RESIDUAL JURISDICTION VERSUS FORUM NECESSITATIS IN EU FAMILY LAW

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Abstract

In the area of judicial cooperation in civil matters, the Council passed a number of regulations under art. 81(1) TFEU, adopting family law provisions with cross-border implications. These measures aimed at approximating the laws, regulations and administrative provisions of the Member States.

Among these measures, this paper will analyse the provisions on residual jurisdiction in Council Regulation (EU) 2019/1111 of 25.06.2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility and concerning international child abduction (Brussels IIb or ter Regulation) in comparison with the provisions on forum necessitatis under Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Measures to approximate the laws of the Member States in cross-border family law, in particular in the case of conflict of jurisdiction, should be able to solve the problems faced by the courts of the Member States when dealing with a dispute in this area. This purpose requires not only the „approximation" of legal acts but also their unification at EU level.

With this study we aim to examine the two types of jurisdictions, residual and forum of necessity, and to establish the similarities and differences between them. We will then try to identify the reasons why the Council opted for different regulation of the jurisdiction in question in the family law sub-branches of the Regulations, analyse whether the two legal institutions are likely to achieve their purpose and, finally, we will present our arguments for proposing the adoption of a unitary provision on the matter.

Keywords: *residual jurisdiction, forum necessitatis, cross-border family law disputes.*

1. Preliminary considerations

Until the year 2000, the Member States of the European Union relied heavily on bilateral and multilateral conventions on private international law, but after that year we can observe a constant concern of the EU legislature to approximate the laws of the Member States in this area.

Therefore, pursuant to art. 81(1) TFEU, the Council adopted a series of regulations on judicial cooperation in civil and commercial matters, among which, in the sub-framework of family law, we recall Council Regulation (EC) no. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Brusseles II), repealed by Regulation (EC) no. 2201/2003 (Brusseles IIa or bis), the latter being repealed by the adoption of Council Regulation (EU) 2019/1111 (Brusseles IIb or ter), and Council Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

With these listed legal acts, the Council has established clear provisions, applicable immediately and uniformly throughout the EU, on the international jurisdiction of the courts of the Member States in family law disputes with cross-border implications, recognition and enforcement of judgments.

The need to adopt a legal framework in family law, as regards private international law rules, arose primarily from the increasing migration of EU citizens from one Member State to another, in particular in search of better paid employment, but this phenomenon was due precisely to the exercise of the right to free movement provided for in art. 45 *et seq.* TFEU.

Secondly, in this context, an increasing number of family law disputes have become cross-border in nature and have led to the emergence of a non-uniform judicial practice regarding the application of the rules of private international law, taking into account the fact that these provisions have a different content from one State to another.

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Therefore, through this study we aim to examine the two types of jurisdictions, residual and forum of necessity, and to establish the similarities and differences between them. We will then try to identify the reasons why the Council opted for different regulation of the jurisdiction in question in the family law sub-branches of the Regulations, analyse whether the two legal institutions are likely to achieve their purpose and, finally, we will present our arguments for proposing the adoption of a unitary provision on the matter.

2. Legal framework

As regards residual jurisdiction, according to art. 6 of Council Regulation (EU) 2019/1111 of 25.06.2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and concerning international child abduction[1] (hereinafter Brussels IIb or ter Regulation):

„(1) Subject to para. 2, where no court of a Member State has jurisdiction pursuant to art. 3, 4 or 5, jurisdiction shall be determined, in each Member State, by the law of that State.

(2) A spouse habitually resident in the territory of a Member State, or a national of a Member State, may be sued in another Member State only pursuant to art. 3, 4 and 5.

(3) Any national of a Member State habitually resident in the territory of another Member State may, like nationals of that State, invoke the rules of jurisdiction applicable in that State against a defendant who is not habitually resident in a Member State and is not a national of that State."

Art. 14 of the same Regulation states that „Where no court of a Member State has jurisdiction pursuant to art. 7 to 11, jurisdiction shall be determined, in each Member State, by the law of that Member State."

