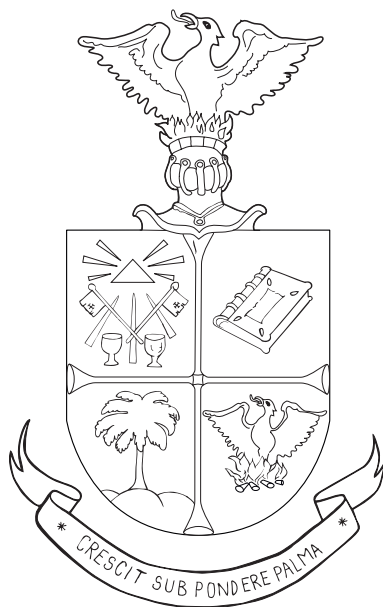


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VI. évfolyam, 1-2. szám

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LEGAL TREATMENT OF DIVORCE AND SEPARATION IN THE EUROPEAN UNION

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1. Introduction

In the European Union, family-related legal institutions, benefits, and other matters, basically fall within the jurisdiction of each Member State, nonetheless there are matters which are influenced by the international judiciary,¹ international conventions and changes in international social norms,² which constantly broaden the concepts that are relevant in the jurisdiction of Member States.³ In Case C-267/06,⁴ the European Court of Justice (hereinafter, the ECJ) stated that ‘marital status’ and the benefits that are based on such status belong to the competence of Member States and that EU law would not violate the competence of the Member States. However, the ECJ highlighted that, in exercising such competence, the Member States are required to respect Community Law/EU Law. In Case C-267/83,⁵ it was stated that the notion of ‘family’ did not include the criterion for family members to have to live together “under the same roof” continuously and that, as such, the fact that spouses live separately does not mean that their marriage is to be treated as having been terminated (which would have to be determined by the competent authorities).

In addition to EU regulations, the following promulgated legal documents constitute the international background for family protection: Article 16 of the Universal Declaration of Human Rights in 1948, proclaimed in 1956; Article 12 of the Convention for the Protection of Human Rights and Fundamental

1 European Court of Human Rights, European Court of Justice.

2 E.g. the spread of same-sex marriages.

3 For example, in a case in which it is necessary to decide whether or not a relationship constitutes “family life”, these relevant factors can be taken into consideration: whether they still live together, the length of the relationship, and other factors demonstrating commitment to the relationship, such as having children or not.

4 Judgment of the Court of 1 April 2008, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen [2008] ECR I-01757.

5 Judgment of the Court of 15 February 1985, Aissatou Diatta v. Land Berlin [1985] ECR 00567.

Freedoms, signed in Rome on 4 November 1950, proclaimed by Act XXXI of 1993 in Hungary; Article 10 of the International Covenant on Economic, Social and Cultural Rights of 1966, New York, proclaimed by Legislative Decree 9 of 1976; Article 23 of the Covenant on Civil and Political Rights; Articles 1 and 2 of the UN Declaration on the Elimination of Violence against Women of 1993; Articles 10 -18 of the European Social Charter of 1961, adopted by the Council of Europe; Article 9 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000; and the Convention on Mutual Acknowledgment, Minimum Age and Registration for Marriage, signed in New York on 10 December 1962.

The Brussels IIa Regulation does not define the concept of marriage, although its interpretation is very important. Consequently, there is a fundamental question of whether the concept of marriage should be interpreted at the level of EU legislation or separately, as it is interpreted under the laws of each Member State. The problem posed by this lack of a uniform concept is most apparent in the different treatment of same-sex couples in Member States, more specifically in deciding whether the concept of marriage is to apply to both heterosexual and same-sex couples. By 2019, sixteen EU Member States will recognize the marriages of same-sex spouses, granting them the same rights as heterosexual spouses. Other Member States, while not recognizing marriages between same-sex couples, guarantee the same rights through the establishment of a special partnership for same-sex couples.⁶

Many argue that currently it is not necessary to have a legal definition for 'marriage' under EU law as, on the one hand, family law institutions are deeply rooted in the national traditions of Member States and, on the other hand, the concept of same-sex marriage differs within each Member State, and thus the definition of marriage should be left to the competence of the Member States. The current ECJ practice strengthens the non-autonomous interpretation⁷ as, for example, the Brussels IIa Regulation must be applied to the divorce of same-sex couples in the Netherlands whilst they need not be applied in Poland and Lithuania. Article 9 of the Charter of Fundamental Rights concerning "men and women who have reached the age of marriage",

6 Source: <http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013> accessed on 12 December, 2018.

7 HONORATI, Costanza (editor): *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, A Handbook on the Application of Brussels II.A Regulation in National Courts*, G. Giappichelli Editore, Torino, Peter Lang GmbH, Frankfurt am Main, 2017, 25-26.

