor may claim retroactively the maintenance;
- the basis for calculating the value of maintenance and its indexing;
- who has the right to file the action;
- periods of limitation or revocation.

Only to the extent that the effects of the Belgian law enforcement would be manifestly contrary to the public policy of the forum, then, based on art. 13 of the Hague Protocol, the court shall apply the Romanian law.

CASE NO. 6. Application for liquidation of matrimonial property regime. Convention on choice of law applicable to the matrimonial property regime. Matrimonial convention of property separation.

The court of Romania has been vested with an application for liquidation of matrimonial property regime and a partition by court for the immovable properties located in Romania (a land and a house, as well as an apartment), the applicant having Romanian nationality and residing in Germany, and the defendant is her husband, national of Germany and residing in Germany. Supporting the enforcement of the Romanian law which lays down the community property regime of the spouses and the equal contribution to the acquisition of the immovable properties, the applicant requests to share them in equal shares, on her part entering the apartment and obliging the defendant to pay an owelty in order to equalize the parts. The defendant has filed statement of defense and counterclaim, at the same time submitting two documents:

- *a convention on choice of law applicable to the matrimonial property regime (German law);*
- *a matrimonial convention of property separation.*

What will be the solution pronounced by the Romanian court?

I. Solution according to the dispositions of the New Civil Code

After checking jurisdiction, the court shall determine the applicable law to the matrimonial property regime and the matrimonial property regime. The solution of the court depends on the answer to the following questions:

1. What is the law applicable to the matrimonial property regime?

In this case, the parties entered into before marriage and during marriage in Romania (or Germany or in another country) a convention to choose the law applicable to matrimonial property regime. The Romanian court seized must verify:

- the validity of the convention in terms of substantive and formal requirements (art. 2591 of NCC¹). For example, for the convention concluded in Romania, the provisions of the art. 2591 in relation to art. 330 of NCC² require the form of the authentic document, under the absolute nullity sanction. In this situation, if the form *as a condition of validity* was not fulfilled, the convention on choice of law applicable to the matrimonial property regime, and the judge shall make an objective determination of the law applicable to matrimonial property regime, according to the provisions of the art. 2592 NCC³ in relation to art. 2589 NCC;
- if the designation of the law applicable to the matrimonial property regime was made within the limits imposed to the autonomy of will by the legislature. Therefore, in this case, it appears that the law chosen by the parties (either Romanian law or German law,

¹ Art. 2591 paragraph (2) of NCC provides: (2) the formal requirements of the Convention on choice of law applicable are those provided for either by the law chosen to govern the matrimonial regime or by the law of the place of conclusion of the Convention of choice. In all cases, the choice of applicable law must be express and established by a document signed and dated by spouses or to be demonstrated beyond reasonable doubt from the clauses of a matrimonial convention. When the Romanian law is applicable, must be fulfilled the formal requirements set by this for the validity of matrimonial convention.

² The conclusion of the matrimonial convention: (1) Under sanction of absolute nullity, the matrimonial convention is concluded by a document authenticated by a notary public, with the consent of all parties, expressed personally or by attorney-in fact with an authentic and special power of attorney and having predetermined content.

³ The objective determination of the law applicable to the matrimonial regime: If the spouses have not chosen the law applicable to their matrimonial property regime, this is subject to the law applicable to the general effects of the marriage.

the law of the State whose nationality has any spouse) is listed by the Romanian legislature among the options of the future spouses or spouses. In the event that the parties had chosen a law other than one of those imposed with limitation by the legislature, the Convention would not be efficient, and the court will remove it.

Schematically, we present the **three hypothetical variants**:

The Romanian law	The German law	Other law chosen by the parties
A. Considering the fact that prior to marriage the parties have chosen <i>the Romanian law</i> as law applicable to the matrimonial property regime, this means that the provisions of the New Civil Code are incident, which provide that, in the absence of a matrimonial convention, the spouses are subject to the <i>community property legal regime</i> .	B. If the parties have designated the <i>German law</i> as the law applicable to the matrimonial property regime, this means that are applicable the provisions of the German Civil Code, according to which <i>the legal regime is the one of participating in the procurement</i> , in the absence of a matrimonial convention in which the spouses to choose another matrimonial regime. In order to settle the litigation, the Romanian judge shall apply the provisions of the German law, thus being obliged to get informed about the content of the foreign law by resorting to the European Judicial Network in civil and commercial matters or the London Convention of 1968.	C. In the absence of the convention on choice or if this is not effective (due to absolute nullity, for example), the court shall proceed to determine objectively the law applicable to matrimonial property regime, the solutions being <i>ranked succesively</i> , according to art. 2589 of NCC: <ul style="list-style-type: none">➤ the German law, as law of the State where the parties are habitually resident;➤ failing that, the law of common nationality of the parties (which is not the case here);➤ - failing that, law of the state where the marriage was concluded (the Romanian law, the German law or the Austrian law, if the parties got married in Austria and for whom the regime of separation of property is a legal regime).

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An important **clarification** must be made regarding the **rights of the spouses on the dwelling**: if by the convention of the parties or by applying the conflictual rules provided by art. 2589 of NCC, the law which governs the matrimonial property regime is the foreign law, the rights of the spouses on the dwelling shall be subject to the Romanian law, because the immovable property is located in Romania and because these rights fall within *the structure of the primary imperative regime* (art. 2589 paragraph 3 of NCC).

2. What is the matrimonial property regime?

In this case, the matrimonial property regime chosen by convention is the regime of separation of property. But the situation of the spouses is different depending on the law applicable to the matrimonial property regime.

A. If to the separation of property regime is applied the **Romanian law** (either designated by the spouses, by convention, or objectively determined by the court under art. 2592 and art. 2589 of NCC), the judge applies the provisions of the art. 360 paragraph (2) of NCC, which means that, where appropriate:



a. the liquidation of the matrimonial regime of separation of property is made under the terms of the convention (if any), depending on the properties acquired by each spouse during marriage, based on which shall be calculated the receivable of participation agreed;

b. if in the convention was not stated explicitly, the receivable of participation is half the difference in value between the two masses of net acquisitions and will be payable by the spouse whose mass of net acquisitions is higher, it can be paid in cash or in kind.

B. If the **German law** applies to the separation of property regime, means that the acquisitions made by each spouse are not equalized. In other words, in the situation of the separation of property regime being subject to the German law, the earnings accumulated by the spouses will not be equalized (as opposed to the Romanian law). Only in the case of procurement community, as legal matrimonial property regime in Germany, coexist separate categories of properties and the earnings accumulated by spouses equalize.

C. If the **Austrian law** applies, the judge will get informed about the content of this law and will find that the regime of separation of property is legal. The liquidation of matrimonial property regime is submitted to trial under the provisions of the Austrian law.

3. What solution will pronounce the court on the merits of the case?

In this case, it is noted the fact that prior to marriage, the parties have chosen, as law applicable to the matrimonial property regime, *the German law* (the convention meets the conditions of validity, and the law chosen complies with the options provided by art. 2590 of NCC) and as matrimonial property regime the one of *separation of properties*, which means that the acquisitions made during marriage by each spouse will not be equalized.

In settling the case with element of foreign origin, the court shall give legal value to the *autonomy of will of the parties*, as this results from the conventions concluded by spouses, by complying with the requirements of the law.

Consequently, as the separation of properties means that each spouse retains exclusive ownership of his or her present properties and of those acquired during marriage, not having importance the onerous or gratuitous character of acquiring on the legal nature of that property, if we consider the case data we conclude the following: the land and the house are private goods of the defendant, being acquired exclusively by him, and the apartment being bought together by the spouses, is in severalty, as private property.

By applying art. 362 paragraph (1) of NCC, which provides that “*belong them (s.n. spouses) in joint ownership on shares, under terms of the law*” and the art. 361 of NCC, and in the absence of a clause in the contract of sale of the apartment on the share of each spouse, the court considers that the property in joint ownership belongs to the parties, each spouse having an equal share.

Therefore, the liquidation of the matrimonial property regime is done by assigning apartment in kind to the applicant, obliging the defendant to pay an owelty, representing half of the immovable property, and by finding, for the land and house, their quality of personal property of the defendant.

If the Romanian law had been applied to the separation of property regime, the applicant would have received a sum of money, as receivable of participation, representing half of the difference in value between the two masses of net acquisitions of the parties (*in the absence of express provision*), according to art. 360 paragraph (2) of NCC.

II. Solution under the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes

If the Romanian court has international jurisdiction (for example, the spouses have concluded an agreement on choice of the Romanian court), the reasoning to identify the applicable law in question is as follows:

As long as the spouses have chosen, prior to marriage, bases on the principle of the *autonomy of will* that the law applicable to the matrimonial property regime to be the *German law*, this will govern all the properties of the spouses (art. 15), either they are movable or immovable and irrespective of the place where they are located in the Member States. The Romanian court verifies if the agreement designating the applicable law complies with the substantive and formal requirements of the Regulation and if the chosen law is one of those indicated in art. 16, namely:



- law of the state where the spouses (future spouses) or one of them have/has their/his habitual residence when the agreement is concluded;
- law of the State of nationality of either one of the spouses when the agreement is concluded.

Applying these provisions to the data of the case, the court finds that the law chosen by the parties corresponds both as the law of the state where one of the future spouses resides and as the law of the State of nationality of either spouse at the time of the agreement. In these circumstances, the Romanian court will apply the German law regarding the matrimonial property regime chosen, the solution being the same as in section I above.

**THEME No. 2 - EXEQUATUR PROCEDURE IN FAMILY
LAW MATTERS**

PART I. THEORETICAL PART

CHAPTER I. THEORETICAL ASPECTS RELATED TO EXEQUATUR PROCEDURE IN FAMILY LAW MATTERS

1. DIVORCE AND EXERCISE OF PARENTAL AUTHORITY

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) no. 1347/2000¹ (hereinafter "the Rules") contains, along with uniform rules for resolving conflicts of jurisdiction between Member States, and a number of rules to ensure free movement within the EU of judgments, authentic instruments and agreements, establishing provisions on recognition and enforcement of these in another Member State.

1. What are the judgments that are subject to recognition and enforcement?

Considering art. 21 and art. 46 of the Regulation, are subject to recognition and enforcement the following:

- *judgments* (of divorce and those involving the exercise of parental authority) pronounced in a Member State in judicial proceedings instituted after the implementation of Regulation.
- *authentic instruments* (concerning the divorce and the exercise of parental authority) concluded after the implementation of the Regulation and enforceable in a Member State;
- *agreements between parties* privind concerning the exercise of parental authority, agreements concluded after the implementation of the Regulation and enforceable in the Member State of origin.²

2. What is the procedure for recognition and enforcement of a judgment?

According to art. 21 paragraph (1) of the Regulation, judgments on matters of divorce and exercise of parental authority given in a Member State **are recognized in other Member States without the need to resort to any procedure**. Therefore, it is about the *rightful* recognition of these judgments and about their direct enforcement, *without the need for an exequatur procedure*.

Therefore, the judgment pronounced in a Member State shall be effective throughout the European Union, without the need for any procedure for updating the civil registry documents of the spouses based on a judgment pronounced in other Member State in matters of divorce, legal separation or annulment of the marriage, which cannot be subject to any other means of appeal, in accordance with the law of that Member State. This judgment is effective, under the same conditions also concerning the *surname of the spouses after divorce* (preservation or restoration of the surname had before marriage, if appropriate).

¹ Published in OJ L 338, 23.12.2003, p.1. The Regulation applies to all EU Member States except Denmark, from March 1, 2005 (except art. 67-70, which entered into force on 1 August 2004). He is known in the literature as 'Brussels II bis Regulation'.

² According to paragraph (22) of the preamble to the Regulation, the authentic instruments and agreements between parties that are enforceable in a Member State shall be treated as "judgments" for the purposes of applying the rules on recognition and enforcement.

Regarding the recognition procedure, there are two aspects mentioned (art. 21 paragraphs 3 and 4):

- *optional recognition*, which means that any interested party has the right to use the procedure of recognition of the divorce judgment or of the judgment on the exercise of parental authority, under art. 28-36 of the Regulation, requiring, where appropriate, a pronouncement of judgment of recognition or of non-recognition of the judgment;

- *incidental recognition* - before a court of another Member State, indirectly, is seeking recognition of the judgment given in the Member State.

Please note that in one of the next sections, we will perform a separate analysis of art. 40-45 which governs the enforceability of certain judgments concerning *rights of access and return of the child*.

3. During the procedure for recognition and enforcement of the judgment on divorce or exercise of parental authority, can the jurisdiction of the court of the Member State of origin be verified?

No. According to **art. 24** of the Regulation, in the procedure for recognition and enforcement, the jurisdiction of the court of the Member State of origin where the judgment was given (and which is based on the rules laid down in art. 3-14) cannot be controlled by the courts of the Member States where the judgment will be enforced. This prohibition regarding the control of jurisdiction cannot be removed not even by invoking **the public order criterion** of international private law of the State in which recognition and enforcement are requested, mentioned on art. 22 letter (a) and art. 23 letter (a) of the Regulation.

Exception: If a court of a Member State is seised with an application of recognition and enforcement of a judgment in matters of divorce or of exercise of parental authority, given in another Member State, will be verified not *only the moment when the judgment was given*, in relation to the date of 1 March 2005 (when entered into force the *Regulation Brussels II bis*)¹, but also *the date when the action of divorce was filed in the State of origin*, in relation to the date 1 March 2001 (when entered into force the *Council Regulation (EC) no. 1347/2000 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and procedures relating to parental responsibility for children of both spouses*, known as the "Brussels II Regulation")². There are four hypotheses, namely:

1. both promoting the action in the State of origin, and the delivery of the judgment is subsequent to the date 1 March 2005, in which case there is no verification of the jurisdiction of the court that gave the judgment that is to be recognized and enforced;

2. the delivery is subsequent to the date 1 March 2005, and the action in the State of origin was filed after the entry into force of the *Regulation (EC) no. 1347/2000*. According to art. 64 paragraph (2) of the Regulation, this judgment is recognized and enforced in accordance with Chapter III of the Regulation, where those rules of jurisdiction applied are in accordance with those provided by one of the following instruments:

- a. *Brussels II Regulation bis*;
- b. *Regulation (EC) no. 1347/2000*;
- c. a convention which was in force between the Member State of origin and the Member State requested when the action was filed.