The jurisdiction of the forum of necessity is governed by art. 7 of Council Regulation (EC) no. 4/2009 of 18.12.2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[2] (hereinafter referred to as Regulation (EC) no. 4/2009):

„Where no court of a Member State has jurisdiction pursuant to art. 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised."

3. Residual jurisdiction

It has been held that in private international law jurisdiction is „that which concerns the determination of the courts of one country, in relation to the courts of another country, which are called upon to settle a dispute arising"[3] with an element of foreignness.

International jurisdiction provisions are often based on principles such as territoriality[4] (based on the domicile or residence of the parties), nationality[5] and sometimes on the choice of forum by the parties[6], but there are situations where none of these criteria apply.

Residual jurisdiction in EU law refers to the determination of whether a court in a Member State has jurisdiction to hear disputes which are not covered by the jurisdictional provisions laid down in the legal acts of the Union, and the rules of private international law of the Member State of which the court is a member apply. Under private international law, jurisdictional provisions determine which court or legal system has the authority to hear a particular dispute.

In the CJEU case law, in the Sundelind case[7], Mrs Sundelind (a Swedish citizen), married to Mr Lopez (a Cuban citizen), filed for divorce in a Swedish court. That court dismissed the application on the ground that, during their cohabitation, the spouses had lived in France and that, at the time the court was seised, while Mrs Sundelind was still living in France, her husband was living in Cuba, so that the French courts had jurisdiction to hear the case under art. 3 of Regulation no. 2201/2003.

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[1] OJ L 178/02.07.2019, pp. 1-115.
[2] OJ L 7/10.01.2009, pp. 1-79.
[3] I.P. Filipescu, *Drept Internațional Privat*, Actami Publishing House, Bucharest, 1999, p. 473.
[4] See art. 1066 CPC.
[5] See art. 1079, art. 1081 para. (2) items 1, 3 CPC.
[6] For example art. 1068 CPC.
[7] CJEU, judgment of 29.11.2007, *Kerstin Sundelind Lopez v. Miguel Enrique Lopez Lizazo*, C-68/07, EU:C:2007:740.

Mrs Sundelind appealed against the dismissal, arguing that art. 6 of Regulation no. 2201/2003, which establishes the exclusive nature of the jurisdiction of the courts of the Member States under art. 3 to 5 of that regulation where the defendant is habitually resident in a Member State or is a national of a Member State, implies that, where the defendant is neither of those persons (as in the case of her husband), the exclusive jurisdiction of those courts does not apply and the jurisdiction of the Swedish courts could be based on national law.

The Swedish Court of Appeal referred to the CJEU the question whether, in factual circumstances such as those set out above, the action may be heard by a court of a Member State which does not have jurisdiction under art. 3 of Regulation no. 2201/2003, even though a court of another Member State may have jurisdiction in that regard under one of the rules of jurisdiction laid down in that art. 3.

CJEU held that the parties do not dispute that the French courts have jurisdiction to hear the divorce under the second or fifth indent of art. 3 of Regulation no. 2201/2003 and that, according to the clear wording of art. 7(2) of Regulation no. 2201/2003, if no court of a Member State has jurisdiction under art. 3 to 5 of that regulation, jurisdiction is determined, in each Member State, by national law.

Furthermore, under art. 17 of Regulation no. 2201/2003, the court seised which does not have jurisdiction under this Regulation must declare of its own motion whether a court of another Member State has jurisdiction under that Regulation.

In those circumstances, the Court of Justice concluded that the Swedish courts could not declare that they had jurisdiction to hear the case on the basis of the provisions of national law, since, under art. 7 para. 1 and art. 17 of that regulation, the Swedish courts are required to find that they do not have jurisdiction, taking into account the fact that the French courts have jurisdiction to rule on the application pursuant to art. 3(1) of that regulation.

We note that in this case the Court has clearly set out the stages of the analysis which a court of a Member State must carry out when it is seised of an application in matrimonial matters or in matters of parental responsibility, the residual jurisdiction (based on the national law of the Member State in whose territory the court seised is situated) not being available in any event if a court of another Member State has jurisdiction under the jurisdictional rules laid down in the regulation. This conclusion also applies where the defendant is not habitually resident in a Member State and is not a national of a Member State.