confirms the “right to marry and establish a family” in Article 12 of the European Convention on Human Rights, which clearly demonstrates progress towards the recognition of marriage between same-sex couples. However, Article 9 also states that the effective exercise of these rights must be ensured in accordance with “national laws”, which means that national parliaments have discretion to deal with these matters. Although they are not binding, the “Explanations” to Article 9 of the Charter provide useful guidance to its interpretation. Generally, the “Explanations” emphasize that “the Article does not prohibit or provide for the marriage status of same-sex relationships”.⁸

At the time of the drafting of the Brussels IIa Regulation, the legal practice and jurisprudence in the EU was more inclined to define marriage as a relationship between a man and a woman aimed at a long-lasting common life, which essentially maintained the formalities of the national laws the Member States. In the case of the Kingdom of Denmark and the Kingdom of Sweden v the EU Council⁹ it was still stated that, according to the generally accepted definition of the Member States, the concept of marriage meant a union of heterosexual spouses. In recent years, given the changes in the regulations of the Member States, the ECJ no longer defines marriage as a relationship between a man and a woman. Consequently, the Brussels IIa Regulation applies to divorces between same-sex spouses but not to divorces between same-sex couples who live in registered partnerships.¹⁰ In the case of *Schalk and Kopf v Austria*¹¹ in 2010, the position of the European Court of Human Rights was that the European Convention on Human Rights (ECHR) does not oblige member states to legislate for or legally recognize same-sex marriages, was clarified, thus each member state had the discretion to decide whether or not to accept marriages between same-sex couples, resulting in narrower or broader interpretations of the concept of marriage. In Case No C-117/01,¹² the ECJ stated that Member States have discretion to define the

8 WOPERA, Zsuzsa: *Az európai unió családjog érvényesülésének kritikás pontjai*. (Critical Points of Family Law Enforcement of the European Union), 2013. forrás: http://real.mtak.hu/40097/1/EUcsal%C3%A1djog_ktitikuspontok.pdf, accessed on 12.12.2018.

9 Joined Cases of C-122/99 P. and C-125/99 P. Judgment of the Court of 31 May 2001, ECLI: EU: C: 2001: 304.

10 CSERBÁNÉ NAGY, Andrea: *A házassági jog kodifikációi (Codification of Marriage Law)*, PhD értekezés (PhD dissertation), Miskolc, ME ÁJK DI, 2012. kézirat, (Manuscript 2012).

11 Application No. 30141/04.

12 Judgment of the Court of Justice of 7 January 2004, *KB v. National Health Service Pensions Agency and Secretary of State for Health*, ECtHR 2004 I- 00541, 14.

conditions under which the new sex of a person can be legally recognized and whether such person (who has undergone a sex change operation) may then be entitled to enter into a heterosexual marriage.

Life partners have been recognized as spouses in the practice of the Court of First Instance. In Case T-65/92,¹³ the Court of First Instance could not accept this concept. However, there has been a case since,¹⁴ in which the ECJ extended the application of the legal consequences of marriage to life-partnerships. Nonetheless, there still seems to be a tendency to give priority to marriages over life-partnerships.¹⁵

In the case of registered partnerships (as these are also recognized by a formal procedure), the ECJ has stated that in some instances (e.g. in supplementary leave, marriage allowance) registered partners are to be treated the same way as married spouses.¹⁶

Overall, it seems that there is no need for an integrated definition of marriage, and that it would be more practicable for each Member State to have the discretion to decide whether or not to accept marriages between same-sex couples.

2. The Institution of Divorce and Separation

The legal bases for divorce in EU Member States can be classified as follows: (a) based on an agreement, (b) based on irreparable deprivation of marriage, (c) based on the mistake of either party, (d) based on actual separation, and (e) based on any other reason.¹⁷

13 Judgment of the Court of First Instance of 17 June 1993, *Monique Arauxo-Dumay v. Commission of the European Communities*, ECR 1993, II-00597.

14 E.g. C-65/98 Judgment of the Court of Justice of 22 June 2000, *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg*, ECR 2000 I-04747.

15 See e.g. Case C-485/08 P. Judgment of the Court of 15 April 2010 *Claudia Gualtieri v European Commission*, 2010 I-03009; 59/85 Judgment of the Court of Justice of 17 April 1986, *State of the Netherlands v Ann Florence Reed* ECLI: EU: C: 1986: 157.