3. the delivery is prior to 1 March 2005, and the action in the State of origin was filed after the entry into force of *Regulation (EC) no. 1347/2000*. According to art. 64 paragraph (3)

¹ For countries that joined the European Union after the date of entry into force of *Regulation Brussels II bis*, it is taken as temporary reference the date of their accession. For example, for the Czech Republic, Hungary, Cyprus, the date of 1 May 2004, for Romania and Bulgaria the date of 1 January 2007.

² For Romania, the *Council Regulation (EC) no. 1347/2000* was not in force, following the principle of non-retroactivity.

of the Regulation, the judgment is recognized and enforced in accordance with the provisions of Chapter III of Regulation.

4. the delivery was made between 1 March 2001 and 1 March 2005, and the action in the State of origin was filed before the entry into force of Regulation (EC) nr.1347 / 2000. According to art. 64 paragraph (4) of the Regulation, the judgment is recognized and enforced in accordance with Chapter III of the Regulation, provided that it relates to divorce or parental responsibility towards children of both spouses, given on the occasion of this matrimonial proceeding, and the rules of jurisdiction to be consistent with those provided by one of the following instruments:

- a. Brussels II Regulation *bis*;
- b. Regulation (EC) nr. 1347/2000;
- c. a convention which was in force between the Member State of origin and the Member State requested when the action was filed.

4. Aspects of judging an application for recognition of the judgment given in another Member State

The referral to the court with an application for recognition and enforcement of a judgment given in another Member State on divorce, respectively on the exercise of parental authority, and the judging of the application are made according to *lex fori*, with few exceptions provided for by the Regulation and which concern the following aspects:

Territorial jurisdiction of the courts

According to art. 29 of the Regulation, **the exequatur application** is submitted to the court indicated in the list notified to the Commission, pursuant to art. 68, and for Romania, this is the tribunal. The territorial jurisdiction is established according to one of the following criteria:

- the habitual residence of the person against whom the enforcement is requested;
- the habitual residence of any child whom the application concerns;
- if the residence is not on the Member State of enforcement, the territorial jurisdiction is established according to the place of enforcement.

Choosing the domicile

The applicant must choose the domicile in the jurisdiction of the court seised, according to art. 30 paragraph (2) of the Regulation. However, if the law of the State Member where the enforcement is made does not provide choosing the domicile, the applicant shall appoint an attorney-at fact *ad litem*.

The documents attached to the exequatur application

Party who, addressing the court of another Member State, requires one of the following:

- *recognition of a judgment in matters of divorce or parental authority*;
- *contestation of a judgment in matters of divorce or parental authority*;
- *the approval of enforcement of such judgment*,

must submit the following documents provided by art. 30 paragraph (3) in relation to art. 37 and art. 39 of the Regulation:

- copy of the judgment which satisfies all conditions necessary to establish its authenticity;
- the certificate issued at the request of any interested party by the court or competent authority of the Member State of origin using the standard form shown in Annex I (judgments in matrimonial matters) and Annex II (judgments on parental responsibility).

In addition to these documents, if it is a judgment **in absence**, the party seeking recognition must submit one of the following:

- the original or a certified copy of the document which establishes that the document of seising the court or a similar document was notified or communicated to the party who has not appeared;
- any document indicating that the defendant has accepted the judgment unequivocally.

In the absence of the documents mentioned, the court seised with an exequatur application may specify a deadline for their submission or may accept equivalent documents or, if considers that has sufficient information, may renounce to their submission (art. 38 of the Regulation).

Also, based on art. 52 of the Regulation, no legalization or other similar formality shall be required on the documents referred to in art. 37 and art. 38 or, where appropriate, on a power of attorney *ad litem*.

Legal aid

The applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled to benefit, within the proceedings for recognition and enforcement of the judgment of divorce referred to in art. 21 and art. 28, of the most favorable legal aid or the most extensive exemption provided for by the law of the executing Member State (art. 50 of the Regulation).

Stay of proceedings

According to art. 27 of the Regulation, the court may stay the proceedings if the decision subject to recognition is subject to an ordinary appeal in the State of origin. If this is an application for recognition of a judgment given in Ireland or the United Kingdom and whose enforcement is stayed in the Member State of origin by reason of an appeal, the court of exequatur may stay the judgment proceedings.

5. The judgment delivered by the exequatur court

According to art. 31 of the Regulation, the court seised by application delivers a judgment on short term, without the person against whom the enforcement is sought, or the child, in this stage of the proceedings, to be able to submit observations.

A. If the divorce judgment is given in another Member State, the exequatur application submitted:

- *cannot be rejected* on the ground that the law of the Member State in which the recognition is requested does not allow divorce, legal separation or annulment of marriage based on the same facts (art. 25 of the Regulation).
- *can be rejected* by the court only on the grounds referred to in art. 22 and art. 24 of the Regulation.

Under what circumstances a court of another Member State may refuse to recognize a divorce judgment given in a Member State?

According to **art. 22** of the Regulation, **a judgment given on matters of divorce, legal separation or marriage annulment** shall not be recognized by a court of another Member State in one of the following situations:



- recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- the document of seising the court or another equivalent document has not been notified or communicated in due course to the defendant who did not appear and so that he or she could prepare the defense, unless it is found that the defendant has accepted the judgment in an unequivocal manner;
- recognition is irreconcilable with a judgment given in an action between the same parties in the Member State in which recognition is sought;

- recognition is irreconcilable with **an earlier judgment given in another Member State** or in a third country in a case between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State in which recognition is sought.

B. If judgments on parental authority (except those concerning the right to access and the return of the minor) given in a Member State, which are enforceable in that State, the exequatur application:

- *may be allowed*, approving the enforcement in the State of this court (art. 28);
- *may be rejected*, the enforcement of the judgment being denied only for the reasons listed in art. 23.

Under what circumstances a court of another Member State may refuse to recognize a judgment in matters of parental authority given in a Member State?

According to **art. 23** of the Regulation, a judgment given in matters of parental authority is not recognized by a court of another Member State in one of the following:

- taking into account the best interests of the child, recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- except urgent cases, the judgment was given without the child having the opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
- the document of seising the court or another equivalent document has not been notified or communicated in due course to the defendant who did not appear and so that he or she could prepare the defense, unless it is found that the defendant has accepted the judgment in an unequivocal manner;
- at the request of any person claiming that the judgment opposes to his or her exercise of parental responsibility, if the judgment was given without such person having the opportunity to be heard;
- recognition is irreconcilable with a later judgment relating to parental responsibility in the Member State in which recognition is sought¹;
- recognition is irreconcilable **with a later judgment**² relating to parental responsibility in another Member State or in the third country in which the child is habitually resident since the later judgment fulfills the conditions necessary for its recognition in the State addressed.
- was not complied with the procedure laid down in **Art. 56, which regulates the placement of the child in another Member State**. Thus, if the court with jurisdiction

¹ In Case **C211- 10**, the application for a preliminary delivery of judgment was filed within the litigation between Ms. Povse, on the one hand, and Mr. Alpago, on the other hand, concerning the return of their daughter to Italy, who was in Austria with her mother, and the custody of the child.

CJEC held that art. 47 paragraph (2) second subparagraph of Regulation no. 2201/2003 must be interpreted in the sense that a judgment given subsequently by a court of the Member State of enforcement, which rules provisionally on the custody and which is considered enforceable according to the law of that State, may not be opposed to the enforcement of a certified judgment previously delivered by the court with jurisdiction of the Member State of origin and by which is ordered the return of the child. Enforcement of a certified judgment cannot be refused, in the Member State of enforcement, on the ground that, after a change of the circumstances appeared subsequent to its delivery, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the competent court of the Member State of origin, which should be seized and with a possible application for stay of enforcement of its judgment.

² Making an analysis of art. 22 letter d) containing the phrase "earlier judgment", referring to the divorce, on the one hand, and art. 23 letter f) which contains the phrase "later judgment", referring to the judgments in matters of parental responsibility, on the other hand, results that a judgment in matters of parental responsibility is subject to change and the later judgment is prevailing and therefore it is recognized.

pursuant to art. 8-15 of Regulation envisages placing the child in an orphanage or foster family and where such placement is to take place in another Member State, the court **shall first consult** the central authority or other competent authority from the state of placement¹, existing two solutions:

- a) *if the public authority intervention is provided in that Member State for domestic cases of child placement*, situation in which judgment on the placement of the child may not be taken in the requesting State only if the competent authority of the requested State has consented to the placement²;
- b) if the public authority intervention is not provided in the latter Member State for domestic cases of child placement, the court shall notify this fact to the Central Authority or to a competent authority in that Member State).

ATTENTION!

Whether the application concerns or not the recognition and enforcement of a judgment of divorce or of one on parental authority, the court:

- is not entitled to make a subsequent verification of the international jurisdiction (art. 24)
- has no right to further review on the merits (art. 26, art. 31, paragraph 3);
- may approve only one of the heads of claims, therefore approving a partial enforcement (art. 36).

¹ Referring to the arrangements for consultation or consent, they are governed by the internal law of the requested State and for Romania, according to art. 100 of *Law no. 272/2004 on the protection and promotion of children's rights*, the competent authority is the National Authority for Child Protection and Adoption, which operates within the Ministry of Labor, Family, and Social Protection (GD no. 344/30 April 2014, published in the Official Gazette of Romania, no. 322 of 7 May 2014). Also, according to art. 2 of Law no. 361/2007 for the ratification of the Hague Convention of 1996, the National Authority for Child Protection and Adoption is the central authority for the fulfillment of the obligations established by the Convention, in compliance with art. 29 paragraph 1 of the Convention.

² In Case C-92/12, application for delivery of a preliminary judgment concerns the interpretation of Regulation (EC) no. 2201/2003, in particular Articles 1, 28 and 56, and was made in proceedings between the Health Service Executive (Department of Public Health, hereinafter referred to as "HSE"), on the one hand and a child with Irish nationality and residing in Ireland, and his mother, resident in London, on the other hand, on the placement of the child in an orphanage with closed regime offering therapeutic and educational care situated in England. The judgment of a court of a Member State which requires the placement of a child in an orphanage with closed regime, situated in another Member State, involving, for protection, a deprivation of liberty for a specific period, enters into the material scope of Regulation (EC) no. 2201/2003. The approval referred to in Article 56 paragraph (2) of the Regulation must be given prior to the adoption judgment ordering the placement of a child, by a competent authority under public law. It is not enough that the orphanage where the child should be placed to give its consent. In circumstances such as those in the main proceedings, the court of the Member State, which decided the placement, has doubts as to whether it was validly given the consent in the requested Member State, because it was not possible to determine with certainty which was the competent authority in the latter state, it is possible to regulate to ensure that the requirement of approval referred to in art. 56 of Regulation no. 2201/2003 has been fully complied with. Regulation no. 2201/2003 must be interpreted as meaning that to a judgment of a court of a Member State which requires the mandatory placement of a child in an orphanage with closed regime in another Member State shall have to, before the enforcement in the requested Member State, be declared enforceable in that Member State. In order not to lack the regulation of its effectiveness, the requested Member State court judgment on the application for a declaration of enforceability must be taken with a special celerity, since the means of appeal against such a judgment of the court of the requested Member State cannot have suspensive effect. If was given for a specified period of time, the placement approval under Article 56 (2) of Regulation No. 2201/2003 does not apply to judgments which have as their object the extension of placement. In such circumstances, a new approval must be sought.

6. Notification of the judgment and the means of appeal

According to the *lex fori*, the judgment given on the application for recognition and declaration of enforceability shall be notified to the applicant, through the court's diligence.

Against a decision on the application for a declaration of enforceability, either party may pursue the appeal, according to art. 33 of the Regulation, to a court expressly stated by each state, according to art. Regulation 68, on the list communicated to the Commission and published in the *Official Journal of the European Union*.

7. Enforcement Procedure

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There are two important ideas, namely:

- any judgment (in matters of divorce or exercise parental authority) delivered by the court of another Member State and declared enforceable in accordance *with art. 28-36 of Regulation runs in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.*
- the enforcement procedure is established by the law of the Member State of enforcement.

2. CHANGE OF SURNAME AFTER DIVORCE

If the judgment given in a Member State in matters of divorce also refers to the surname of the spouses after the dissolution of the marriage, then are incident the dispositions of art. 21 paragraph (2) of *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*, according to which there is no need to update the civil registry documents of the spouses that are in another Member State.

In other words, the disposition of the court on changing the surname of the spouses included in the judgment of divor (return of one of the spouses or of both to the surname had before marriage or preservation of the surname had during marriage) is recognized by the law and is effective on the whole territory of the European Union, under the same conditions, as well as the divorce judgment.

3. PROPERTY REGIME

According to the *Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes*¹, under negotiation at the time of preparation of this guide, as it was approved with amendments by the European Parliament legislative resolution of 10 September 2013², the rules on recognition and enforcement of judgments are inspired by the *Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* and can be summarized as:

- the rule is the same, of the **rightful recognition** of the judgments given in a Member State, without having to fulfill any proceedings before the courts of another Member State (Art. 26 paragraph 1);
- recognition of the judgment may be made by **the principal or the incidental way** (art. 26, paragraph 2 and paragraph 3);

¹ Published by the European Commission on 16.03.2011- COM (2011) 125 final.

² The text is at the address: [www. Europol.europa.eu/sidesgetDoc.do?](http://www.Europol.europa.eu/sidesgetDoc.do?)

- the grounds for non-recognition of a judgment in matrimonial property regimes (art. 27) are the same as those provided by art. 34 of Regulation (EC) no. 44/2001;
- the jurisdiction of the courts of the Member State of origin may not be subject to the control of the court from the Member State seised with an application for recognition (art. 28);
- judgments given in a Member State and enforceable shall be enforced in the other Member State in accordance with art. 31 related to art. 38-56 and art. 58 of Regulation (EC) no. 44/2001.

Differences exist in relation to the recognition of **authentic instruments relating to matters of matrimonial property regime**, namely:



- they are not assimilated by the judgments regarding their recognition (art.32-33);
- recognition of authentic instruments means that they have the same force of evidence in the content of the registered document and the same effects as in the Member State of origin (Art. 32 paragraph 2);
- authentic instruments are protected by the presumption of validity which may be rebutted in the event of a dispute.

The enforceable judicial transactions in the Member State of origin:



- are recognized and declared enforceable in another Member State under the same conditions as the authentic instruments;
- if their enforcement is manifestly contrary to public policy in the Member State of enforcement, the court seised shall refuse the application for a declaration of enforceability or shall revoke the declaration of enforceability (art. 34).

4. PROTECTION MEASURES IN CIVIL MATTERS

EU legal instrument binding and immediately effective to achieve the objective of free movement of protection measures in civil matters disposed within the European Union is *Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters*¹ (hereinafter referred to in this section as „Regulation”).