4. *Forum necessitatis*

In order not to violate the right of access to a court recognised by art. 47 ECHR, in Romanian national law, the legislator has regulated the legal institution of the *forum necessitatis* as a solution for resolving situations in which concrete jurisdictional rules of private international law would not apply.

According to art. 1070 CPC, if the law does not provide for the jurisdiction of the Romanian courts, then the Romanian court becomes competent to hear the case if the following conditions are met: the case has a sufficient connection with the place where the court seised is located; it is proved that it is not possible to bring a claim abroad or that it cannot reasonably be expected to be brought abroad.

In the Romanian doctrine[8], it has been argued that the New Code of Civil Procedure[9] has taken over the institution of the „forum of necessity" from European regulations in the field.

This claim is plausible, since the legal institution in question was not previously regulated by Law no. 105/22.09.1992 on the regulation of private international law relationships[10], and the EU legislature regulated the forum of necessity on 18.12.2008 by art. 7 of Regulation (EC) no. 4/2009, in the area of maintenance obligations, prior to the date of adoption of the Civil Procedure Code.

In the ECtHR Case *Naït-Liman v. Switzerland* (para. 84), the Court conducted a comparative law analysis and found that the rules governing universal civil jurisdiction in twelve of the 39 European States considered (Austria, Belgium, Estonia, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Portugal, Switzerland and Romania) explicitly recognise either the forum of necessity or a principle that goes by another name but has very similar consequences.

[8] C.-P. Buglea, *Dreptul internațional privat român din perspectiva reglementărilor europene aplicabile în domeniu și a noului Cod civil român,* 2nd ed., Universul Juridic Publishing House, Bucharest, 2015, p. 185.

[9] Adopted by Law no. 134/01.07.2010, published in the Official Gazette of Romania no. 545/03.08.2012.

[10] Published in the Official Gazette of Romania no. 245/01.10.1992.

At the same time, we note from this case law that the forum of necessity is a type of universal civil jurisdiction recognised in private international law, which can sometimes raise problems of sovereignty, equity and comity between States, in particular when several jurisdictions could claim authority over the same dispute, or practical difficulties concerning the taking of evidence, recognition and enforcement of judgments[11].

Author Abhimanyu George Jain has noted in the paper *Universal Civil Jurisdiction in International Law*[12] that in European states that have regulated the institution of *forum necessitatis*, courts are permitted to exercise jurisdiction despite the absence of any connection with the forum, but, however, most of these states interpret the doctrine of *forum necessitatis* as removing the requirement of a legal basis for jurisdiction, but not removing the requirement of some connection with the forum.

In our opinion this conclusion is based on the wrong premise, namely that the forum necessity regulated by the European states does not presuppose a sufficient connection with the state of the court seised. Therefore, the requirement of a connection with the forum is not merely an interpretation of the courts of the respective states, but a legal requirement.

In this paper we will use the definition of *forum necessitatis* as developed by the EU legislator. Thus, *forum necessitatis* is the authority of a court of a Member State to hear and determine, in exceptional cases, disputes which do not fall within the scope of the jurisdictional rules laid down in the legal acts of the Union, if the court proceedings cannot reasonably be brought or conducted, or cannot reasonably be conducted, in a third State with which the dispute is closely connected, provided that the dispute is sufficiently connected with the Member State of the court seised.

In the following, we will present some details concerning the interpretation given by the Court of Justice of the EU to the legal institution of *forum necessitatis* in its recent case law.

In Case *MPA v. LCDNMT*[13], the referring court referred six questions to the Court of Justice for a preliminary ruling, the fifth of which sought to ascertain, in essence, in the event that the habitual residence of all the parties to the dispute in matters relating to maintenance obligations is not in a Member State, the circumstances in which jurisdiction based, in exceptional cases, on the *forum necessitatis*, referred to in art. 7 of Regulation no. 4/2009, could be established. In particular, the referring court is seeking to ascertain, first, the conditions necessary for it to be held that proceedings cannot reasonably be brought or conducted, or would be impossible in a third State with which the dispute is closely connected, and whether the party relying on art. 7 is required to demonstrate that he or she has been unsuccessful in bringing or has attempted to bring those proceedings before the courts of that third State and, second, whether, in order to find that a dispute must have a sufficient connection with the Member State of the court seised, it is possible to base such a finding on the nationality of one of the parties.