16 Joined Cases of C-122/99.P and C-125/99.P in the case of the Kingdom of Denmark and the Kingdom of Sweden v. EU Council, Judgment of the Court of Justice of 31 May 2001, ECLI: EU: C: 2001: 304; C-147/08 Judgment of the Court of Justice of 10 May 2011 in *Jürgen Römer v Freie und Hansestadt Hamburg* 2011 I-03591; C- 267/12 Judgment of the Court of 12 December in 2013 *Frédéric Hay v Crédit agricole mutuel de Charente Maritime et Deux Sèvres*, ECLI: EU: C: 2013: 823.

17 WOPERA Zsuzsa: *Az európai családjog kézikönyve*. (Handbook of European Family Law) Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2012, 54-56.

European divorce laws essentially based on two legal bases, the irreparable devaluation of marriage or the mistake of either party, which are both regulated, but it is not possible to apply these bases to other issues (e.g. termination of matrimonial property, determination of the party responsible for the dissolution of marriage, etc.) except for parental responsibility and child maintenance.

With respect to divorces based on the mistake of either party, marriage may be terminated if one of the spouses has wrongfully breached his/her marriage obligation, and only the party not in fault may apply for the divorce. Where the divorce is based on the irreparable devaluation of marriage, the cause need not be proven, and either party may apply for divorce. Irreparable devaluation of marriage may be found where there is an equal intention to divorce (that is free from any influence) if the parties have agreed on the so-called “additional issues”, or if the parties have been living separately for a long time.¹⁸

The difference between the two legal bases for divorce arose, most expressively on EU level, in Case C-168/08.¹⁹ In this case, the husband (Mr. Hadady), who had Hungarian- French dual nationality, initiated divorce in Hungary, based on the irreparable devaluation of marriage, while the wife (Mrs. Hadady), who also had Hungarian-French dual nationality, wanted the divorce to be initiated on the basis of the mistake of her husband. The husband initiated divorce proceedings in Hungary so that the wife would not be able to initiate proceedings in France. The problem was essentially the difference between the substantive laws of the two countries, which, by virtue of the jurisdiction rules of the Brussels IIa Regulation, enables “forum shopping”. In other words, the spouse who reacts quicker and has access to better legal advice may be in a more favorable position with regards to the initiation of divorce proceedings.

The essence of “separation” is the termination of the spouses’ common life and property without divorce, although separation is mostly the final step before divorce. Separation as a legal institution exists in the law of most Member States (e.g. Belgium, Ireland, Germany, Luxembourg, France, Greece, Malta, Italy, Poland, Netherlands, Portugal, United Kingdom and Spain), and the common element in the laws of these Member States is to terminate the existing spousal rights and obligations of the spouses without divorce. In most Member States, separation is the first step, but not a necessary step of

18 HEINERNÉ BARZÓ Tímea: *Családi Jog*. (Family Law) Miskolc, Egyetemi jegyzet, negyedik átdolgozott kiadás, Novotni Alapítványa magánjog fejlesztéséért, (Novotni Foundation for the Development of Private Law Publisher, 4th ed.) 2004, 82.

19 Judgment of the Court of Justice of 16 July 2009. Laszlo Hadadi (Hadady) v Csilla Marta Mesko, married name: Hadadi (Hadady), ECR I-06871.

divorce. In some Member States, there is no legal separation (e.g. Hungary), but there are legal proceedings which may result in consequences which are similar to separation,²⁰ however, the Brussels IIa Regulation must not be applied with respect to the common property of spouses. "Separation" within the meaning of the Regulation only covers formalized procedures, which assume the involvement of a court or other authority.²¹

In Hungary, separation entails the termination of matrimonial cohabitation. The legal separation of spouses marks the end of their common matrimonial life. Once separation has taken place, among other things, the division of matrimonial property may be sought from the court. The beginning and end of the common life of the spouses as a couple, and consequently the period for which they held a joint estate, will be established at the discretion of the court. When exercising its discretionary powers, the court must place the various aspects of the spouses' life, as a married couple, under scrutiny (for example, sexual relationship, economic interdependence, common family home and household, expressions of the couple's unity, common children raised, relatives, and the care of the children of either spouse). The court establishes whether the spouses' common life as a married couple continues to exist or whether it has come to an end by a joint analysis of all the inter-related economic, family, emotional and intentional factors involved. The fact that any or some of these are lacking does not necessarily mean that the common life of the spouses as a married couple has ended, especially if there are objective reasons for these. As a result of legal separation marking the end of their common matrimonial life, the spouses are free to seek the division of the matrimonial property. At this point, the marriage is not yet legally annulled, but the spouses can acquire assets independently, except for pre-existing common property. In respect of the latter, the spouses may

20 See e.g. in accordance with the previous Act of Family Law, Article 31 and the New Civil Code, Family Law Book Nr.4. there is a possibility to terminate the common property of the spouse outside of litigation, and by Article 455, Section (1) and Article 462 of the new Civil Procedure Code, the divorce and the common property of the spouses may be ruled upon in separate litigation procedures.