This Regulation applies to protective measures ordered on January 11 2015 or at a later date, regardless of the date of establishment procedures (art. 22).

The Regulation concerns the *cross-border cases*, which means that cases where the recognition of the protection measure ordered in a Member State (State of origin) is requested in another Member State (requested State). According to art. 3 point 1 of the Regulation, by „protection measure” means any judgment, regardless of the name, ordered by the issuing authority of the Member State of origin², according to its internal law, by which, *in order to protect a person*, when its physical or psychological integrity may be threatened, are imposed one or more of the following obligations *to the person that represents the threat*:

- a prohibition or regulation of access to the place where the protected person resides, works or that attends regularly or where lives on a regular basis;

¹ Published in OJ C 113, 18 April 2012, p. 56. In accordance with art. 1 and 2 of the Protocol no.22 on the position of Denmark annexed to the TEU and the TFEU, Denmark does not participate in the adoption of this Regulation, is not bound by it nor subject to its application.

² According to art. 3 point 4 of the Regulation, "issuing authority" means any judicial authority or any other authority designated by a Member State to be competent for protection measures, provided that this authority to offer the parties guarantees of impartiality and its decisions to be subject to control of a judicial authority and have the force and effects similar to those of a judgment of a judicial authority on the same matter.

- A prohibition or regulation of contact in any form with the protected person, including by phone, electronic or ordinary mail, fax or any other means;
- a prohibition or regulation on approaching the protected person closer than the distance that had been fixed.

Some details concerning the application of this Regulation:



- The Regulation only applies to the *protection measures ordered in civil matters*, being excluded the measures taken in *criminal matters*, which are covered by Directive 2011/99 / EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order 1;
- The Regulation applies to protection measures ordered in civil matters concerning the protection of all victims, whether or not are victims of gender violence;
- The Regulation completes *Directive 2012/29 / EU of the European Parliament and of the Council of 25 October 2012 laying down minimum standards on the rights, support and protection of victims of crime*², ensuring that victims are provided with adequate information and appropriate support;
- It was adopted the *Implementing Regulation (EU) No. 939/2014 of the Commission of 2 September 2014 fixing the certificates referred to in Articles 5 and 14 of Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters*³

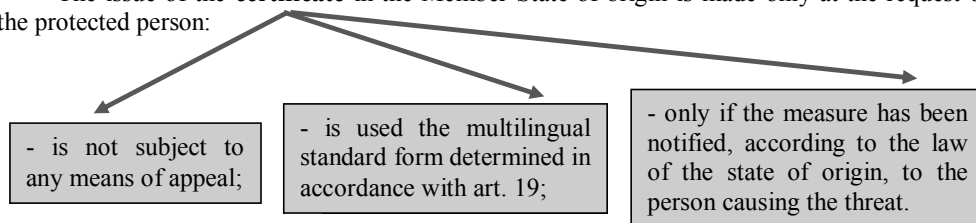
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A civil protection measure ordered in one Member State is recognized in other Member States without the need for any special procedure and is enforceable without the need for a declaration of enforceability.

I. Several aspects of the procedure in the Member State of origin, which ordered the protection measures

Having considered a measure of protection in a Member State, the protected person may request to the competent authority the **issue of a certificate** so that this measure to be recognized in another Member State.

The issue of the **certificate** in the Member State of origin is made only at the request of the protected person:



The notification to the person causing the threat of the information related to the issue of the certificate and the effects produced by this certificate, is made by the issuing authority of the Member State of origin:

- according to the law of the Member State of origin, if:



- if his or her residence is in the Member State of origin;
- his or her address is unknown;
- the person refuses to accept the notification.

¹ Published in OJ L 338, 21 December 2011, p. 2.

² Published in OJ L 315, 14 November 2012, p. 57.

³ Published in OJ L 263, 3 September 2014, p. 10. This Regulation shall not apply to Denmark.

- by *registered letter with acknowledgment of receipt* or other means equivalent if his or her residence is in another Member State or in a third country;

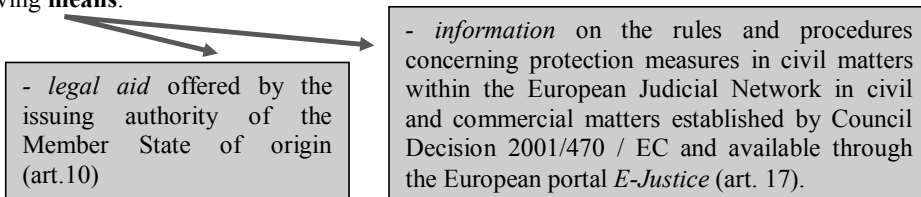
The form that has to be used to apply for a certificate from the Member State of origin is found in Annex I of the *Implementing Regulation (EU) No. 939/2014* and this certificate contains the following information listed in art. 7 of Regulation:

- name and address the contact details of the issuing authority;
- file reference number;
- date of issue of the certificate;
- data regarding the protected person: name, date and place of birth, address to be used for service, preceded by a warning that the address cannot be disclosed to the person causing the risk;
- data on the person causing the risk: name, date and place of birth, address to be used for service
- all information necessary for the enforcement of the protection measure, including, where appropriate, the type of measure and the obligation imposed by this to the person causing the risk, and specifying the function of the place and / or the perimeter of that person is prohibited from approaching or for example, where it is forbidden to enter.
- duration of the protection measure;
- duration of the effects of the protection measure recognition;
- a declaration according to which the requirements listen on art. 6 on the protection measure notification to the person causing the risk have been met;
- information on the rights conferred under Art. 9 (correction or withdrawal of the certificate) and art. 13 (refusing recognition or enforcement of the protection measure).

The legal consequences of issue of the certificate by the issuing authority in the Member State of origin are the following:

- recognition of the protection measure in all Member States;
- the enforceability of the protection measure in all Member States.

The protected person enjoys the effective access to justice in other Member States by the following **means**:



II. Procedure in the requested Member State for the recognition and enforcement of the protection measure

A protection measure ordered in the Member State of origin may be invoked in another Member State by the protected person who must provide to the competent authority of the requested state the following documents (art. 4 paragraph 2):

- a copy of the protection measure that meets the conditions necessary to its authenticity;
- the certificate issued in the Member State of origin at the request of the protected person;
- a transliteration and/or translation of this certificate.

The solutions of the competent authority from the requested Member State on the protection measure ordered by the Member State of origin may be:

1. rightful recognition of the protection measure

Recognition corresponds to the duration of the protection measure, but if the duration is longer, art. 4 paragraph 3 of the Regulation provides for the limitation of the recognition to at most 12 months from the date of issue of the certificate by the authority of the Member State of origin. As regards the enforcement proceedings of the protection measures, it is governed by the law of the requested Member State.

2. adjustment of the protection measure art. 11)

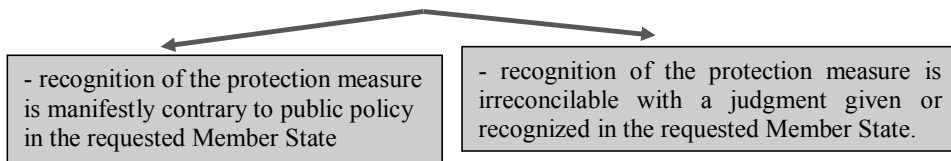
Provided that the nature and essential elements of the protection measure are maintained, the solution of adjusting the elements of the protection measure (such as, for example, address, general location or the minimum distance which the person causing the risk must keep from the protected person) *is possible when such adjustment is necessary for recognition measure to be effective in practice in the requested Member State.*

Some clarifications are necessary:

- cannot be subject to adjustment the type and civilian character of the protection measure;
- the adjustment procedure of the protection measure is governed by the law of the requested Member State;
- the adjustment of the protection measure is notified in accordance with the law of that State, to the person causing the risk;
- the adjustment solution of the protection measure can be appealed by the protected person or by the person causing the risk;
- the procedure on the means of appeal is governed by the law of the requested Member State;
- the promotion of means of appeal has suspensive effect on the judgment delivered.

3. non-recognition of the protection measure and, where appropriate, the refusal of the protection measure enforcement (art. 13)

At the request of the person causing the threat, the court may adjudicate such a solution, if he or she is in one of the following situations:



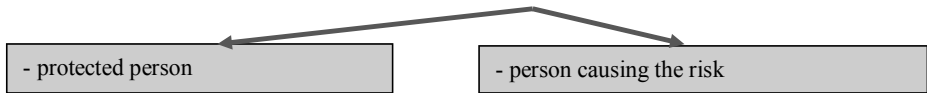
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The court of the requested Member State cannot proceed to the next:

- review on the merits of a judgment which orders the protection measure ordered in the Member State of origin (art. 12);
- The refusal of recognition because its law does not allow the adoption of such a measure based on the same facts (art. 13 paragraph 3)

4. suspension or revocation of recognition or enforcement of the protection measure (art. 14)

This solution is possible if the court of the requested Member State receives from the



a certificate issued by the issuing authority of the Member State of origin under Art. 19 of the Regulation, from which results one of the following:



- the ordered protection measure has been suspended or revoked in the Member State of origin;
- the enforceability of the protection measure is suspended or restricted;
- the previously issued certificate has been revoked under Art. 9 paragraph 1 letter b, namely that at his release were not fulfilled the conditions concerning the notification specified in art. 6 and in the scope of the Regulation.

CHAPTER II. ABOLITION OF EXEQUATUR PROCEDURE IN FAMILY LAW MATTERS

1. EXERCISE OF RIGHTS OF ACCESS

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) no. 1347/2000 ¹ (hereinafter referred to as “Regulation”) facilitates the exercise of cross-border rights of access, when the child and the holders of parental authority are residing in different Member States. The legal mechanism is the legal recognition of the judgment on the exercise of rights of access issued in another Member State and the consecration of its enforceable character in the Member State (Art. 40-45 Regulation).

A judgment on rights of access, if accompanied by a certificate using the standard form in Annex III (**certificate concerning rights of access**), is directly recognized and enforceable in other Member States.

Some clarifications on judgments for which the exequatur procedure is abolished:

- the judgments concern the *award of rights of access* and not the refusal to award such a right;
- *the right of access* shall have the meaning specified in art. 2 pt. 10 of the Regulation, the right to take a child for a limited period in a place other than the child's habitual residence;
- *it is not important who is the beneficiary of the right of access*. According to the national law, the right of access can be attributed to the parent with whom the child does not live, to grandparents or other relatives of the child, or to persons with whom the child has developed emotional and spiritual connections.

The stages of issue of the certificate concerning rights of access are the following:

1. The moment when the certificate is issued

Depending on the cross-border nature of the case or not, since the moment of delivery of the judgment on the exercise of rights of access, is known not only the time but also the manner of issuing the certificate. Thus, there are three hypotheses:

a. the case is cross-border, situation in which the judge issues *ex officio* the certificate, even if :

- the judgment becomes enforceable only provisionally;
- *lex fori* does not allow a judgment to be enforceable, if against it was exercised a means of appeal.

b. the case is not cross-border, *it is up to the judge* to issue such a certificate, depending on the circumstances of the case²;

c. the case is not cross-border, the judge has not issued the certificate, and after the delivery of the judgment, the holder of the rights of access or child changes the residence in another Member State. At the *request* of the interested party, the court shall issue this certificate.

¹ Published in OJ L 338, 23.12.2003, p.1. The Regulation applies to all Member States of the European Union except Denmark, as of March 1, 2005 (except art. 67-70, which entered into force on 1 August 2004). He is known in the literature as' Brussels II bis Regulation ".

² For example, holders of parental authority, though they live in the same state with the child, are of different nationalities, with the likelihood that one of them would reside abroad in another Member State.

2. Verification of the procedural guarantees provided by art. 41 paragraph (2)

The issue of the certificate is made by the authority of the Member State of origin only after verifying that the following procedural guarantees are complied with:

- in case of procedure in the absence, the document of seising the court or another equivalent document has been notified or communicated in due course to the person who did not appear and so that he or she could prepare the defense or, if it was notified or communicated without complying with these conditions, still it is established that he or she accepted the judgment unequivocally;
- all parties have had an opportunity to be heard by the court;
- the child has the opportunity to be heard, unless the hearing was considered to be inappropriate in regard to his or her age and degree of maturity.

What is the effect of non-compliance with procedural guarantees?

Answer: The judgment on exercising the rights of access will not be directly recognized and declared enforceable in other Member States, since the interested party will submit a request of exequatur to the court of the Member State where it is to be enforced.

3. Appeals against the judgment to issue the certificate

The parties are unable to promote any appeal against the judgment to issue the certificate (art. 43), however existing the possibility to submit an *application of rectification*, if in the content of the certificate is not correctly written the content of the judgment.

4. Legal effects of the issue of the certificate concerning rights of access

The certificate issued by the court of origin shall ensure that, for recognition and enforcement, the judgment given in that Member State is considered as if it were a judgment given in another Member State. In other words, **the legal effects are the following:**

- *the exequatur procedure shall no longer be required* for the judgment concerning the exercise of the right of access, being sufficient to submit a copy of the judgment and of the certificate, without having to translate the latter (except item 12 on the practical arrangements for exercising the right of access);
- *the parties no longer have the opportunity to oppose against the recognition of the judgment.* In other words, the non recognition grounds listed in art.23 are not incident to such judgments.

5. A party does not comply with a judgment concerning the rights of access

If a party fails to comply with a judgment on access rights issued by the court in the State of origin, the other party may **directly** request the authorities of the Member State of enforcement to enforce it (art. 44). Regarding the enforcement procedure, it is established by the law of the Member State where the enforcement takes place (art. 47). The courts of the Member State of enforcement are entitled, according to art. 48, that in the absence of sufficient information on the practical arrangements for exercising the rights of access from the judgment, to establish the necessary practical arrangements for organizing the exercise of rights of access, complying with the essential elements of the judgment.

Final clarification: If a party wishes, it may request to the court of another State, the recognition and enforcement of the judgment on rights of access by exequatur procedure, based on the same Regulation (EC) no. 2201/2003.