First, the Court noted that the mere fact that all the parties to the dispute are habitually resident in a non-member State is not sufficient for the first condition of the forum of necessity to be regarded as satisfied, since the national court is required to verify and find that no court of a Member State has jurisdiction under art. 3 to 6 of Regulation no. 4/2009 (para. 101).

Secondly, the Court held that the habitual residence of the parties in the territory of a third State is an element which is covered by the notion of 'close connection' with the third State, since the courts of the State in whose territory the maintenance creditor and debtor are habitually resident would be in the best position to assess the child's needs, having regard to the social and family environment in which the child lives and will live (para. 105).

As regards the condition that the proceedings in question cannot reasonably be initiated or conducted or that it is impossible to conduct them before the courts of the third State concerned, the CJEU referred to the example in recital 16 of Regulation no. 4/2009, namely civil war, and noted that the Regulation does not provide further guidance as to the circumstances that may be invoked, but indicated that the forum of necessity was regulated in order to remedy in particular situations of denial of justice.

Thus, the court seised in a Member State may not require the maintenance creditor to prove that he initiated or attempted to initiate the proceedings in question before the courts of the third State with which he

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[11] ECtHR judgment of 15.03.2018, *Naït-Liman v. Switzerland*, Case no. 51357/07, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181789%22]}*, last consulted on 23.03.2024.

[12] A. George Jain, *Universal Civil Jurisdiction in International Law*, in Indian Journal of International Law, vol. 55, no. 2, June 2015, pp. 224 and 225, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766734*, last consulted on 23.03.2024.

[13] CJEU judgment of 01.08.2022, *MPA v. LCDNMT*, C-501/20, EU:C:2022:619, para. 97-113.

has a close connection, without success, it being sufficient that, having regard to all the facts and points of law of the case, the court seised is able to satisfy itself that the obstacles in the third State in question are such that it would be unreasonable to require the applicant to seek enforcement of the maintenance obligation before the courts of that third State.

This valuable finding for national courts was reinforced by Advocate-General Maciej Szpunar in his Opinion in Case *MPA v. /v. LCDNMT*[14], who added that the court seised must not only take into account the circumstances invoked by the appellant in the main proceedings, but must also base its decision on findings based on objective information and data, in particular, a finding that there are difficulties relating to women's effective access to the courts or that there are discriminatory practices against women in the non-member State would allow the court in question to consider that there is a risk of denial of justice.

The Advocate-General also listed other examples of exceptional occurrences which could be covered by the hypothesis under consideration, *i.e.*, the court of the third State with which the dispute is closely connected refuses to exercise jurisdiction, there are abusive procedural conditions, when, due to civil unrest or natural disasters, it is dangerous to travel to certain places, and the normal work of the third state cannot be exercised, where access to justice is unjustifiably impeded (legal representation is excessively costly, the length of proceedings is excessively long) or there are either serious problems of corruption in the judicial system, or deficiencies in fundamental fair trial guarantees or systemic deficiencies.

Finally, the Court of Justice emphasised that the nationality of one of the parties constitutes a sufficient link with the Member State of the court seised, as this element was given as an example in recital (16) of Regulation no. 4/2009.

With regard to this last condition, it has been argued in the Romanian literature[15] that the notion of „sufficient connection" is likely to create confusion between the determination of the international jurisdiction of the Romanian courts and the determination of territorial jurisdiction under domestic law, in the sense that, once the court seised establishes that it has international jurisdiction to hear the case as a forum of necessity, it will have recourse to the domestic rules of territorial jurisdiction in order to determine in concrete terms the competent court on Romanian territory.