21 OSZTOVITS, András: *A Brüsszel II. A rendelet és a nemzetközi magánjogi kódex viszonya, előtanulmány a nemzetközi magánjogi kodifikációhoz.* (The Relationship Between the Brussels IIa Regulation and the Code of Private International Law, Preliminary Study on the International Private Law Codification) In *Az új nemzetközi magánjogi törvény alapjai, kodifikációs előtanulmányok II.* (Fundamentals of the New International Private Law Act, Codification Preamble II.) (eds.: BERKE Barna- NEMESSÁNYI Zoltán): Budapest, HVG-ORAC Publisher, 2016, 10.

only decide jointly, since the presumption of consent no longer prevails. If the spouses have common children, they must agree on sharing parental responsibility.²²

3. The Jurisdiction System of the Brussels Ila Regulation

With regard to the growing number of international couples and the high divorce rate in the European Union, the question of jurisdiction in matrimonial matters affects a significant number of citizens each year. According to Eurostat data, some 2.2 million marriages and 946 thousand divorces took place in the EU-28 in 2015.²³ Marriages, which have an international element, for example, even where married couples of the same nationality live in another country, are becoming more and more common. In these cases, the choice of jurisdiction has become increasingly significant.

The Regulation seeks to define the appropriate Member State jurisdiction for proceedings, but does not purport to govern the choice between courts within a Member State, which is to be determined under domestic procedural law. A lack of jurisdiction may have two significant legal consequences. On the one hand, a court may reject the application of a party or may terminate the lawsuit later, if domestic law or an international convention excludes jurisdiction. For example, if the Hungarian state does not have jurisdiction (but is not excluded), the court can only terminate the case if the defendant has not joined the lawsuit or has an objection of the court jurisdiction.

With regards to matrimonial matters, the scope of the Brussels Ila Regulation covers three types of cases: divorce, separation and marriage annulment. The scope of the Brussels Ila Regulation does not extend to the property-related consequences of marriage and to other incidental questions, and the material scope of the Brussels Ila Regulation does not extend to non-marital relationships (e.g. registered partnerships, partnerships without official registration) either.

In Hungary, same-sex couples may not get married, thus the Brussels Ila Regulation would not apply to divorce cases involving same-sex couples. Conversely, the Brussels Ila Regulation will apply to the divorce of same-sex

22 Source:https://e-justice.europa.eu/content_divorce-45-hu-maximizeMS_EJN-en.do?member=1 accessed on 12 December 2018.

23 Source:http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics accessed on 12 December 2018.

couples in EU Member States where same-sex marriages are permitted. Since more and more EU Member States permit the marriage of same-sex couples, thus the marriage is established and valid, but getting divorce in another Member State, where it is not permitted, can constitute a serious legal dilemma for the courts of a Member State.²⁴

3.1. *Habitual Residence*

The scope of the Brussels IIa Regulation covers marriages in which at least one of the spouses is habitually resident (has a “domicile” in United Kingdom and Ireland) in the territory of a Member State or are nationals of a Member State and the case has a cross-border aspect. As such, spouses may be sued in Member States in which one of them is not habitually resident or is not domiciled.

In practice, the interpretation of the autonomous term “habitual residence” continues to be problematic. The difficulty is caused mainly by the fact that the parties often move from one state to another within the framework of free movement within the European Union, and it is often difficult to decide where their “habitual place of residence” would be located (i.e. which country their joint home can be said to be in). The question of whether it possible for spouses to have multiple places of habitual residence simultaneously arises frequently.

The biggest problem is that various Member States attribute different degrees of significance to relevant factors in their evaluation, which results in the judicial practice being far from uniform.

The determination of habitual residence is often a serious evidentiary task, the resolution of which may take a significant amount of time, even though in proceedings relating to marriage dissolutions and parental responsibility the main interest (of the child, principally) is that there should be a decision on the merits as soon as possible (which is primarily in the interest of the child). It is uncertain whether it is expedient to connect a procedural question, namely, that of jurisdiction, with the substantive proceedings, especially where such procedural issues raise uncertainties and prolong the entirety of the proceedings. Habitual residence is the fairest connecting principle with regards to jurisdiction, however, the notion has to be established on a clear footing not only based on the guiding decisions of the ECJ, but also at the level of norms. Whilst the exact meaning of habitual residence would not have to

24 WOPERA (2013) op. cit., 6.

be defined concretely, it would be worth considering the establishment of a sort of “checklist”, a uniform system of criteria within the European Union, which could be used by all Member States for evaluating the question of habitual residence while leaving room for judicial discretion as well.