2. RETURN OF THE MINOR

On this matter, the rule is the abolition of the *exequatur* for a judgment of a court of a Member State of origin, which orders the return of the child. Therefore, a court of a Member State, seised based on art. 13 of the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction*, with an **application of return of a child** who has been wrongfully removed or retained in a Member State other than the Member State in which the child was habitually resident immediately before the wrongful removal or retention, applying the rules of this Convention, complemented by art. 11 of *Regulation no. 2201/2003* (hereinafter referred to as "the Regulation"), may rule, after a trial conducted by the fastest method prescribed by the *lex fori*, not exceeding six weeks after it was seized, one of the following judgments:

- **immediate return** of the child¹ or

- **non return of the child**, hypothesis according to which the Regulation provides for a special procedure in art. 11 paragraphs 6-7, according to which this judgment, along with its relevant documents, are transmitted either directly, or through the central authorities of the two Member States to the **court of origin** (of the Member State where the child was abducted), so that the latter, after taking evidence and hearing the parties and the child, as the case may be, to decide, *in the end, whether or not the return of the child will take place*. Only if the judgment is the return of the child, it is directly recognized and enforceable in the requested Member State without the need for the *exequatur* procedure.

1. The procedure before the court of origin after a judgment of non-return of the child was delivered in the Member State where the child is located (requested State)

The court of origin should receive documents from the court of the requested State within one month from the delivery of judgment of non-return of the child under art. 13 of the Hague Convention of 1980. When examining the case, **the court of origin** must do the following:

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| <ul style="list-style-type: none">a. to communicate relevant information to the parties and invite them, in accordance with national law, to submit information within three months from the date of notification, so that they communicate whether they want the court of origin to examine the case (art. 11 paragraph 7 of the Regulation).b. unless such information is received, the court of origin shall close the case;c. if at least one party submits information concerning the examination of the case filed, the court of origin shall proceed to trial;d. to ensure that the <i>procedural rules laid down in art. 42 paragraph 2</i> of the Regulation are met, namely: |
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- all parties have opportunity to be heard²;
- the child has the opportunity to be heard, unless a hearing is considered inappropriate in relation to the age and maturity of the child;
- to consider the reasons for the judgment of non-return and evidence upon which this decision was taken based of art. 13 of the 1980 Hague Convention.

¹ This solution of immediately return of the child is most common in practice, given, on the one hand, the principle enshrined in art. 11 paragraph 4 of the Regulation according to which the child will be returned if it can be protected in the State of origin, on the other hand, the Regulation minimizing (art. 11 paragraph 2-5) the exceptions provided for in Article 13 letter b. of the 1980 Hague Convention.

² The parties have the right that within three months from the date of notification of non-return decision to transmit to the court of origin the observations regarding the case.

The compliance with these rules shall be the basis of the issue by the court of origin of the certificate referred to in art. 42, using the standard form in Annex IV (*certificate concerning the return of the child*).

The solutions of the court of origin may be:

a. *a judgment of non-return of the child*, situation in which the case shall be closed. The jurisdiction to decide on the merits of the case is thus transferred to the courts of the Member State where the child was **moved**.

b. *a judgment of return of the child*, situation in which the Regulation provides that judgment, as well as the judgment on the rights of access, is directly recognized and enforceable in the other Member States, provided that they are accompanied by a certificate (art. 42 paragraph 1).

2. Certificate concerning the return of the child

After the delivery of the judgment on return of the child, the court of origin shall issue the certificate once the judgment becomes "enforceable", which means, in principle, after the deadline for lodging an appeal has expired, the judge, based on the right conferred by regulation¹, may declare that the judgment is enforceable, notwithstanding the provisions of national law according to which an appeal is possible.

From the certificate written in the language of the judgment, results that the procedural guarantees were complied with, as well as the other information required by Annex, including whether the judgment was enforceable in the Member State of origin at the time of its delivery.

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- it is not possible to appeal against the issue of a certificate.
- If the judge of origin has committed an error when filling in the certificate and it does not reflect correctly the judgment, it is possible to bring an action for rectification to the court of origin, being applicable the national law of the Member State of origin.

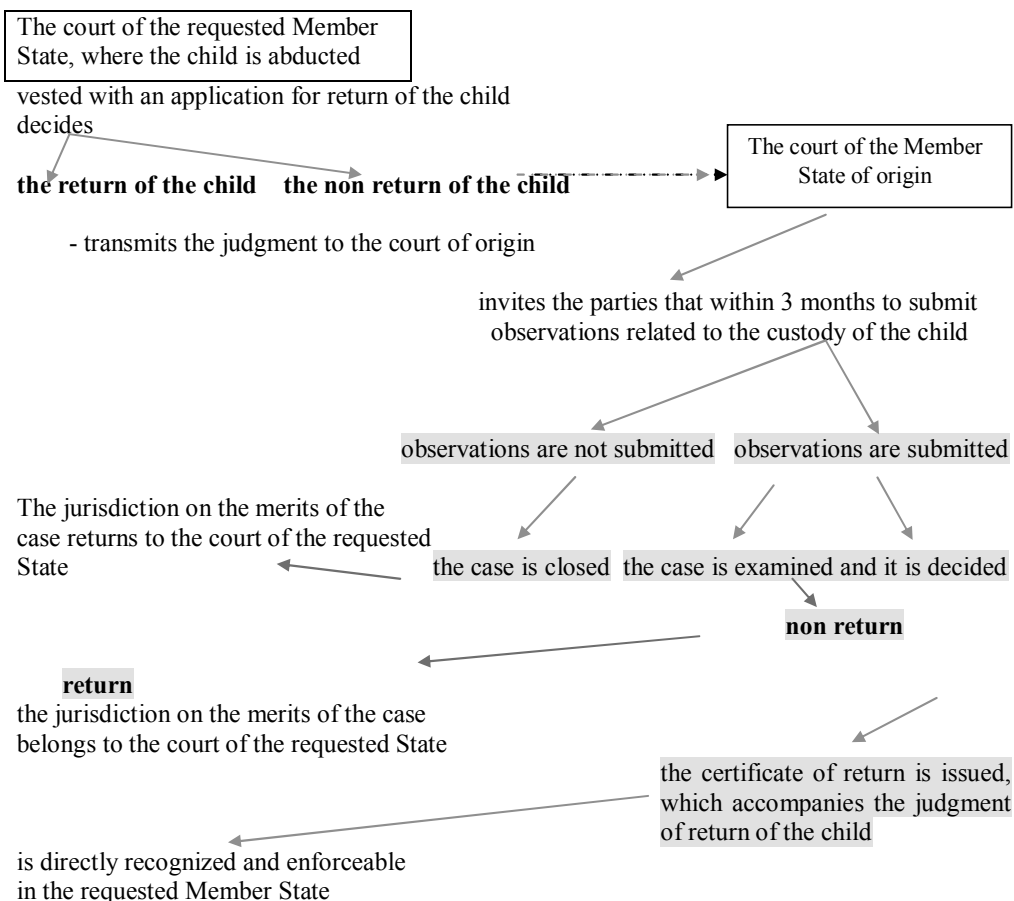
The legal effects of the issue of certificate concerning the return of the child are the following:

- Is no longer necessary the application of an "*exequatur*";
- It is not possible to contest the recognition of the judgment.

¹ The Regulation wanted that by declaring the judgment enforceable to prevent the promotion of some delaying appeals, that would unduly delay the enforcement of the child's return judgment. In Case C-195/08 Rinau regarding the return to Germany of the parties' daughter, retained in Lithuania by Mrs Rinau, the ECJ held that after the delivery of judgment of non-return and after bringing it to the attention of the court of origin, in order to issue the certificate referred to in Article 42 of Regulation (EC) no. 2201/2003, it is irrelevant the fact that judgment was suspended, reformed, annulled, or in any case, has not become *res judicata* or has been replaced by a decision of return, in so far as the return of the child has not actually occurred. Since it has not been expressed any doubt about the authenticity of the certificate and it has been issued in accordance with the standard form that is given in Annex IV of this Regulation, the introduction of an opposition to the recognition of the return decision is prohibited, the burden on the court seized being only to find the enforceability of the judgment certified and to allow the immediate return of the child. Also, unless the procedure aims to issue a judgment certified pursuant to art. 11 paragraph (8) and art. 40-42 of Regulation no. 2201/2003, any interested party may refuse to recognize a judgment, even if it was not previously submitted an application for recognition of the decision.

3. The procedure in the requested State where the child is located after the court has delivered a judgment of return of the child and has issued the certificate of return of the child

Schematically, this procedure is as follows:



According to art. 45 of the Regulation, the party seeking enforcement of the judgment of return of the child, shall provide a copy of the judgment delivered by the court of origin and a certificate of return of the child. The translation of the certificate is not necessary, except point 14 regarding the measures taken by the Member State of origin in order to ensure the protection of the child after his or her return. According to art. 42 paragraph (1) of the Regulation, the *exequatur* is eliminated in case of this judgment of return of the child, the judgment of the court of origin being considered as if it was given by a national court of the enforceable State¹.

¹ In Case C-491/10 PPU (vs. Zarraga Pelz) concerning the return to the father, in Spain, of the daughter, who currently lives in Germany with her mother, the defendant, CJEU held in relation to the circumstances of the case that the court with jurisdiction of the Member State of enforcement (Germany) cannot oppose against the enforcement of a certified judgment by which is ordered the return of a child wrongfully retained on the ground that the court of the Member State of origin (Spain) which delivered this judgment, would have infringed art. 42 of the Regulation (EC) no. 2201/2003, interpreted in accordance with art.24 of the Charter of Fundamental Rights of the

4. The enforcement of the judgment of return of the child

Concerning the procedure of enforcement of a judgment for the return of the child, this is subject to the national law, and the national authorities are called to apply the rules which guarantee the efficient and rapid enforcement of the judgments delivered under the Regulation, without prejudice to its objectives¹.

Regarding the return of the abducted child and the modality of enforcing the judgment in the Member State of origin, from the constant case law of the European Court of Human Rights result the following:



➤ each contracting State must create appropriate and sufficient legal means to ensure the compliance with the positive obligations incumbent on it based on art.8 of the European Convention of Human Rights².



➤ as soon as the authorities of a Contracting State to the 1980 Hague Convention have found that a child has been legally moved, under the Convention, they have the obligation to take necessary and appropriate measures to ensure the return of the child, otherwise, it is violated his right to respect for family life, enshrined in art. 8 of the European Convention on Human Rights³;



➤ the appropriateness of measures to be considered in terms of speed of implementation, since procedures for the award of parental responsibility, including the enforcement of final judgment, need to be settled urgently, as far as the passage of time can have irremediable consequences for the relations between the child and the parent from whom he or she is separated⁴.

European Union, the appreciation of such a breach having exclusive jurisdiction of the courts of the Member State of origin.

¹ In the same case C-195/08, the CJEU held that art. 31 paragraph (1) of Regulation No. 2201/2003, in so far as it provides that neither person against whom enforcement is sought, nor the child can, at this stage of the proceedings, submit observations, do not apply to proceedings for non-recognition of a judgment, filed without being previously been introduced an application for recognition on the same judgment. In such a situation, the defendant, seeking recognition, may submit observations.

² For example, cases *Maire vs. Portugal* of 26 June 2003, paragraph 76 and *Ignaccolo-Zenide vs. Romania* January 25, 2000, paragraph 108.

³ For example, the case of *Iglesias Gil and A.U.I. vs. Spain* July 29, 2003, paragraph 62.

⁴ For example, cases *Ignaccolo-Zenide vs Romania* in January 25, 2000, paragraph 102 and *Maire v. Portugal* of 26 June 2003, paragraph 74.

CHAPTER III.

THEORETICAL ASPECTS RELATED TO THE EXEQUATUR PROCEDURE IN MAINTENANCE OBLIGATION MATTERS

1. ABOLITION OF EXEQUATUR

I. Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations

Recognition, enforceability and enforcement of judgments in matters relating to maintenance obligations are subject to *Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations*¹ (hereinafter referred to as „Regulation”), which distinguishes between two categories of judgments given in a Member State:

- **which has obligations pursuant to 2007 Hague Protocol**², for which is eliminate the *exequatur* procedure (art. 17- 22). The dispositions concerning the recognition and enforcement of those judgments are based, mainly, on the *Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims*³;

- **which has no obligations pursuant to 2007 Hague Protocol** (art. 23-38). The dispositions concerning the recognition of these judgments are based on the regime regarding recognition, enshrined in *Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the "Brussels I Regulation")*⁴.

Taking as reference the date for the implementation of Council Regulation (18 June 2011), the provisions of art. 17-38 are incident to the following judgments:

- judgments delivered in the Member States before the date of 18 June 2011 or judgments delivered after the date of 18 June 2011, but on the basis of an action filed before 18 June 2011, for which recognition and enforceability are requested after this moment;

- judgments delivered after the date of 18 June 2011, based on an action filed after 18 June 2011.

According to art. 48 related to art. 75 paragraph 1-2 of Regulation, **the judicial transactions approved or concluded and the authentic instruments drawn up as of 18 June 2011**, which are enforceable in the Member State of origin, are recognized and shall have the same enforceability as the judgments given in other Member States, according to the same distinction that is made between those judgments.

¹ The Regulation is applicable to the states contracting parties to the Hague Convention of 23 November 2007 on the Recovery Abroad of Maintenance for children and other family members, to the extent that the Convention applies to the relations between the Community and the respective State.

² According to art. 15 of the Regulation, the law applicable to maintenance obligations is indicated by the *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States* bound by this legal instrument.

³ Published J.O. L 143 of 30 April 2004.

⁴ Published J.O. L 12 of 16 January 2001 and repealed by *Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. (published in OJ L 351 of 20 December 2012), applicable from 10 January 2015.

1. The judgment given in a Member State which has obligations pursuant to the 2007 Hague Protocol¹

- is recognized by law in another Member State, without having to recourse to any procedure;
- it is not possible to oppose against its recognition;
- If the judgment is enforceable in the Member State of origin, it becomes enforceable in another Member State without the need for a declaration of its enforceability (*exequatur*);
- it is not possible any form of control on the substance in the Member State of enforcement.

For **enforcement** of the judgment on maintenance obligations in another Member State, the applicant creditor submits to the competent authority of that State the following documents listed in art. 20 of the Regulation:

- a copy of the judgment which satisfies the conditions necessary to its authenticity;
- extract from the judgment given by the court of origin using the form set out in Annex I² (if it is necessary, with transcription or translation of the content form into the official language of the Member State or into another language which the Member State declares that it accepts);
- where appropriate, where appropriate, a document showing the situation of arrears and the date when such amount was calculated;

At the request of the debtor maintenance, the competent authority of the Member State of enforcement may order:



- total or partial **refusal** to comply with the judgment of the court of origin if it is found that was prescribed the right to require enforcement of that judgment, under the law of the Member State of origin or the Member State of enforcement, taking into account the longest limitation period (Article . 21 paragraph 2 of the Regulations);
- total or partial **stay** of the enforcement of the judgment given by the court of origin, if it is found that:

a) this is irreconcilable with a judgment given in the Member State of enforcement, in another Member State or third country, which satisfies the conditions necessary for its recognition in the Member State of enforcement;

b) the competent court of the Member State of origin has been vested with the settlement of a means of appeal concerning the judgment enforced. Therefore, in order to guarantee the compliance with the requirements of a fair trial, the Regulation allows the **defendant** that, *during the enforcement of the judgment given in the State of origin, to file a means of appeal* against this judgment, **to** the competent court of the Member State of origin, unless:

- he or she appeared before the court of the Member State of origin during the trial of the action

and

- is in one of the following situations expressly provided by art. 19 paragraph 1 of Regulation:



- he or she was not notified on the document of seising the court or an equivalent document in due course, so that he or she could have been able to defend;

¹ That is to all Member States of the European Union, except Denmark and the United Kingdom.