Our opinion is that there is no confusion in determining the court with international and national territorial jurisdiction, since, if the connection identified as sufficient does not fall within any of the criteria for establishing domestic territorial jurisdiction, then the application will be directed, following the rules of subject-matter jurisdiction, to the Court of 1st District of the Municipality of Bucharest, respectively to the Bucharest Tribunal[16]. This conclusion also applies in the case of the forum of necessity provided for in Regulation (EC) no. 4/2009.

5. Similarities and differences between the two institutions

Among the similarities, we note that the two types of jurisdictions are subsidiary in nature, in the sense that they are applicable when the specific jurisdictional rules in the regulations that established them are not applicable. Both types of jurisdictions are forms of universal civil jurisdiction in private international law.

Some authors[17] have argued that, at European level, there are indirect references to the forum of necessity, with the examples given of art. 7 and 14 of the Brussels IIa Regulation, which govern residual jurisdiction. This would suggest an equivalence between the two legal institutions.

We cannot agree with this opinion, because residual jurisdiction, in the view of the EU legislator, is the case where the conflict of jurisdiction rules specifically laid down in the regulation are not applicable, referring to the internal rules of jurisdiction, in the field of private international law, of the Member States. From this point of view, the provisions of the Member States are different in that some of them provide for the institution of a forum of necessity (as in section 4), but regulated differently, or contain another provision which would constitute a basis for establishing international jurisdiction, different from the forum of necessity, while others have not legislated for the institution in question.

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[14] Opinion of Advocate General Maciej Szpunar delivered on 24.02.2022 in Case C-501/20 *MPA v. LCDNMT*, EU:C:2022:138, para. 122-128.

[15] S. Popovici, *Procesul civil international în reglementarea noului Cod de procedură civilă – Partea I: Competența internațională a instanțelor române (art. 1064-1069)*, in Revista Română de Drept al Afacerilor no. 6/2013, p. 16, *https://www.sintact.ro/#/publication/151007899?keyword=%20procesul%20civil%20international&cm=STOP*, last consulted on 23.03.2024.

[16] See art. 1072 para. (2) CPC.

[17] G. Boroi *et al.*, *Noul Cod de procedură civilă, comentariu pe articole*, vol. II, Hamangiu Publishing House, Bucharest, 2013, p. 690.

Thus, there is no identity of content between the residual jurisdiction and that of the forum of necessity, differing, in particular, by reference to the scope, effective application and the circumstances in which they are invoked. As soon as we find that a dispute cannot fall within the jurisdiction of the court seised, on the basis of the jurisdictional rules of the two regulations in question, in the case of residual jurisdiction, the court seised will apply the provisions of jurisdiction under national law, whereas in the case of forum de necessity, the court will proceed to analyse the four conditions laid down in art. 7 of Regulation no. 4/2009.

As mentioned in section 4 of this study, ECtHR carried out a comparative law analysis in the Case *Naït-Liman v. Switzerland* (para. 84), which concluded that *forum necessitatis* (or a principle with the same content but with a different name) was explicitly recognised in 12 of the 39 European states considered (Austria, Belgium, Estonia, France, Germany, Luxembourg, Netherlands, Norway, Poland, Portugal, Switzerland and Romania). Of these 12 European countries, only Norway and Switzerland are not Member States of the European Union.

In the given context, where only 10 out of 27 EU Member States have regulated in their national law the institution of the forum of necessity, when the conditions for residual jurisdiction are met in matrimonial matters and parental responsibility matters, this does not mean that the forum of necessity will be applied, as it depends on the aspect of the regulation of that institution by the Member State of the court seised in its internal law system.

For this reason, we note that there is no identity between the forum of necessity and residual jurisdiction, as species of universal civil jurisdiction, nor are they in a part-whole relationship, there being common aspects only where the court seised belongs to a Member State which has regulated the forum of necessity in national law and only if there are no other jurisdictional provisions applicable.