The definition of habitual residence poses a problem in marital cases where parties are the citizens of one Member State but have their place of employment in another Member State (where they often maintain accommodation and bank accounts, make social security and pension contributions, and have indefinite duration with their employer), since they are attached to their state of origin through various ties (for example, through their family home, relatives, bank accounts, frequent visits, and their use of healthcare services). An evaluation of a party’s intent may also prove inadequate, since it would not be objective and would greatly depend on the party’s momentary interests. The significance that should be attributed to a person’s knowledge of a foreign language, his/her citizenship, and the period of time spent in a particular country, is also open to debate. Namely, even if a person spends more time in the Member State where he/she is employed, the true focus of his/her interests may remain in the state of origin. The evaluation of foreign visits by delegates can be similarly problematic, for example, a Member State delegates to Brussels or with diplomatic missions to other any Member States. All the existing EU regulations on family law²⁵ that are in force and are applicable, and even in The Hague Protocol of 2007, which is an integral part of the Council Regulation (EC) No 4/2009 on jurisdiction, applicable law,

25 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, L 343/10, 29.12.2010; COUNCIL DECISION of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU) 22.7.2010, L 189/12; COUNCIL REGULATION (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, L 183/1, 8.7.2016; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, L 183/30, 8.7.2016.; 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, L 7/1, 10.1.2009; 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, L 338/1, 23.12.2003.

recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,²⁶ rely on the habitual residence of a person to determine jurisdiction and applicable law. Each preamble and commentary of the Regulations clearly states that the concept of habitual residence should be attributed to the autonomous interpretation of the EU, instead of the *lex fori* of the applicable national law.²⁷

Habitual residence is one of the most commonly used determining factors with respect to jurisdiction both in EU regulations and in international conventions. However, neither EU regulations nor the European Court of Human Rights conventions define it. The ECJ developed certain considerations for the purpose determining habitual residence in several cases. The Explanatory Report on the Convention written by Alegría Borrás (Borrás Report) describes habitual residence as “the place where the person had established, on a fixed basis, his permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence”.²⁸ The new Hungarian Act of Private International Law²⁹ defines habitual residence on the basis of the rulings of the ECJ in order to facilitate its application. According to Article 3(b) of the Hungarian Act of Private International Law, habitual residence is to be understood as the center of the person’s livelihood, which is to be determined by taking the circumstances and the intentions of the person into consideration. The new law intends to give an important connecting role to the definition of habitual residence: by applying it in personal law to the protection of individual rights, to family law, and to registered partnerships. The new act uses the definition of residence in concordance with the Brussels I Regulation and Brussels Ia Regulations, mainly in the context of jurisdictional rules in property cases. Residence is defined as the place where the person actually lives permanently or with the intention of settling down permanently.³⁰

26 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, L 7/1, 10.1.2009.

27 WOPERA (2013) *op. cit.*

28 Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegría Borrás Professor of Private International Law University of Barcelona, Official Journal C 221 , 16/07/1998 P. 0027 – 0064.

29 Article 3, Section b) of Act XXVIII. 2017.

30 RAFFAI, Katalin: The New Hungarian Private International Law Act – a Wind of Change. *Acta Univ. Sapientiae, Legal Studies Journal*, 2017, 6 (1), 126.

The European legislator puts the emphasis on the place of habitual residence because the spouses may show the closest connection with the law of the country of their habitual residence. This is a somewhat uncertain basis for the determination of residence, especially as compared to citizenship and place of residence, which are factors with a certain degree of permanence, and predictably, and can verifiable through official documents. The uncertain bases for the determination of habitual residence may in some extreme cases result in a private person having multiple habitual places of residence during the course of a single year.³¹

The ECJ stated in Case C-90/97 that the following factors should be taken into account in the case of marital matters: whether the spouses habitual center interest are in the same Member State, their purpose of moving to the Member State, close family relationships, length of stay in the same Member State, whether they are employed in the Member State, and whether such employment is continuous or not. The ECJ has interpreted the concept of habitual residence in a number of other cases, but these may not apply to marital affairs.³² The European Commission has issued a guide on habitual residence from a social security perspective³³ within the context of the exercise of the fundamental right of free movement.

3.2. *The Nationality of Spouses*

With regards to divorce and divorces involving mixed marriages, the general conditions of jurisdiction are grouped around habitual residence, on the one hand, and the nationality of the spouses, on the other. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State of the nationality of both spouses.³⁴ Unlike habitual residence, the question of nationality must be assessed in accordance with the rules of national law relating to nationality. The regulation does not

31 MÁTYÁS, Imre: Az új nemzetközi magánjogi törvényről. (The New Hungarian International Private Law) *Publicationes Universitatis Miskolcensis Sectio Juridica et Politica Journal*, 2017, 35 (1), 361-362.