² In case of judicial transactions and authentic instruments, at the request of the interested party, the competent authority of the Member State of origin shall issue an extract, by means of the standard form set out, as the case may be, in annexes I and II, respectively III and IV (art. 48 paragraph 3 of the Regulation).

- was prevented from contesting the maintenance claim by reason of force majeure or due to extraordinary circumstances, without the defendant having been at fault, if he failed to file an action against the judgment when it was possible to do that.

The deadline for formulating this appeal is 45 days and begins to run when the defendant was effectively acquainted with the contents of the judgment and was able to act at the latest from the first day of enforcement measures that have resulted in partial or total unavailability of goods.

The court of the Member State may deliver one of the two solutions:

- *of rejecting the means of appeal*, the reason being that none of the conditions on the appeal is satisfied. The consequence of this solution is *maintaining the judgment delivered in the Member State of origin*;


- *of approving the means of appeal*, because the defendant proved that he was in one of the two situations. The consequence of this solution is *cancelling the judgment delivered in the Member State of origin*¹.


c) the enforceability of the judgment of the court of origin is stayed in the Member State of origin.


2. The judgment given in a Member State which does not have obligations pursuant to 2007 Hague Protocol²

- is recognized by law in another Member State, without having to recourse to any procedure;
- it is possible the contestation of the judgment, situation in which the interested party on the recognition of the judgment may request principally, through a special procedure, that the judgment to be recognized;
- if it is enforceable in the Member State of origin, it becomes enforceable in another Member State only after it has been declared enforceable by a court of this state.

The recognition of a judgment relating to maintenance obligations given in the Member State of origin invoked, *principally or incidentally*, before a court of a Member State **may be refused** for the following reasons listed in art. 24 of the Regulation:

 - recognition is manifestly contrary to public policy in the Member State in which recognition is sought,

 - the defendant was not notified on the document of seising the court or an equivalent document in due course, so that he or she could have been able to defend, if he failed to file an action against the judgment when it was possible to do that;

 - judgment is irreconcilable³ with an earlier judgment given between the same parties in the Member State in which recognition is sought;

¹ According to art. 19 paragraph 3 second sentence of the Regulation, although the judgment is void, the creditor does not lose the benefits for the period of the interruption of prescription or limitation and neither the right to claim retroactively the maintenance acquired in the initial proceedings.

² It's about Denmark and the United Kingdom.

³ In Case C-145/98 (Hoffman vs Krieg), the CJEU held that a foreign judgment which has been recognized under art. 26 of the Brussels Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters must, in principle, have the same effects in the State in which enforcement is sought as in the State in which the judgment was rendered. Also, a foreign judgment enforceable in a State under art. 31 and which remains enforceable in the State in which it was given, shall not be enforced in the State in which enforcement is sought when, under the law of that State, ceases to be enforceable on grounds which are outside the scope of the Convention. The Brussels Convention does not prevent court of the State in which the enforcement is sought to draw the necessary conclusions from a national law divorce when takes into consideration the enforcement of the judgment given in relation to maintenance obligations between spouses. A foreign judgment which obliges a person



- judgment is irreconcilable with an *earlier* judgment given in another Member State or a third country between the same parties in a dispute on the same subject and the same question, provided that this latter decision fulfills the conditions necessary for its recognition in the Member State in which recognition is sought.

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In connection with the last two grounds relating to the possibility of irreconcilable judgments, art. 24 paragraph 2 of the Regulation establishes the rule that a judgment which has the effect of modifying, by reason of changing the circumstances, an earlier judgment on maintenance obligations (such as, for example, reducing the amount of the alimony) is not considered an "irreconcilable judgment" within the meaning of subparagraph c or subparagraph d.

A special mention for the consecration of the **partial *exequatur***. Therefore, according to art. 37 of the Regulation¹, if a judgment of a Member State contains solutions on several heads of claims, the court of the other Member State rules only in the case of one or more of these heads of claims, when, if appropriate:

- the enforceability cannot be given for all of them;
- the applicant is the one who requests that the declaration of enforceability to be limited to some parts of the judgment.

To be taken into consideration is the **art. 22** of the Regulation according to which " *the recognition and enforcement of a judgment on maintenance under this Regulation does not imply in any way recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the judgment*", which means that a court of a Member State (for example, Romania) could recognize a judgment given in another Member State (for example Netherlands, France) concerning the maintenance obligation between two persons, without conditioning it by the existence in the internal law of the relationship of partnership or civil union.

to pay maintenance to his wife based on his obligations from the marriage is contrary in the context of the dispositions of art. 27 paragraph 3 of the Convention with a national judgment which rules the divorce of the spouses. Art. 36 of the Convention must be interpreted according to the principle that a party who did not exercise any remedy at law against the judgment of enforcement referred to that article is prevented, at the time of enforcement, to raise a valid reason that he could have presented in such a remedy at law, and that this provision should be applied ex officio by the states in which enforcement is sought. However, this disposition does not apply when it results in obliging the national court to condition the effects of a national judgment which is outside the scope of Convention of its recognition in the state where was delivered the foreign judgment that is sought to be enforced.

¹ In Case C-220/95 (Boogard vs Laumen), the CJEU argued that, if the grounds of a judgment in a divorce proceeding indicates the fact that the maintenance granted is intended to help the husband / wife to maintain themselves or , where the needs and resources of each spouse are taken into account in determining the amount of maintenance, the judgment will cover the maintenance obligations and will be within the scope of the *Brussels Convention of 1968, as amended by Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic*. On the other hand, where the maintenance granted aims only the division of property between spouses, the judgment will take into account the property rights arising out of a matrimonial relationship and, in this context, will not be enforceable under the Brussels Convention of 1968. A judgment which satisfies these two conditions can be enforced in part, pursuant to art. 43 of the Brussels Convention, if clearly shows the various purposes for which the various maintenance allowances are granted. Consequently, a judgment given in a divorce action by which is ordered a single global payment and transfer of ownership right by one party to the former husband / wife should must be seen as relating to maintenance and therefore as covered by the scope of the Convention if its purpose is to ensure the maintenance of the former husband / wife. The fact that, in its decision, the court of origin disregarded a marriage contract is not relevant in this respect.

If we do this analysis also from the perspective of the two proposals of regulation on matrimonial property regimes¹, both under negotiation, we conclude that the recognition and enforcement of a judgment on matrimonial property regimes under this Regulation should not in any way imply recognition of marriage which underlies the matrimonial property regime that led to the judgment.

As far as **the enforceability** is concerned, a judgment given on maintenance obligations in a Member State which has no obligations pursuant to the 2007 Hague Protocol, *if it is enforceable in the state of origin*, it is enforced in another Member State when, at the request of any interested party, has been declared the enforcement in that State (art. 26 of the Regulation).

The application for a declaration of enforceability is accompanied by the same documents as in the previous scenario, and the reasons for which the court from the State of enforcement may refuse the enforcement are identical to those presented in the case of judgments given in Member States that have obligations according to the 2007 Hague Protocol.

II. Exequatur procedures under the Hague Convention of 23 November 2007 on the Recovery Abroad of Maintenance for children and other family members²

A. Procedure on an application for recognition and enforcement (art. 23)

According to art. 23, the application for recognition and enforcement of a judgment is transmitted through the central authorities under Chapter III of the Hague Convention of 2007, and the requested central authority shall proceed, as the case may be:

- a) Transmits the application to the competent authority which declares immediately the judgment enforceable or registers it for enforcement.

A declaration or registration may not be refused only by invoking the grounds specified in art. 22 a) without having the possibility to formulate objections. The applicant and the party against whom the request is directed shall be notified immediately concerning the declaration or the registration made or concerning their refusal and can contest or appeal them by right. In the procedure of appeal/second appeal, both parties have to benefit from the possibility of being heard.

Means of appeal on the judgment:

- must be filed within 30 days from notice, with the possibility of extension to 60 days, if the party who files the objections does not reside in that contracting state;
- can rely only on art. 20 (criteria for recognition and enforcement), art. 22 (grounds for refusal of recognition and enforcement), or 25, paragraph 1 letter a), letter b) or letter d) or paragraph. 3 letter b) regarding the authenticity or integrity of any document transmitted.
- the solution is communicated to both parties and the promotion of a further appeal does not have as effect the stay of the enforcement of the judgment, except for the extraordinary situations (art. 23 paragraphs 6-10).

- b) If it is itself responsible, then shall take these measures.

¹ It's about the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matters of registered partnerships and Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes.

² 2011/432/EU: Council Decision of 9 June 2011 on the approval, on behalf of the European Union, the Hague Convention of 23 November 2007 on the Recovery Abroad of Maintenance for children and other family members. To be seen http://eur-lex.europa.eu/search.html?lang=en&text=2007+Hague+convention&DTS_DOM=ALL&textScope=ti-te&type=advanced&DTS_SUBDOM=ALL_ALL&SUBDOM_INIT=ALL_ALL&qid=1417074483357&instInvStatus=ALL&DTC=false&locale=ro

2007/712 / EC: Council Decision of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

B. Alternative procedure for an application of recognition and enforcement (art.24)

By the declaration in accordance with art. 63, a State may opt for this procedure, which, unlike the first procedure, is characterized by the following:

- requires that the parties have the *opportunity to be heard before* the judgment for recognition and enforcement to be given;
- the grounds for refusal of recognition and enforcement are separated into a group that the authority may invoke *ex officio* (art. 22 letters a, c, d) and a group that can be invoked (art. 20, art. 22, art. 23 paragraph 7 c) when the reason was generated by the defendant or by the doubts that rise from the documents submitted in accordance with art. 25;
- the means of appeal have no effect on the enforceability of the judgment, except for special circumstances.

We mention that in the relationship between the Member States of the European Union and the Contracting States to the 2007 Hague Convention applies the first exequatur procedure and not the alternative one.

2. ADMINISTRATIVE COOPERATION BETWEEN CENTRAL AUTHORITIES

In order to improve the cross-border recovery of maintenance claims, the 2007 Hague Convention and Regulation (Art. 49-63) established a **system of administrative cooperation**, based on the following authorities:

- **central authorities** designated by each Member State¹, which specify, at the same time, which of the attributions listed by the legal instruments are incumbent to it;
- **competent authorities², public bodies or other institutions** which operate in that State³, under the supervision of the central authority.

Central authorities have the following attributions:

a) general attributions:

- cooperate with each other, including by exchanging information;
- identifies solutions for solving the difficulties that arise in applying the Regulation;
- take measures to facilitate the implementation of the Regulation and to strengthen their cooperation, using the European Judicial Network in civil and commercial matters

b) specific attributions, related to giving assistance in relation to applications listed in art. 56 of the Regulation and 10 of the Convention, namely:

- transmit and receive applications on the matter;
- initiate or facilitate the institution of proceedings upon such applications;
- help to locate the debtor or the creditor, in particular in accordance with art. 61, art. 62 and art. 63;
- help to obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets, in accordance with art. 61-63;

¹ According to Law no. 36/2012 on measures necessary for the implementation of regulations and decisions of the Council of the European Union and private international law instruments in the field of maintenance obligations, in Romania the central authority designated under Art. 49 of the Regulation and art. 4 of the Convention is the Ministry of Justice.

² The competent authority is the public body or a person in a Member State invested with the right conferred by the law of that State to exercise specific powers under the Convention or Regulation. Competent authority may be a court, an administrative institution, an institution of protection of minors and other public institutions that fulfill certain attributions associated to the domain of the Convention or Regulation. In Romania, the competent authorities are, for example, courts, lawyers, judicial executors, notaries, mediators.

³ The designation of any such body, public or of other kind, and the details and scope of its duties shall be transmitted by each Member State in accordance with art. 71 of Regulation.

- Encourage amicable solutions to obtain voluntary payment of the amount of maintenance, where appropriate through mediation, conciliation or similar processes;
- facilitate the ongoing enforcement of judgments, including of arrears;
- facilitate the collection and expeditious transfer of maintenance payments;
- facilitate the production of written evidences or of other kind, without prejudice to Regulation (EC) no. 1206/2001;
- gives assistance in establishing parentage, where necessary for the recovery of maintenance claims;
- initiate or facilitate the institution of proceedings to obtain any provisional measures which are territorial in nature and whose purpose is to ensure the completion of a pending maintenance application;
- facilitate the service of documents, without prejudice to Regulation (EC) no. 1393/2007.

A **creditor** seeking to recover the maintenance claims of his debtor who resides or has assets or income in another Member State, may file the following applications (art. 10 paragraph 1 of the Convention and art. 56 paragraph 1 of the Regulation)



- application for recognition or for recognition and declaration of enforceability (*exequatur*) of an existent decision;
- application for enforcement of a judgment given or recognized in the requested Member State;
- application for delivery of a judgment in the requested Member State, when there is no judgment, including when is necessary the establishment of parentage;
- application to amend a judgment given in the requested Member State or in another state;

A **debtor**, against whom there is a court judgment on maintenance obligations, may file the following applications (art. 10 paragraph 2 of the Convention and Art. 56 paragraph 2 of the Regulation):



- an application for recognition of a judgment leading to the suspension or limitation of enforcement of a previous judgment in the requested Member State;
- an application to amend a judgment given in the requested Member State or in another State.

The applicant has two possibilities:

- a. can address directly the foreign competent authorities of the Member State where the defendant resides;
- b. addresses to the central authority of the Member State of residence (requesting authority / transmitter), which proceeds to the following:
 - ensure to the applicant assistance in completing his application:

Part A to the following categories of applications:	- application of specific measures, filed under art. 53 and set out in Annex V;
	- application for recognition, enforceability or enforcement of a judgment concerning maintenance obligations made under art. 56 and art. 57 and provided by Annex VI of the Regulation;
	- application to obtain or amend a judgment on maintenance obligations made under art. 56 and art. 57 and set out in Annex VII of the Regulation.

