Jurnalul de Studii Juridice

Year XVI, No. 1-2, November, 2021, pp. 1-7

THE LAW APPLICABLE TO DIVORCE ACCORDING TO THE PROVISIONS OF THE ROMANIAN CIVIL CODE

Nadia-Cerasela ANIȚEI

DOI: <https://doi.org/10.18662/jls/16.1-2/79>

Covered in:

CEEOL, CrossRef, CrossCheck,
Index Copernicus, Ideas RePeC,
EconPapers, Socionet,
HeinOnline

©2021 The Authors & LUMEN Publishing House

THE LAW APPLICABLE TO DIVORCE ACCORDING TO THE PROVISIONS OF THE ROMANIAN CIVIL CODE

Nadia-Cerasela ANIȚEI¹

Abstract

The article aims to study the provisions concerning the law applicable to divorce according to art. 2597 and art 2600 of the Romanian Civil Code (2011e, 2011f).

The article aims to answer the following questions:

- 1. What is the law applicable to divorce by choice of law agreement?*
- 2. What is the law applicable to divorce in the absence of a choice of law agreement?*
- 3. What does recognition of divorce by unilateral termination entail?*
- 4. What is the scope of divorce law?*

Keywords:

spouses; the law applicable to divorce by the convention of choice of the applicable law; the law applicable to divorce in the absence of the convention for choosing the law applicable to the divorcee; Romanian private international law

¹ PhD Univ. Prof. , Faculty of Law, Social and Political Sciences, "Dunărea de Jos" University, Galați, Romania, e-mail: ncerasela@yahoo.com, nadia.anitei@ugal.ro
International Scientific Conference Ethical and Social Dimensions in Public Administrative & Law, Five Edition, 26-27 november, 2020 <https://conference.asdap.ro/wp-content/uploads/2020/11/Program-ESDPAL-2020-1.pdf>

1. What is the law applicable to divorce by choice of law agreement?

From the provisions of Section 2597 of the Civil Code (2011e) and of Section 2600 (3) Civil Code (2011f) we note that the spouses, by mutual agreement, by choice of law agreement, will choose one of the following laws to govern their divorce:

a. The law of the State governing the spouses' joint residence at the time of the choice of law agreement.

Thus, the law of the date of the divorce agreement (old law) is the law applicable to the legal relationship in question and constitutes the solution to the mobile conflict of laws.

Ordinary residence in Romanian law coincides in principle with the notion of "domicile" so that *lex domicilii* applies.

In the case of conflict of laws, the old law will be applied, for example, the choice of law agreement is concluded at the same time with the marriage contract at the time of the conclusion of marriage, the habitual residences that the spouses will acquire during the marriage not being important.(

In other situations, the new law applies if the agreement of choice is concluded during the marriage, regardless of other joint habitual residences the spouses had prior to the date of the agreement of choice.

b. The law of the State governing the spouses' last joint habitual residence, but the condition imposed by the legislature is that at least one of the spouses still resides there on the date of the choice of law agreement.

Thus, the spouses' last joint habitual residence is the law of the spouses' state where they had their joint habitual residence, namely the new law in the context of the mobile conflict. However, it is a question of *de facto* residence.

The mobile conflict of laws that may arise is resolved in favour of the new law of the 'last' joint habitual residence.

We note that this conflict solution is consistent with the provisions on jurisdiction in divorce matters laid down in Section 914(1) Code of Civil Procedure (2010).

c. The law of the State of nationality of either spouse will govern the choice of law agreement applicable to the divorce.

We note that, in the case of divorce, the point of connection of nationality is mentioned after the spouses' habitual residence, but it is alternative to it in the subjective determination of the applicable law.

We note that while in the case of the habitual residence referred to in (a) and (b) the requirement is that it be common, in the case of nationality as

the connecting factor the law of the nationality (*lex patriae*) of either spouse will apply.

For the purpose of resolving the mobile conflict of laws by analogy with the provision in the preceding paragraphs, it is understood that the text refers to the law of the State of which either spouse is a national at the time of the choice of law agreement.

d. the law of the State in whose territory the spouses have resided for at least three years.

We note that the legislature has established that the spouses must have lived in the territory of that State for at least three years without specifying whether or not the residence was common to both spouses.

The point of connection of the conflicting rule in this case is the spouses' 'residence', a concept which is not qualified in Roman private international law, but which in our opinion can only have the meaning of simple residence, since the 'main residence' is the one which defines the concept of 'habitual residence' under Section 2570(1) of the Civil Code (2011d). On the other hand, if the qualification operation is subject to Roman law as *lex fori*, the notion of "family dwelling" is qualified by S.321-324 Civil Code.