32 E.g. Case C-392/05 Judgment of the Court of 26 April 2007, Georgios Alevizos v Ypourgos Oikonomikon, ECR I-03505; C-102 / 91 Judgment of the Court of 8 July 1992, Doris Knoch v Bundesanstalt für Arbeit, ECR 1992, I-4341.

33 Brussels, 13 January 2014, http://europa.eu/rapid/press-release_IP-14-13_en.htm accessed on 15 December 2018.

34 Article 3, Section 1, Point b) of the Brussels IIa. Regulation.

regulate the question of dual citizenship. This has caused a regulatory gap in the field of family law and the first request for a preliminary ruling in the context of a Hungarian case was submitted by the French Cour de Cassation in 2008 in the case of *László Hadadi v Csilla Márta Meskó, épouse Hadadiné*. The court sought the annulment of Article 3(1)(b) of the Brussels IIa Regulation in cases where the spouses had dual nationalities and both of them had been habitually resident in France. In its judgment of 16 July 2009, the ECJ ruled that “whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case. Where spouses each hold the nationality of the same two Member States, Article 3(1)(b) of Regulation No 2201/2003 precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seize the court of the Member State of their choice.”³⁵

The meaning of “domicile” is the same as the term used in the legislation of the United Kingdom and applies as a matter of jurisdiction, if both spouses have a domicile that means a permanent residence. The English House of Lords dealt with the issue of the spouses’ domicile in the cases of *Ray v Sekhri*³⁶ and *Divander v Divall*.

35 Case C-168/08 judgment of 16 July 2009, *László Hadadi (Hadady) and Márta Meskó Csilla, married name Hadadi (Hadady)*, European Court Reports 2009 I-06871, See in detail WOPERA Zsuzsa: *A Hadadi-ügy. A kettős állampolgárság megítélése a házassági perek joghatósági szabályaiban.* (The Hadadi Case Judgment of Dual Citizenship in the “Rules of Jurisdiction of Marriages) *JeMa*, 2010, 1 (1), 66.

36 *Ray v Sekhri* [2014] EWCA Civ 119. In source <http://www.familylawweek.co.uk/site.aspx?i=ed127711> and *Divander v Divall* [2014] EWHC 95 (Fam) In source <http://www.familylawweek.co.uk/site.aspx?i=ed127210>. accessed on 15 December 2018.

As Hungary does not take part in the enhanced cooperation on matrimonial property regimes,³⁷ the applicable law is regulated separately.³⁸ The new Act of the Hungarian Private International Law offers limited choice of law to matrimonial property rights, which may also arise prior to marriage (it is an option for persons planning marriage). The choices are the following: the law of the state of one party's nationality, the law of the state of one party's habitual residence, or the law of the court (*lex fori*). If the parties do not opt for any of the options, the rules state the following order: law of the parties' common nationality, if the parties do not have common nationality, the law of their common habitual residence, if they do not have a common habitual residence, then their last known habitual residence, and finally, the law of the court (*lex fori*).³⁹ The common nationality of the spouses is the one which they both share. If the spouses have more than one common nationality, their common nationality is the one that has the closest ties to them in light of all the circumstances of their case.⁴⁰

From the rules of jurisdiction, it would be appropriate to eliminate the factor of nationality in its entirety, while rendering it possible for the parties to make a choice of court agreement.

4. The Problem of “Rush to Court” Associated with Choice of Law, and the “Forum Shopping” Associated with Jurisdiction

The alternative and non-hierarchical reasons of jurisdiction set out in the Brussels IIa Regulation may motivate one of the spouses to “run to court”, i.e. to start an action for divorce before the other married couple, in order to have the law applicable in the divorce procedure protect his/her interests.⁴¹ Where proceedings relating to divorce, legal separation or marriage annulment

37 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes OJ L 183, 8.7.2016, 1–29. Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships OJ L 183, 8.7.2016, 30–56.

38 Article 28–30. of the Hungarian Private International Law.

39 Article 27. Section 1-3 of the Hungarian Private International Law.

40 Article 24. of the Hungarian Private International Law.

41 CZIGLER, Tamás Dezső: *Cornerstones of European Private International Law and International Family Law*, Ph.D. dissertation (Győr, 2011) manuscript.

between the same parties are brought before courts of different Member States, the court second seized shall stay its proceedings on its own motion until such time as the jurisdiction of the court first seized is established.⁴²

Council Regulation Regulation 1259/2010⁴³ implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter referred to as the “Rome III Regulation”), by allowing choice of law, complements the Brussels IIa Regulation. Until 21 June 2012, these disputes were subject to the Brussels IIa Regulation. This situation led to continuous legal problems as both parties wanted their own country and their own personal right to be applied, but this has often encountered obstacles. The Rome III Regulation allows international couples to agree in advance on the law that would apply to their divorce or legal separation as long as the agreed law is the law of the Member State with which they have a closer connection. In case the couple cannot agree, judges can use a common formula for deciding applicable law. The Rome III Regulation does not, however apply to the following matters: the legal capacity of natural persons; the existence, validity and recognition of a marriage; the annulment of a marriage; the name of the spouses; the property consequences of marriage; parental responsibility; maintenance obligation and trusts, and successions. It also does not affect the application of Brussels IIa Regulation with regards to jurisdiction and the recognition and enforcement of judgments in matrimonial matters, and the matters of parental responsibility.