Part B to the last two categories of applications mentioned above	- shall ensure that the application is accompanied by all information and documents required by the art. 57 paragraph 5;
	- transmits the application and the annexes of the central authority of the requested State (<i>requested/ receiving authority</i>), which, after performing the control of international regularity, sends them for settlement, depending on the category of application, to the authority or institution holding the personal data(art. 61), to competent courts, to competent authorities responsible for service of documents, to competent authorities for the enforcement of a judgment or to the one competent to ensure free legal aid (art. 44-47).

In order to achieve the acquisition, modification, recognition, enforceability or enforcement of a judgment, the requested central authority uses, as appropriate, according to art. 61, all means to obtain information about the:



- address of the debtor or creditor;
- incomes of the debtor;
- identification of the debtor's employer and/or his back account;
- debtor's assets, resorting to public or administrative authorities that have such information and are responsible for their processing.

The requested / receiving authority has the following obligations to the requesting central authority:

a) within 30 days of receiving the application:



- to confirm that it has received the application, using the form in Annex VIII;
- to inform the initial steps that have been taken or are to be incurred in processing the application
- provide the name and contact details of the person or unit responsible for information regarding the progress of the application.

b) within 60 days after the receipt confirmation, to report on the status of the application.

The requested/ receiving authority may:

- refuse the settlement of the application received, if the requirements of Regulation are not met, transmitting to the requesting central authority the form in Annex IX and stating the reasons for refusal (art. 58 paragraph 8);
- orders the cessation of the process, if after 90 days or within the time period specified, the requesting central authority does not complete the application with the additional information or documents, situation in which is transmitted the form of the Annex IX (art. 58 paragraph 9).

PART II.

PRACTICAL CASES WITH SETTLEMENTS INCLUDED

CHAPTER I.

EXEQUATUR PROCEDURE IN FAMILY LAW MATTERS

1. CASES FOR NOTARIES

CASE NO. 1. Divorce judgment given in a Member State. The lack of mention of the surname of spouses after divorce. Authentication of the husband's statutory declaration.

The marriage registered in the Romanian civil status documents produced a surname change for at least one of the spouses, national of Romania. Subsequently, the spouses get a divorce, and from the divorce judgment given in a Member State does not appear the surname used after the dissolution of the marriage. The civil status offices request a statutory declaration of the spouses or spouse who changes the surname, as a result of divorce.

Given the authentication of this declaration, does the notary public of Romania recognize the divorce judgment given in a Member State?

According to art. 44 of *Law no. 119/1996 on civil status*¹, changes in marital status of nationals of Romania from abroad are registered by the officer of civil status by mentioning it indication on the margin of the civil status acts, with the approval of the National Inspectorate for Public Records. Therefore, in case of a divorce judgment given in a Member State, if it concerns a spouse that is national of Romania, the marriage being registered in the Romanian civil status registers, the civil status officer shall verify the divorce judgment, noting that within its content there is no disposition referring to the surname that the spouses shall have after the dissolution of the marriage (if the marriage has produced legal effects on the surname, one spouse or both spouses changing the surname, under the legal requirements).

In that case, the officer of civil status shall direct the spouses or the spouse to the notary's public office to get an authentic statutory declaration concerning the surname after divorce. Therefore, according to art. 103 paragraph 5 of *Government Decision no. 64/2011 approving the methodology on the implementation of the provisions on civil status*², if from the divorce judgment given abroad does not appear the surname that the spouse will have after the dissolution of the marriage, the civil status officer requests to be submitted, as the case may be:

- authenticated statutory declarations of the spouses from which to result the surname they wish to have as a result of divorce;
- authenticated statutory declaration of the husband who requests the registration of divorce claim from which to result the surname he will have after divorce.

In these situations, the spouses or one of them requests to the notary public the authentication of a statutory declaration regarding the surname that they will have after divorce.

For the drafting and authentication of such declaration, the notary public requests according to Art. 79 paragraph 1 and paragraph 2 in relation to art. 89 of *Law no. 36/1995 on public notaries and notary activity* a copy of the divorce judgment given in a Member State, which he will keep under review, in the light of the legal provisions³.

That is, the notary public will apply art. 21 paragraph 1 of *Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of*

¹ Republished in the Official Gazette of Romania, Part I, no. 339 of 18 May 2012. Subsequently, the law was amended by Law no. 213/2013, published in Official Gazette of Romania, Part I, no. 397 of July 2, 2013.

² Published in the Official Gazette of Romania, Part I, no. 151 of 2 March 2011.

³ See also art. 81 paragraph 4 of Law no. 36/1995.

judgments in matrimonial matters and the matters of parental responsibility, according to which judgments on divorce and matters of exercising parental authority given in a Member State **are recognized in other Member States without the need to resort to any procedure**.

Depending on the modification of the surname occurred as a result of the marriage, the spouses or the husband, as the case may be, are in one of the following situations, according to the Romanian law applicable to the dissolution of marriage (art. 383 of the Civil Code):

- the spouses declare that they have agreed that each of them should keep the surname had during marriage;

- the spouses or the husband declare that they retake the surname had previous to marriage.

In conclusion, the notary public of Romania shall recognize *ipso jure* the divorce judgment given in a Member State and shall proceed to authenticate the statutory declaration of the spouses or of the husband, as the case may be.

CASE NO. 2. Judgment concerning the rights of access given in a Member State. Its recognition with the occasion of the authentication of the declaration of consent given by a parent so that the minor could travel abroad.

The judgment concerning the rights of access was given in a Member State, the mother and the child being resident in that State, and the father resides in Romania. During the program of visiting in Romania, the father wants to spend a stay with the child abroad. For the travel abroad, it is necessary an authentic declaration of the other parent by which agrees.

With the occasion of authentication of this declaration, shall the notary public of Romania proceed to recognize the judgment given in a Member State?

Let us assume that through the judgment concerning the rights of access (or an authentic instrument) given in the Member State (for example, Italy), under 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, it was ordered, among other things, that the minor residing in Italy to spend a month from the summer holiday (the month July) at the residence of the father, national of Romania, and residing in Romania. During the course of this visit program, the father wishes to spend a stay in a resort from outside the area of the European Union (for example, Turkey).

Under these conditions, if the mother is in Romania, goes to the notary public to give the declaration of consent concerning the child's trip abroad, accompanied by the father of the child. Based on the provisions of the art. 30 of Law no. 248/2005 on the status of the free movement of Romanian citizens abroad¹ and art. 24 of Government Decision no. 94/2006 for the approval of the Methodological Standards for implementing this law², which stipulate the conditions under which a minor child, national of Romania, can leave the country as well as the necessary documents for this purpose, results that, in our case, the minor child may travel to Turkey, accompanied by his father, only if presents to the border police an authentic declaration of the mother from which results her consent concerning the trip in the State of destination, as well as the period of the trip.

In order to draw up this declaration, the notary public asks the mother to submit a copy of the foreign judgment. Therefore, if the judgment on access rights is accompanied by a certificate using the standard form in Annex III (**certificate concerning rights of access**), it is directly recognized and enforceable in other Member States, including Romania, and notary public finds that the certificate issued by the court of Italy ensures that, for recognition and enforcement, the judgment given in Italy is considered as if it were a judgment of a Romanian court.

¹ Published in the Official Gazette of Romania, Part I, no. 682 of 29 July 2005.

² Published in the Official Gazette of Romania, Part I, no. 76 of 27 January 2006.

In conclusion, the notary public of Romania shall recognize *ipso jure* the judgment concerning the rights of access issued in Italy and shall proceed to draw up the declaration of the mother based on which the father, during the period of visit that should take place only in Romania, may travel with the minor child abroad.

CASE NO. 3. Authentic convention on the rights of access concluded in a Member State. Changing the child's residence in Romania. Recognition of this convention by the notary public when amending the visit program according to the new arrangement of the parents.

The parents of a minor child, national of Romania, go to the notary public with an application to enshrine their agreement on the modification of the visit program, as it was originally established by an authentic document concluded in a Member State, where the child was habitually resident.

Shall the notary public of Romania recognize the foreign authentic convention when concluding the new agreement of the parents concerning the rights of access?

Taking into consideration the cross-border situation, under *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*, the notarial convention on the rights of access was concluded in a Member State, for example France, and concerned a minor child, national of Romania and residing in France.

Subsequently, the mother with the minor child shall establish in Romania, the father remaining to reside in another Member State, for example, Italy.

Before a notary public of Romania appear the parents of the child and request that, through their consent, to modify the original agreement concluded in France.

The appearance before the Romanian notary public of the father, national of Romania or national of a Member State, attracts the application of the art. 9 paragraph 2 of *Regulation no. 2201/2003*, according to which if the holder of the rights of access accepts the jurisdiction of the court of the Member State where the child is habitually resident by participating to a proceeding before this authority without contesting its jurisdiction, are not incident the provisions of the art.9 paragraph 1, which establishes an exception to the rule according to which the jurisdiction of the courts from the previous habitual residence of the child is maintained.

In this situation, the notary public proceeds to the following:

- requests the submission of the authentic convention concerning the rights of access. In our opinion, it is not necessary that this document to be accompanied by the certificate issued by the competent authority in France, using the standard form in Annex III of Regulation (*certificate concerning rights of access*);

- the rightful recognition of the authentic convention concerning the rights of access drawn up in France;

- draws up a convention for its modification, by applying on the merits of the issue, the Romanian law, as law of the residence of the child;

- hears the minor, if it is necessary;

- issues, at the request of any of the interested parents (in this case, the most interested is the father, as father holding the rights of access), a certificate concerning the rights of access, under art. 41 paragraph 1 of *Regulation (EC) no. 2201/2003* and art. 2 paragraph 2 of *O.U.G. no. 119/2006 on measures necessary for the implementation of Community regulations from the*

date of accession of Romania to the European Union¹, approved by Law no. 192/2007², using the standard form is given in Annex III to Regulation.

CASE No. 4. Authentic convention of liquidation of the matrimonial property regime concluded by the former spouses in a Member State. Its recognition when receiving the owelty

Subsequently to the divorce pronounced by a court of a Member State, under Regulation(EC) no. 2201/ 2003, the former spouses go to the notary public of the same Member State for the liquidation of the matrimonial property regime, and by notarial convention is established of the former wife to receive an owelty from her former husband.

Currently, the former husband is residing in Romania, and the former wife, having the residence in the Member State of origin, goes to the notary public of Romania in order to conclude a convention for receiving the owelty. How will the notary public proceed?

This case is solved based on *Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes*, that is under negotiation³.

According to art. 32, the authentic instruments drawn up in a Member State are recognized in other Member States, unless their validity is contested in accordance with the applicable law and provided that such recognition is not manifestly contrary to public policy of the Member State requested.

Regarding the enforceability, although the notarial convention of France is enforceable, being an authentic instrument, in order to also obtain the enforceability in Romania, according to art. 33, it is necessary to follow the procedure provided by art. 38-57 of Regulation (EC) no. 44/2001 (submission of the exequatur application at the competent tribunal, copy of the foreign notarial convention, which should satisfy the conditions necessary to establish its authenticity).

CASE NO. 5 Recognition of the divorce judgment given by a court of a Member State during the administrative change of surname of the former wife

Can the notary public recognize the divorce judgment given in a Member State in connection with the authentication of the declaration of consent expressed by the former wife to have the surname used during the marriage in order to have the same surname as the children for whom she exercises exclusive parental authority, as well as with the authentic declaration of consent of the former spouse with the same purpose.

Government Ordinance no. 41/ 2003 on acquiring and changing administratively the names of the individuals entitles the former wife to return to the surname has during marriage in order to have the same surname as the children for whom she exercises exclusive parental authority or who actually live with her. The two authentic declarations, of the former wife and former husband, are required. However, if the divorce judgment was rendered under Regulation no. 220/2003 by a court in another Member State (France, for example), the notary public will recognize this judgment in connection with the authentication of the two declarations of consent.

¹ Published in the Official Gazette of Romania, Part I, no. 1036 of 28 December 2006. Subsequently, it was amended by Ordinance no. 79/2011 regulating measures for the entry into force of Law no. 297/20009 on the Civil Code (published in the Official Gazette of Romania, Part I, no. 696 of 30 September 2011).

² Published in the Official Gazette of Romania, Part I, no. 425 of 27 January 2006.

³ The proposal provides for the free movement of judgments, authentic instruments and judicial transactions in matters of matrimonial property regimes, on the one hand, and makes a mutual recognition based on mutual trust resulting from the integration of the states in the European Union. The recognition of authentic instruments means that they enjoy the same probative value as regards the contents of the registered document and the facts contained in it, the same presumption of authenticity as well as the same enforceability as in the State of origin.

2. CASES FOR JUDGES

CASE NO. 1 Recognition of a divorce judgment given in a Member State. Grounds for refusal of recognition of this judgment invoked before the Romanian court

Tribunal X of Romania, in whose area is the Register Office where the marriage was registered, was vested with an application promoted by the husband cetățean, having German nationality and residing in Germany, by which is requested the recognition and enforcement of the divorce judgment given in Germany. By filing a statement of defense, the defendant, national of Romania and residing in Italy, requests the rejection of the exequatur application, because the divorce trial took place in Germany without her being summoned, the German courts not having jurisdiction, and she, in turn has filed for divorce at a court of Italy, submitting for this purpose a divorce judgment previously rendered.

How will the Romanian court proceed?

The Romanian court verifies the documents specified in Art. 37 paragraph 1 of Regulation no. 2201/2003 and attached to the application for summons (these documents represent certificates drawn up by the court of origin, meant to ease the burden of proving that the requirements of regularity of the judgment given by the German court were satisfied).

If it is a *judgment given in absence*, the applicant must submit some additional documents, according to art. 37 paragraph 2 of Regulation, respectively the original or a certified copy of the document which establishes that the document of seising the German court or an equivalent document has been served to the party who failed to appear at the hearing or any document which shows that the defendant has accepted the judgment unequivocally. Depending on the situation, the Romanian judge may grant a deadline for submission of these documents or of the standard certificate whose form is in Annex I, or may accept equivalent documents or renounce to their submission, if he considers that has sufficient information to judge (delivering a solution of rejecting of this defense or, on the contrary, rejecting the exequatur application based on art. 22 letter b of Regulation). Also, he may, under art. 27 paragraph 1 of Regulation, to stay the procedure of recognition if it is proved that the German court's judgment is subject to an ordinary means of appeal.

Regarding the invocation of *non jurisdictional competence of the German courts*, the Romanian judge shall apply the provisions of art. 24 of the Regulation, according to which it is forbidden the control of the court with jurisdiction of the Member State of origin.