We support the opinion of the research literature, with the concept of the spouses' housing meaning the joint dwelling and the continuous residence for three years of the two spouses, with the purpose to produce the legal effect envisaged by the law.

e. Romanian law.

The spouses may choose Romanian law as *lex fori*, to apply to the convention on the choice of law applicable to divorce, insofar as its provisions are acceptable to the spouses. Thus, they will choose Romanian law in the following situations:

- Romanian law where the foreign law thus determined does not allow divorce or allows it under particularly restrictive conditions, if one of the spouses is, on the date of the divorce application, a Romanian citizen;

- Romanian law where the foreign law, so determined, does not allow divorce or allows it under particularly restrictive conditions, if one of the spouses at the time of the divorce petition habitually resides in Romania.

We note that Romanian law does not appear as a rescue situation, as a subsidiary solution, but is one of the alternative laws that the spouses can claim for their divorce.

Analysing Section 2597 of the Civil Code (2011e), we observe that the spouses have the possibility to choose one of the applicable laws listed in the divorce matter, but the laws listed are alternative, so the spouses can

choose any of them. Therefore, the principle of the autonomy of will of the spouses is defined in the law applicable to divorce (*lex voluntatis*).

Research literature states that, generally speaking, the parties' choice of the law governing the divorce cannot be set aside on exceptional grounds, as provided for in Section 2565(2) in conjunction with Section 2565(3) of the Civil Code (2011c).

2. What is the law applicable to divorce in the absence of a choice of law agreement?

It follows from the provisions of Section 2600 of the Civil Code (2011f) that the law applicable to divorce in the absence of a choice of law agreement is one of the following laws in the following order:

(a) the law of the spouses' common habitual residence on the date of the filing of the application for divorce; (so, for example, if the spouses have their habitual residence on the date of the filing of the application for divorce in France, French law applies irrespective of the nationality of the spouses);

- in the absence of a joint habitual residence,

(b) the law of the last joint habitual residence, (for example, the last joint habitual residence in Italy, so Italian law applies to the divorce) provided that at least one of the spouses still has his/her habitual residence on the territory of that State (so, in our example, one of the spouses still lives in Italy) at the date of the divorce application;

- if one of the spouses does not habitually reside in the territory of the State where they last had their common habitual residence,

(c) the law of the spouses' common nationality on the date of the divorce application will govern the divorce only if the spouses have the same nationality;

- in the absence of the spouses' common nationality,

(d) the law of the spouses' last common nationality shall govern the divorce only if at least one of them has that nationality on the date of the application for divorce;

(e) Romanian law, in all other cases. Thus, we apply Romanian law to divorce in the following cases:

- if the spouses are resident in different countries (unless one of them is still habitually resident in that country at the time of the divorce application);

- the spouses have different citizenships (unless one of the spouses still has joint citizenship on the date of the divorce application);

- if the foreign law, so determined, does not allow the divorce or allows it under particularly restrictive conditions, Romanian law applies, if one of the spouses is, on the date of the divorce application, a Romanian citizen;

- if the foreign law, so determined, does not allow the divorce or admits it under particularly restrictive conditions, Romanian law shall apply if one of the spouses habitually resides in Romania;

- stateless persons.

The application of Romanian law appears to be a subsidiary, rescue solution, based on the presumption that Romanian law is the law of the authority referred to (*lex fori*) for the ruling of the divorce.

The solution used to resolve the conflict of laws involves applying the new law, which means that the laws of the States in the territory of which the spouses had their joint habitual residence and the laws of the States of common nationality of the spouses, prior to the date of the divorce proceedings, are not applicable.

In application of S. 1096 (2) of the Code of Civil Procedure (2011b), if the divorce concerning a Romanian citizen spouse is ruled abroad, because it is a trial concerning the civil status of a Romanian citizen, the foreign court must respect, as a matter of principle, the conflict rules of Romanian private international law, namely those established by S. 2597 of the Civil Code (2011e) and S. 2600 of the Civil Code (2011f), otherwise the recognition of the foreign divorce judgment in Romania may be refused. As such, the condition for recognition of the foreign divorce judgment in Romania appears to be compliance with Romanian private international law, irrespective of whether, according to S. 2597 (2011e) or S. 2600 Civil Code (2011f), it refers to Romanian substantive law or to a foreign law.