The Rome III Regulation reduced the possibility for parties to “rush to court” by providing harmonized rules for the law applicable to matrimonial matters in the Member States participating in the regulation. However, since the Rome III Regulation is not yet in force in all Member States, the law applicable in a given matrimonial case may be different depending on the Member State of the proceedings (Rome III or national law may be applicable). The issues with “rushing to court” can therefore have the effect of applying a right, which the defendant does not consider to be closely linked, or which does not take into account the interests of the defendant.

42 Article 19. of the Brussels IIa Regulation.

43 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, L 343/10, 29.12.2010.

The spouses may agree to designate the law applicable to divorce and legal separation at different times⁴⁴:

1. at the time of marriage (e.g. in a marriage contract): the law of the state where the spouses are habitually resident at the time the agreement is concluded or the law of the state of nationality of either spouse at the time the agreement is concluded;
2. during the marriage: the law of the state where the spouses are habitually resident at the time the agreement is concluded; or 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; or the law of the state of nationality of either spouse at the time the agreement is concluded; or
3. before/during the divorce: the law of the state where the spouses are habitually resident at the time the agreement is concluded; or 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; or the law of the state of nationality of either spouse at the time the agreement is concluded; or the law of the forum.

According to the Hungarian Private International Law, the parties may exercise their choice of law within the deadline set by the court, at the end of the first part of the procedure (termination phase) at the latest.⁴⁵ Applicable law in the absence of a choice by the parties⁴⁶

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

44 Article 5. of the Rome III. Regulation.

45 Article 30. of the Act of Hungarian Private International Law.

46 Article 8. of the Rome III. Regulation.

According to the public policy⁴⁷ or differences in national law,⁴⁸ the application of the applicable law of the Rome III. Regulation may be refused. By the Article 12, is it possible for the Hungarian court to take a decision on divorce based on the mistake of any of the spouses if the French law is the applicable law by the choice of the spouses? According to the legal literature, the provisions relating to the mistake of either of the parties may be refused in this case. By the Article 13, if the law of the Member State does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings, the court shall not apply the Rome III Regulation to divorce the spouses.⁴⁹ This problem may arise in the Member States, which do not recognize same-sex marriages, or in the case of religion-based (discriminatory) divorce systems from countries outside the EU. It is open to question whether the Member State could carry out a procedure that it does not regulate, for example with respect to the institution of separation. According to the literature, it is not compulsory to carry out this procedure as a Member State. The ECJ deals with the problem of parties “rushing to court” in case C- 489/14.⁵⁰

The alternative grounds of jurisdiction under Article 3(1) of the Brussels IIa Regulation also gives rise to the problem of forum shopping. According to the experiences of Hungarian judges, there have been abuses relating to forum shopping in several cross-border cases. For example, in the Supreme Court Case No. Pfv.II.21.678/2012/7, the claimant’s legal representative expressly submitted that the claimant had commenced the action in Hungary in order to have that the prenuptial agreement concluded in Denmark (in compliance with all the formal requirements) declared invalid under German law, as the law of the state of the last place of shared residence (by the Hungarian International Private Law, the renvoi of the German to Danish law is prohibited). In any case, the lawsuit had to be decided not on the basis of the Brussels IIa Regulation, but on the basis of the Hungarian Act on Private International

47 Application of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum. In Article 12. of the Rome III. Regulation.

48 Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation. In Article 13 of the Rome III. Regulation.

49 WOPERA (2012) op. cit. 212-213.

50 Judgment of the Court of 6 October 2015 A v B, ECLI:EU:C:2015:654.

Law. There are many cases which based on the court documents, are suspect to abuses relating to the provisions of the fifth and sixth subparagraphs of Article 3(1). However, these abuses were not objected to by the (foreign citizen) respondents residing in the other Member State, moreover, in some cases they even agreed with the jurisdiction of the Hungarian courts. The ground for jurisdiction contained in the sixth paragraph of Article 3(1) point a) of the Brussels IIa Regulation is obviously discriminative and suitable for the evasion of the rest of the grounds for jurisdiction, unless the other spouse brings an action earlier in a different Member State (e.g. the state of habitual residence).