Regarding *the existence of a divorce judgment given in Italy between the same parties*¹, only if this is **previous** to the divorce judgment whose exequatur is requested, on the one hand, and only if there is irreconcilability between the two foreign judgments, as well as the circumstance according to which the divorce judgment given in Italy meets the necessary requirements for its recognition in Romania, then the Romanian court shall reject the *exequatur* procedure, holding as reason for refusing the recognition art. 22 letter d of Regulation.

CASE NO. 2 Exequatur application of a judgment on child's custody given by a court of a Member State. Not hearing the child and the existence of a subsequent judgment in matters of parental responsibility.

Through a judgment given in a Member State (Italy, for example), the child is entrusted to the father, with Romanian or Italian nationality residing in Italy, and the mother who is in Romania, opposes the judgment. The father addresses to the court within whose jurisdiction the defendant resides, having Romanian nationality, requesting a declaration of enforceability for

¹ The Romanian court may refuse to recognize the foreign judgment requested by the applicant and if the defendant files in defense a divorce judgment given by a Romanian court, between the same parties, and which is irreconcilable with the divorce judgment of the German court.

the judgment given by the court of the Member State of origin, under art. 28 of Regulation no. 2201/2003, submitting the documents provided for art. 37 and art. 39. What will be the solution of the Romanian court, if from the certificate mentioned in art. 39 results that the minor has not been heard or if there is a later judgment relating to parental responsibility?

Although art. 21 paragraph 1 of Regulation, starting from the principle of mutual trust, provides for automatic recognition of any judgment in matters of parental responsibility given in a Member State of origin, still the legislator is the one who entitles any interested person to file, before the court of another Member State, an application for recognition or non-recognition of the judgment.

However, in this case we are in such a situation, the Romanian judge being vested with an application based on provisions of art. 28 of Regulation, which also takes up the recognition and enforcement of the foreign judgment in Romania, as a Member State. The solution of the Romanian court may be:

- Refusal of recognition under art. 23 letter b) of the Regulation, based on the fact that the child was not heard in this procedure either directly by the Italian court, or through rogatory letter by the Romanian court in whose jurisdiction is the child's residence, although such a hearing is decided depending on the child's age and maturity, on the one hand, and through the Romanian legal provisions;
- Refusal of recognition under art. 23 letter e) of the Regulation, if the judgment given by a Romanian court (or by the court of a Member State or third country where the child is habitually resident) by which the child's residence is established at the mother, is so irreconcilable as well as subsequent to the judgment whose enforceability is sought, and the subsequent judgment meets the requirements of recognition in Romania.

This situation based on art. 28 of Regulation should not be confused with the assumption according to which the father has a judgment of return of the child given by the court of Italy under art. 11 paragraph 8 of the same Regulation (see case no. 3). The holder of the parental responsibility may, at the same time, make use on the territory of Romania of both judgments given by the courts of Italy, their legal regime being different, although the purpose is the same, bringing the child in Italy.

CASE NO. 3. Abolition of the exequatur procedure when exists a judgment on the return of the child given by a court of a Member State. Seising the Romanian court with an application for refusal of recognition of this judgment.

The mother submits to a court of Romania an application for refusal of recognition of the judgment given by the Italian court under art. 11 paragraph of Regulation no. 2201/2003 and certified in the State of origin by issuing the certificate on the return of the child mentioned in art. 42 and whose model is in Annex IV. What will be the solution of the Romanian judge?

Making a brief history of the events in this case, the situation is as follows: In a judgment given in a Member State (Italy, for example), it was ordered the custody of the child to the father (national of Romania or Italy and residing in Italy), and the child is temporarily on vacation with the mother in Romania. Because the mother refuses to return with the minor in Italy, and being a wrongful retention of the child in another Member State than the State where the child is habitually resident, the father addresses the Romanian court that has jurisdiction with an application for return grounded on the provisions of the art. 13 of the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction*. If the solution of the Romanian court is of non return of the child, this judgment is transmitted, according to art. 11 paragraph 6 of the Regulation, to the court of the Member State of origin, so that in the end, to decide the return or non return of the child from Romania. If the solution is to return the child

(art. 11 paragraph 8 of Regulation), the court of Italy shall issue the certificate of return (only after certain procedural guarantees were complied with during the judicial procedure, especially if the parties and the child were heard), which accompanies the judgment of return and which is directly recognized and enforced in Romania.

However, as long as there is no doubt about the authenticity of the certificate of return issued by the foreign court, and it is submitted in accordance with the standard form that can be found in Annex IV of the Regulation, is inadmissible the promotion of opposition to the recognition of the judgment for return, the purpose of the seised court being to establish the enforceability of the certified judgment and to allow the immediate return of the child.

The only means of appeal of the mother against the judgment of return and not against the certificate of return is the appeal which must be filed at the court of the Member State of origin. Moreover, the courts of Romania, as Member State of enforcement, have no jurisdiction to refuse or stay the enforcement of a certified judgment by which is ordered the return of the child wrongfully retained, even if the court of the Member State of origin has violated art. 42 of the Regulation, this breach being regarded as a matter which solely concerns the jurisdiction of the court of the Member State of origin.

CASE NO. 4. Conflict between two judgments delivered in relation to the return of a child

How is settled by the Romanian court the conflict situation which may occur between a non return judgment given by the court of the State where the child was abducted and a later judgment of return ordered by the court of the Member State of origin?

The Regulation provides for the solution in the case of this situation of conflict between a non return judgment given by the court of the State where the child was abducted (in this case, Romania) and a later judgment of return ordered by the court of the Member State of origin. Therefore, from the analysis of art. 11 paragraph 1 and art. 42 of the Regulation results that the certified judgment of return of the child is not subject to any exequatur procedure, being immediately recognized and enforceable in Romania, the state where is the child abducted or removed or wrongfully retained.

It is not necessary for the Romanian judge to be proved the existence of an earlier judgment, final, on the child's custody, since the purpose of return is precisely to settle the problem of the child's custody.

CASE NO. 5 Judgment given in a Member State (for example, Spain) on rights of access of a minor residing in Romania.

The spouses have Romanian nationality and reside in different Member States (Spain and Romania), and the child resides in Romania. By judgment of the Spanish court, the father has a right of access which implies moving the minor child to his residence in Spain, for one month during summer holiday. Since the wife opposes to the program of visit, and he does not have the certificate on rights of access, the husband addresses to the Romanian court in order to obtain the exequatur. How will the judge proceed?

Since the right of access stated by an enforceable judgment given in a Member State is recognized and enforceable in Romania without being necessary a declaration of enforceability and without any possibility of opposing to its recognition only if the judgment is certified in the State of origin by using the form in Annex II of the Regulation (EC) no. 2201/1003, results that the lack of this certificate from the file of the case determines the judge to proceed to one of the following solutions:

- either postpones the case so that the applicant may submit the certificate, under which the recognition takes place by operation of law, being abolished the *exequatur* procedure;
- or verifies all documents and procedural guarantees, so that in the end, to admit or not the *exequatur* procedure with which was vested.

CASE NO. 6. Civil Protection Order. Residence of the persons protected in a Member State. Recognition in Romania

Civil protection measure of the wife, national of Romania residing in a Member State and of her minor child from the marriage, was ordered by a judgment of the competent authority¹, according to which the husband, national of Romania, has prohibition for 12 months to have access in the common residence from the Member State, to get near the dwelling at a distance of less than 100 m, to approach them, at a distance of less than 100 m and to get in touch by any form with them.

Coming back to Romania in order to spend the holidays with the minor child, the wife requests the recognition of the protection measure ordered in the State of origin, because the husband is also in Romania. What will be the solution of the Romanian court?

Based on the verification of the documents expressly provided by art. 4 paragraph 2 of Regulation (EU) No. 606/2014 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, for which according to art. 15 of Regulation no legalization or other formality are imposed, the tribunal with jurisdiction of Romania shall accept the application of recognition filed by the wife and shall deliver a judgment by which:

- recognizes by operation of the law the protection measure ordered by the court of Italy, limiting, if it is necessary, the duration of the measure to at most 12 months from the date of issue of the certificate, using the standard form specified in Annex I of Implementing Regulation (EU) No. 939/2014 of the Commission of 2 September 2014 fixing certificates referred to in art. 5 and 14 of Regulation (EU) No. 606/2013

- adjusts, according to art. 11 of Regulation, the protection measure ordered by the court of the Member State of origin, in the sense that provides, for example, the prohibition of access and of approaching the dwelling to concern the dwelling of the applicant from Romania. This adjustment is made for the recognition of the protection measure to be effective, on the one hand, and on the other hand, the Romanian law enshrines such a measure (art. 26 of Law no. 217/2003 on preventing and combating domestic violence). The court is obliged to notify the husband on the adjustment of the protection measure who, is entitled, according to art. 11 paragraph 5 of Regulation to promote an appeal, with suspensive effect.

The foreign judgment, adjusted or not by the decision of recognition of the Romanian court, shall benefit of *res judicata* on the territory of the ruling State, being enforceable, without the need for a declaration of enforceability.

Question: In this case, in what circumstances the foreign judgment is refused to be recognized or is refused the enforcement of the protection measure by the Romanian court?

Answer: The Regulation imposes in the content of art. 13 the following requirements:

- the application for refusal of recognition or of non recognition to be promoted by the husband at the competent court of Romania;
- recognition is manifestly contrary to public policy in Romania;
- recognition is irreconcilable with a judgment given or recognized in Romania.

¹ The measure of civil protection must be ordered subsequent to the date 11 January 2015, regardless the date of institution of proceedings, so that according to art. 22 of Regulation, this shall enter into the scope of the European instrument.

CASE NO. 7 Recognition of a judgment given in a Member State by which was ordered the custody of the minor to the mother and the father was obliged to pay a monthly alimony.

By the application lodged at the court within whose jurisdiction the defendant resides, the applicant requested recognition of the judgment given by a court of Spain by which the child's custody was given to the mother, residing in Spain. Can be requested the partial exequatur ? What will be the solution of the court?

Regarding the solution related to the child's custody are incident the dispositions of art. 21 paragraph 1 of Regulation no. 2201/2003, and on the solution related to the maintenance obligations are applicable the dispositions of art. of Regulation no. 4/2009, which means that the judgment given by a court of a Member State, in this case Spain, is recognized *ope legis* in Romania, without the need of further formalities (stating that for the application ancillary to the alimony, is abolished the exequatur procedure).

However, since in the case was not proved the existence of any reason for refusing the recognition or enforcement, the Romanian court will accept the application filed.

CASE NO. 8 Cross border case on the rights of access settled by the Romanian court. Jurisdiction for the issue of the certificate on the rights of access

In case of a judgment on rights of access of a parent, if there are elements of foreign origin (for example, the minor is at the residence of his mother in other Member State, Germany), at the request of the interested party is issued the certificate on rights of access. What is the competent authority to issue the certificate?

According to Government Emergency Ordinance no. 119/2006 on measures necessary for the implementation of Community regulations from the date of accession to the European Union, for the judgments given in Romania and for which recognition and declaration of enforceability in another country (Germany) are sought, the jurisdiction to issue the certificate on rights of access (as well as the divorce certificate and certificate of return of the child) belongs to the first instance, thus to the court.

In this case, if the court does not issue *ex officio* this certificate, the father may request the issue of the certificate either while promoting the action, or later, after the delivery of the court judgment.

CHAPTER II. MAINTENANCE OBLIGATIONS


1. CASES FOR NOTARIES

CASE NO. 1. Minor child habitually resident in Romania. Parents with different nationalities and residence in different Member States, which have obligations under the Hague Protocol of 2007. Recognition by the notary public of Romania, when concluding the notarial convention on amending the amount of the alimony, the authentic instrument drawn up in the Member State of origin concerning the maintenance obligation between parent and child.

The mother has Romanian nationality residing in Romania, and the father of the child (born in or out of wedlock) is national of a Member State and resides abroad. These submit to the notary public of Romania an authentic instrument drawn up in a Member State (for example, Italy or Germany) concerning the alimony which the father is obliged to pay for the child who is habitually resident in Romania. It is intended to conclude a notarial convention amending the amount of alimony to which the minor child is entitled to.

Will the notary public recognize the authentic instrument of the Member State of origin?

The notary public proceeds to the following:



- verifies the date of drawing up the authentic instrument issued by the competent authorities of Italy or Germany¹, as Member State of origin, to see if it is subject, concerning the recognition, to the provisions of *Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*. Therefore, even if the authentic instrument of the State of origin is issued prior to the date of applying the Regulation, according to art. 75 paragraph 2 of this Regulation, are incident its provisions, if the moment of requesting the *exequatur* is subsequent to the date 18 June 2011;

- verifies if the present authentic instrument has the meaning indicated by art. 2 p. 3 of the *Regulation*;

- verifies the existence of the extract of the authentic instrument on maintenance obligations which is not subject to a procedure of recognition and enforcement, by presenting the form whose model is in Annex III of the Regulation;

- applies art. 48 in relation to art. 17 of the Regulation, which means that the notary public will recognize by operation of law the authentic instrument from the state of origin, without having to go through any procedure and without any possibility of opposing its recognition. With respect to enforceability, the foreign authentic instrument has the same enforceability as any authentic instrument from Romania;

- draws up the notarial convention of raising the amount of alimony, initially agreed by the authentic instrument from Italy or Germany, as Member State of origin, applying the provisions of art. 3 of the *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations*

- under art. 48 paragraph 3 of Regulation and art. 6 of *Law no. 36/2012 on measures necessary for the implementation of regulations and decisions of the Council of the European Union and private international law instruments in the field of maintenance obligations*², the

¹ Italy and Germany are Member States bound by the 2007 Hague Protocol.

² Published in the Official Gazette of Romania, Part I, no. 183 of 21 March 2012.

notary public, as issuer of the document, issues at the request of any interested party an extract of the authentic instrument completed using the form found in Appendix III.

Therefore, if it is necessary, the authentic instrument concluded by the notary public of Romania, by which the amount of the alimony increased, is to be recognized and enforced in the Member State where is the residence or where the creditor has his assets (in this case, Italy or Germany).

CASE NO. 2. Notarial convention between parents on the maintenance obligation for the minor child. The residence of the parties in different Member States, which are bound by the Hague Protocol of 2007. Minor child habitually resident in Romania. Information on the recognition procedure.