3. What does recognition of divorce by unilateral termination entail?

From the provisions of Section 2601 of the Civil Code (2011g), we note that if the document requesting the dissolution of the marriage is drawn up abroad only by unilateral manifestation of the man's will to divorce, it cannot be recognised in Romania if the applicable foreign law does not also recognise the woman's equal right, except when the following conditions are cumulatively met:

- (a) the applicable foreign law has recognised the legality of the act of dissolution of marriage by fulfilling all the conditions of substance and form;

- (b) the woman has freely and unequivocally accepted this method of marriage dissolution;

c) in Romania, there is no other ground for refusing recognition of the decision granting the dissolution of the marriage in this way.

If the cumulative conditions stipulated in this Section are met, a divorce by mutual consent is in fact taking place, so that the protection of the woman by the public policy exception is no longer justified.

4.What is the scope of divorce law?

The following aspects are particularly relevant to the law of divorce:

1.Determination of the scope of persons entitled to request the dissolution of marriage by divorce;

2.The grounds for divorce, i.e. the ways in which divorce can take place (by agreement of the spouses, by fault of one spouse, by fault of both spouses, after a separation in fact after a certain period of time, etc.);

3.The effects of divorce on the relationship between the spouses, namely:

- Personal relationships between spouses, including names of spouses after divorce, rights of the divorced spouse, whether former spouses can remarry, etc.;

- The spouses' capacity to exercise their rights;

- Property relations between the spouses, i.e. the effects on the matrimonial property regime, the right to compensation, the compensatory allowance, the system of joint residence after divorce, the bearing of joint debts to third parties, etc;

- Maintenance obligations between the former spouses are governed by the Hague Protocol (2007) on the law applicable to maintenance obligations;

4.The effects of divorce on the relationship between parents and children, namely:

- Personal relationships, e.g. exercise of parental authority over minor children, etc;

- Property relations, e.g.: parents' maintenance obligation in relation to their children, enforcement of rights and duties in respect of the child's property, living arrangements for the child after divorce, etc.

The provisions of the Civil Code concerning divorce law become inapplicable if the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children* (Hague Conference, 1996) is applicable.

Divorce proceedings (*ordinatoria litis*) are not subject to the law of divorce but to the law of the forum under Section 1087 of the Civil Code (2011a).

Provisional measures and urgent measures ordered by the court in the divorce proceedings are subject to the same law and are procedural matters.

References

- Hague Conference on Private International Law. (1996, October 19). *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. <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>
- Hague Conference on Private International Law. (2007, November 23). Protocol on the law applicable to maintenance obligations. <https://assets.hcch.net/docs/d5f89587-f5f1-4c86-aa40-70472892cf11.pdf>
- Romanian Civil Code. (2011a, May 5). *Art. 1087. Moștenitorii rezervatari* [Art. 1087. Reserved heirs]. <https://www.codulcivil.ro/art-1087-Mostenitorii-rezervatari/>
- Romanian Civil Code. (2011b, May 5). *Art. 1096. Ordinea reduciunii* [Art. 1096. Order of reduction]. <https://www.codulcivil.ro/art-1096-Ordinea-reduciunii/>
- Romanian Civil Code. (2011c, April 30). *Art. 2565. Înlăturarea excepțională a legii aplicabile* [Art. 2565. Exceptional removal of the applicable law]. <https://www.codulcivil.ro/art-2565-Inlaturarea-exceptionala-a-legii-aplicabile/>
- Romanian Civil Code. (2011d, April 30). *Art. 2570. Determinarea și proba reședinței obişnuite* [Art. 2570. Determining and proving the habitual residence.] <https://www.codulcivil.ro/art-2570-Determinarea-si-proba-resedintei-obisnuite>
- Romanian Civil Code. (2011e, April 30). *Art. 2597. Alegerea legii aplicabile divorțului* [Art. 2597. The choice of the law applicable to divorce]. <https://www.codulcivil.ro/art-2597-Alegerea-legii-aplicabile-divortului/>
- Romanian Civil Code. (2011f, April 30). *Art. 2600. Legea aplicabilă divorțului* [Art. 2600. The law applicable to divorce]. <https://www.codulcivil.ro/art-2600-Legea-aplicabila-divortului/>
- Romanian Civil Code. (2011g, April 30). *Art. 2601. Recunoașterea divorțului prin denunțare unilaterală* [Art. 2601. Recognition of divorce by unilateral denunciation]. <https://www.codulcivil.ro/art-2601-Recunoasterea-divortului-prin-denuntare-unilateral/>
- Romanian Code of Civil Procedure. (2010, July 1). <https://legislatie.just.ro/Public/DetaliiDocument/140271>