The likelihood of “forum shopping” has been raised in several cases that were brought before the Central District Court of Buda.⁵¹ For example, the Brussels IIa Regulation itself provides an opportunity for “waiting out” the commencement of the action, because it does not require the parties to cohabit in a conjugal relationship during this period, which means that the regulation itself supports forum shopping. The legitimization of forum shopping at the level of Brussels IIa Regulation is undesirable. Instead, the parties should rather be given the possibility of agreeing on jurisdiction, in other words, the parties should legitimize jurisdiction based on their common nationality or the nationality of one of the parties. It is difficult to trace forum shopping, although it probably happens in several cases.

Proceedings in matrimonial cases raise a lot of practical questions, for example, with respect to actions to be taken if the legal system concerned does not provide for separation (this is the case in Hungary as well) or annulment, or actions to be taken if the first lawsuit is filed for annulment and the second petition is submitted for divorce. In cases like this, practically speaking, the only requirement should be that the proceeding should concern a dispute “between the same parties”, and then the court second seized should of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. The evaluation of these questions is rather complex in practice. The situation could be simplified to a great extent by the creation of norms that define terms.

The lack of hierarchy between the rules of jurisdiction in matrimonial matters allows enables “forum shopping”, involuntarily promoting competition between forums. In the case of the applicant, the court to be chosen would be the faster, cheaper forum and the courts where a better judgment can

51 Hungarian Cases 8.P.XI. 30.107/2011., 8.P. XII. 30.130/2008., 8.P.XI. 30.393/2010.

be expected. The first party, which starts the procedure at the court, can choose the state and may influence the law applicable to the proceedings, which may have serious additional implications as well.⁵²

5. Conclusion

The Brussels IIa Regulation does not define the concept of marriage, however, the interpretation of this concept is essential. The basic question to which the Brussels IIa Regulation does not provide a response is the following: should the concept of marriage be interpreted in EU legal terms, independently from the concepts used in the laws of the Member States, or should it be interpreted as a national concept? The current problem raised by the definition of marriage results from differences in content and regulation relating to marriage and other forms of relationships between persons of the same sex. In 2013 in Europe, nine states, including seven EU Member States, recognized same-sex marriages, ensuring equal rights for same-sex couples. Another ten Member States, excluding the possibility of same-sex marriage, but ensuring similar rights to those of married heterosexual couples, established a special form of partnership for same-sex couples. Finally, eleven Member States within the EU do not recognize any form of relationship between same-sex couples.

With regard to jurisdiction, no problem arises, since in matters of divorce or annulment of same-sex marriages, similarly to proceedings relating to heterosexual couples, the rules of jurisdiction contained in the Brussels IIa Regulations are applicable. The recognition of judgments granting divorce or annulment of marriage raises no particular problem either. At the same time, the recognition and enforcement of a judgment relating to the division of joint matrimonial property may conflict with public policy, since in Hungary same-sex marriages are not permitted by law. There is no case law available in relation to this question.

Repealing point (b) of Article 3(1) is justified, in order to abolish the nationality factor as a ground for jurisdiction. It could be preserved in the form of a jurisdiction clause forming part of an agreement on jurisdiction.

The biggest problem is that the various Member States attribute differing importance to relevant factors during assessment, which results in judicial practice being far from uniform.

52 CSERBÁNÉ *op. cit.*, 32.

The determination of habitual residence is often a serious evidentiary task, the resolution of which may take a significant period of time. At the same time, in proceedings relating to the dissolution of marriage and parental responsibility, the main interest (of the child principally) is that there should be a decision on the merits as soon as possible. It is uncertain whether it is expedient to connect a procedural question, namely, that of jurisdiction, with the main proceedings, as they may result in the prolongation of the entire proceedings. Habitual residence is the fairest connecting principle concerning jurisdiction, but the notion has to be placed on a clear footing not only in the guiding decisions of the ECJ, but also at the level of norms. Whilst the exact meaning of habitual residence would not have to be defined concretely, it would be worth considering the establishment of a sort of “checklist”, a uniform system of criteria within the European Union, which could be used by all Member States for evaluating the question of habitual residence while leaving room for judicial discretion as well.

With regard to matrimonial matters, it is unfortunate that ancillary issues relating to marriage annulment, divorce or legal separation (e.g. maintenance obligations and the property consequences) are not covered by the Brussels IIa Regulation. Fortunately, with respect to matters relating to maintenance obligations, it is possible to apply Regulation (EC) No. 4/2009. At the same time, questions relating to matrimonial property are still governed by the earlier autonomous or contractual system. It is also important to strive toward a unified evaluation of questions not covered by the scope of the Brussels IIa Regulation.