In 2012, by an authentic instrument concluded in Romania, the parents agreed that the minor child habitually resident in Romania to benefit from maintenance in kind from the mother and the father, residing in a Member State (for example, Italy), to pay monthly, by back transfer, the amount of 300 euro. Since in the last months the debtor has no longer complied with the obligation assumed through the notarial convention, the mother, as legal representative of the child creditor, addresses to the notary public of Romania in order to obtain information on how to enforce the authentic instrument in the Member State of residence of the creditor.

What is the legal advice offered by the notary public so that the notarial document concluded in 2012 to be recognized and enforced in another Member State?

1. Depending on the Member State in which enforcement is sought by the creditor, the notary public shall issue an extract from the authentic instrument concluded in 2012, using one of the two forms of the following Annexes of the Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations:

Annex III, for states bound by the 2007 Hague Protocol and for which the authentic document in this case shall not be subject to a procedure for recognition and declaration of enforceability;

Annex IV, for states not bound by the 2007 Hague Protocol and for which the authentic instrument in this case is subject in these States to a procedure for recognition and declaration of enforceability.

In this case, being Italy, the notary public shall issue an extract of the authentic instrument on maintenance obligations, using the form in Annex III.

2. The notary public shall inform the creditor that has the following legal possibilities to obtain maintenance from the debtor abroad:

a. may address to the Ministry of Justice, as central authority in Romania, which has responsibilities related to completion, transmission of the application to the central authority of another Member State, namely Italy, and cooperation with any authorities and institutions in the field. Therefore, the creditor must submit the following documents to the Ministry of Justice, provided by art. 48 of Regulation (art. 25 of the Hague Convention):

- notarial convention in its entirety;
- extract from the notarial document
- a document showing the amount of arrears and the date when such amount was calculated

After performing the control of international regularity, the Ministry of Justice completes *Part A* of the application for recognition, enforceability or enforcement of the authentic instrument (using the form in Annex VI), after which can assist the creditor to complete *Part B* of the application.

Finally, the Ministry of Justice of Romania shall transmit the application and supporting documents to the central authority of Italy.

b. the creditor has the opportunity to directly address the competent foreign authorities in Italy (art. 3 paragraph 4 of Law no. 36/2012).

CASE NO. 3. Adult child habitually resident in a Member State bound by the Hague Protocol of 2007. The debtor is resident in Romania. Recognition by the notary public in Romania of the judgment given in a Member State on the maintenance obligation of the parent to child, during authentication of a declaration of the creditor for receiving the overall amount of the alimony.

The adult child, who is completing his education, is resident in a Member State bound by the Hague Protocol of 2007 and, coming on holiday in Romania, addresses the notary public in order to give a declaration from which to result the fact that he has received from his father the alimony anticipated for the next year. Will the notary public recognize the judgment given in the Member State of origin and will proceed to authenticate the declaration of the adult child?

The answer is positive, if the judgment of the court of origin falls within the dispositions of art. 75 paragraph 1 of Regulation no. 4/2009, which attracts under art. 17 paragraph 1 of Regulation, the rightful recognition of this judgment, in the situation of submitting to the notary public the documents provided by art. 20 of the same European instrument.

2. CASES FOR JUDGES

CASE NO. 1 Judgment given to establish the alimony between in-laws.

Judgment given in France after 18 June 2011 by which the son-in-law, national of Romania and residing in Romania, was obliged to pay alimony for his mother-in-law, national of France and residing in France. Since the debtor does not voluntarily comply with the judgment, the creditor addressed immediately the judicial executor from Romania to begin the forced execution.

Is admissible the appeal to the execution filed by the debtor by which invokes the refusal of recognition and enforcement of the foreign judgment on the grounds that the Romanian law does not regulate the maintenance obligation between this category of in-laws?

If, for example, according to art. 3 paragraph 1 of the 2007 Hague Protocol, the law applicable to maintenance obligations between the parties (their relationship being of in-laws, mother-in-law and son-in-law) was the French law, which enshrines in art. 260 of Civil Code such a legal obligation, the court of the Member State of origin ruled that the defendant (national of Romania / French domicile / residence in Romania), as son-in-law, was obliged to pay alimony for his wife's mother, of French nationality and resident in France. In relation to the date of filing the action in France (after the date of 18 June 2011) and the date of delivering the judgment (subsequent to the same date), results that the procedure of the *exequatur* is abolished, the foreign judgment producing the same effects in Romania as a judgment given by a Romanian court, and if the judgment is enforceable in the Member State of origin, it is also enforceable in Romania, without the need for a declaration of enforceability (art. 17 of Regulation).

The creditor has chosen to address with an application for forced execution, through a conventional representative (attorney), to the judicial executor of Romania, who will proceed directly to forced execution¹, under the provisions of the New Code of Civil Procedure.

The debtor files an application at the court in whose jurisdiction there is the legal executor's office, invoking a ground for refusal of recognition and enforcement of the judgment given in France, the fact that according to the Romanian law, the parents-in-law and the son-in-law/daughter-in-law are not among those listed in art. 516 of the Civil Code among whom there is the maintenance obligation (husband and wife, former spouses, relatives in a straight line, among brothers and sisters).

The court will reject the application made by the applicant as inadmissible because, according to art. 17 of the Regulation, there is no possibility of contesting recognition of the judgment, the debtor having as option either a means of appeal against it promoted at the French court within 45 days, for the reasons provided by art. 19 paragraph 1 of Regulation, or an application for refusal or stay of enforcement of the judgment, according to the Romanian law, in so far as they are not incompatible with the reasons mentioned in art. 21 paragraphs 2 and 3 of the Regulation.

There would be a solution, based on art. 6 of the Hague Protocol of 2007, which entitles the debtor to contest the creditor's claim on the grounds that "neither the law of the State where the debtor has his habitual residence nor the law of the State of nationality of both parties, if they have the same nationality, does not require the maintenance obligation concerning him". However, this text implies that, in our case, the debtor and creditor must have common Romanian nationality, in order to be able to admit the application for appeal with which the Romanian court would have been vested.

A note on art. 22 of the Regulation, according to which "the recognition and enforcement of a judgment on maintenance does not imply in any way recognition of the family

¹ According to art. 636 of the NCPC, the European enforcement orders on which the EU law does not require preliminary recognition in the Member State in which enforcement is to be made, are enforceable by law, without any prior formality.

relationship, parentage, marriage or affinity, underlying the maintenance obligation which gave rise to the judgment": if the maintenance obligation is based on a marriage between two persons of the same sex concluded in a Member State that allows the union (i.e. the Netherlands), the foreign judgment is to be recognized and enforced in Romania.

CASE NO. 2. Judgment for establishing the alimony. Minor child residing in a Member State. Debtor residing in Romania. Legal aid.

Through a final judgment in France, whose *exequatur* is requested in Romania, the minor child obtained the obligation of the father, national of Romania/France and residing in Romania, to pay a monthly alimony. The minor, through the legal representative, requests legal aid from the Romanian court

How it should be proceed?

Legal aid is understood by Regulation (EC) no. 4/2009 as „assistance necessary to enable parties to know and assert their rights, and to ensure that applications sent through the central authorities or directly to the competent authorities, shall be resolved in an efficient and complete manner” (art. 45 paragraph 1)¹. From the analysis of chapter V on access to justice of the Regulation (EC) no. 4/2009, results that the problem of granting legal aid² by the **court of the requested Member State** arises in the following situations:

1. The creditor is *a minor under the age of 21* and filed *any application* on the maintenance obligations arising from a parent-child relationship, pursuant to art. 56, case in which the legal aid is free, according to art. 46 paragraph 1 of the Regulation.

As for Romania, as requested State, the creditors of the maintenance obligations who have not attained the age of 18 years and are completing their education, but not more than 21 years old as well as the vulnerable persons, as they are defined by art. 3 letter f) of the 2007 Hague Convention, benefit, according to art. 13 paragraph 1 of the *Law no. 36/2012 on measures necessary for the implementation of regulations and decisions of the Council of the European Union and private international law instruments in the field of maintenance obligations, from free assistance in the forms provided by art. 6 and art. 8 index 1 of the Government Emergency Ordinance no. 51/2008 on legal aid in civil matters*;

2. In the State of origin, the applicant has *received full or partial legal aid or exemption from costs or expenses*, or benefited from free proceedings before an administrative authority listed in Annex X of the Regulation³, in which case has the right to benefit, within any procedure of recognition, enforceability or enforcement, from the most favorable legal aid or from the most

¹ The current rules on legal aid in the European Union under *Directive 2003/8 / EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes* (published OJ L 26 of 31 January 2003, p. 41), were supplemented by specific rules, through the texts of Regulation no. 4/2009, thus creating a special legal aid in matters relating to maintenance obligations.

² According to art. 45 letter a) - letter g) of the Regulation, legal aid includes the following: "pre-litigation advice with a view to reaching agreement before the initiation of proceedings; legal aid in seising an authority or a court and representation in court; total or partial exemption from payment of the costs and fees of persons authorized to perform certain acts during the proceedings; in the Member States where the party who enters pleas unsuccessfully is obliged to pay the expenses of the other party, if the beneficiary of legal aid enters pleas unsuccessfully, the costs incurred by the opposing party, provided that such expenses have been covered if the beneficiary was ordinarily resident in the Member State where the court is seised; interpretation; translation of the documents required by the court or competent authority and transmitted by the beneficiary of the legal aid that is necessary to settle the dispute; travel expenses which the beneficiary of the legal aid has to bear when the physical presence at the hearing of people involved in supporting the cause of the beneficiary is required by law or by the court of the Member State concerned and when the court decides that there is no other possibility that such people to be heard properly”.

³ For example, the administrative authorities indicated by art. 2, paragraph 2, are: in Sweden, law enforcement authority (*Kronofogdemyndigheten*) in England, Wales and Scotland, the Commission on maintenance and enforcement (*Child Maintenance and Enforcement Commission- CMEC*).

extended exemption provided for by the law of the State of enforcement (art. 47 paragraph 2, respectively paragraph 3 of Regulation);

3. The applicant did not receive any legal aid in the Member State of origin, in which case he can benefit from legal aid under the internal law of the requested State, especially the evaluation of the applicant's means or of the grounds of his application (art. 47 paragraph 1 of Regulation). With regard to Romania, according to art. 13 paragraph 2 of , *Law no. 36/2012 on measures necessary for the implementation of regulations and decisions of the European Union Council and private international law instruments in the field of maintenance obligations*, the debtors and creditors of the maintenance obligation who are in such a situation, benefit from legal aid under requirements of Government Emergency Ordinance no. 51/2008, complying with the continuity and equal treatment given in the State of origin.

In this case, according to art. 46 paragraph 1 in relation to art. 50 paragraph 1 and paragraph 3 of Regulation, the Romanian court grants legal aid in case of the exequatur procedure, at the request of a minor creditor, of some claims of maintenance, as they appear from a foreign judgment given in a Member State. If the application of legal aid concerns legal aid for seising an authority or of a court and for representation in justice (art. 45 letter b), then they are ensured by the central authority of the requested Member States, either directly through public authorities or through other private bodies or persons .

According to art. 41 of GEO no. 51/2008, the application for public aid shall be filed with supporting evidence

- either through the central authority of the Member State of domicile or residence of the applicant;

- either through the Ministry of Justice of Romania, as requested central authority, which after performing the control of international regularity of the exequatur application accompanied by the documents provided for by the Regulation, transmits them for competent settlement to the competent territorial bar (being applicable in this case art. 18 in relation to art. 14-17 of Law no. 36/2012), to the Chamber of Judicial Executors, or, as the case may be, to the court with jurisdiction (the court within whose jurisdiction there are the domicile or assets of the debtor);

- or directly to the competent Romanian court according to art. 11, respectively to the court of enforcement.

CASE NO. 3 Change the first judgment establishing alimony and its recognition in Romania. Effects on the original judgment

The debtor is resident in Germany where was given the initial judgment on establishing alimony in favor of the minor child. The debtor has assets or incomes in Romania. The creditor is residing in Romania and the initial judgment was recognized in Romania and is enforced on the assets of the debtor in Romania. The debtor has obtained a judgment of changing the amount of the alimony in Germany and wants that the judgment on change to be recognized in Romania in order to limit the enforcement of the first judgment. How will proceed?

The debtor may file an application pursuant to art. 56 paragraph 2 letter a of Regulation, addressed to the central authority of Germany, which transmits the request to Romania, where the judgment on change is recognized or acknowledged and its enforcement is approved (exequatur). The parties will be notified of this judgment and will have the opportunity to contest or appeal against the recognition, the approval of exequatur or the enforcement, according to the procedures laid down by Regulation. Once the exequatur and the means of appeal shall be exhausted, the judgment of change shall be effective in Romania, thus limiting the enforcement of the first judgment.

CASE NO. 4. Law applicable to maintenance obligation. Adult child completing his education. Residence of the creditor in a Member State

The creditor residing in a Member State has a judgment of the Member State of residence by which the debtor, who is residing in Romania, is obliged to pay monthly the amount of 400 euro, as alimony, for the minor child who is abroad. The creditor wants that judgment on maintenance obligation to be enforced in Romania, the state where the debtor resides.

We present the case where the foreign judgment is given in a Member State bound by the 2007 Hague Protocol.

The creditor requests to the central authority of the Member State of origin (Italy, for example) to transmit using the form in Annex VI, an application for recognition or acknowledgment or for declaration of enforceability (exequatur), according to art. 56 paragraph 1 letter a, of the judgment on maintenance in Romania, pursuant to Section I of chapter IV of the Regulation, using the attached forms.

In the application, the creditor may be, where appropriate: the person to whom is owed; a public institution acting on behalf of the creditor; a public institution that provided benefits to the creditor.

The application will be processed by the Ministry of Justice, as the central authority in Romania, being verified:

- if the application falls within the scope of Regulation
- if the application concerns the recognition or acknowledgment and declaration of enforceability
- if the debtor resides in Romania or has property or income in Romania (something that may have been found already by the central authority of Italy)
- verifies if the information required in the application (art. 57, paragraph 2) and the documents attached to the application are complete.

The judgment may be enforced by the competent authorities responsible for the enforcement of Romania in the same manner as if it were a judgment of a Romanian court. The debtor will have an opportunity to present an appeal or to contest the enforcement of the judgment on the grounds set out in the Regulation.



Edited and printed by S.C. MAGIC PRINT S.R.L.

45 B Republicii Street, Onești, Bacău County

Telephone / Fax: 0234 319 810

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This publication has been produced with the financial support of the "Civil Justice" Programme of the European Union. The contents of this publication are the sole responsibility of the author, Gabriela Lupșan, and can in no way be taken to reflect the views of the European Commission.

ISBN 978-606-622-152-8



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2014

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