As regards the reasons why the Council opted for a different rule on residual jurisdiction in the Brussels IIb Regulation compared to the forum of necessity in Regulation no. 4/2009, the Report of 15.04.2014 from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) 2201/2003[18] showed that in both matrimonial matters and matters of parental responsibility, there is no uniform and exhaustive rule on residual jurisdiction and this results in unequal access to justice for citizens of the Union.

The Commission added that this regulation does not contain a rule on *forum necessitatis* which is found in other EU regulations (on maintenance or succession). Such a criterion for conferring jurisdiction was requested by the European Parliament in its legislative resolution of 15.12.2010 on the proposal for a „Rome III" Regulation[19].

Although it stated that the lack of provisions setting out the cases in which Member States' courts may decline jurisdiction in favour of a court in a third State creates a high level of uncertainty, the Commission proposed to regulate the institution of forum de necessity in the new Council Regulation (EU) 2019/1111, but without success.

Our opinion is that the non-adoption of the institution of the forum of necessity in Council Regulation (EU) 2019/1111 is precisely due to the differences between the jurisdictional provisions of private international law of the Member States, since only 10 Member States have recognised and legislated this institution.

Continuing this reasoning, we note, however, that the EU legislator has provided in Regulation (EU) 2019/1111 for a substitute for the forum of necessity, namely residual jurisdiction which entails the application of the legal provisions of the domestic law of the Member State in whose territory the court seised is located.

6. Case study

We chose to examine a court ruling which raised the issue of the application of Regulation (EC) no. 2201/2003, because we did not identify relevant jurisprudence of the Romanian courts with regard to Regulation Brussels IIb, taking into account the relatively recent date of application (01.08.2022), but the residual jurisdiction remained unchanged by the new regulation.

[18] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no. 1347/2000, celex 52014DC0225, pp. 8 and 9, *https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52014DC0225*, last consulted on 24.03.2024.

[19] European Parliament legislative resolution of 15.12.2010, P7_TA(2010)0477, point 3, *https://www.europarl.europa.eu/doceo/document/TA-7-2010-0477_EN.pdf*, last consulted on 24.03.2024.

By civil judgment no. 598/23.01.2023, pronounced by the District 5 Bucharest Court in case no. 20795/302/2022, the court admitted the exception of international incompetence of the Romanian courts, invoked on its own motion, and rejected the divorce application as not falling within the competence of the Romania courts. As a matter of fact, the court found that the parties were Romanian citizens and at the time of filing the application they had their residence abroad, respectively in the United Kingdom of Great Britain and Northern Ireland, where they currently live.

The court found that the residence of the parties in the United Kingdom of Great Britain and Northern Ireland constitutes an element of extraneity, which gives the disputed legal relationship the nature of an international private law relationship, and, given that the UK has left the European Union, becoming a third State at the end of the transitional period (31.12.2020), from that date, the provisions of Regulation (EC) no. 2201/2003 no longer find their application in cases which have an extraneous element, consisting of the English citizenship of a party or the habitual residence in the Kingdom, because they have ceased to be extraneous elements of EU law. Furthermore, to determine international jurisdiction, the court applied the domestic provisions provided for by art. 1066 *et seq.* CPC.

We note that the District 5 Bucharest Court has wrongly established that the applicability of Regulation (EC) no. 2201/2003 would be analysed in relation to the location of the extraneity element, since this is carried out according to the scope provided for in art. 1 of the regulation itself. Furthermore, given that the two parties were Romanian nationals, the international jurisdiction was the court before which the case was brought, in relation to the criterion of common citizenship provided for in art. 3(1)(b) of Regulation (EC) no. 2201/2003.

Another example is Civil judgment no. 667/04.07.2022, pronounced by the Novaci Court in file no. 324/267/2022. The court found that it was not internationally competent to hear the case with the object of increasing the maintenance pension requested by the claimant C.M.V. (Romanian citizen), through the legal representative of P.E., against the defendant C.D.M. (Romanian citizen).

The court has found that the minor creditor and the debtor reside in Spain and the subject matter of the case relates to the payment of maintenance to the minor, so that the provisions of art. 3 (a) and (b) of Regulation (EC) no. 4/2009 are applicable to the establishment of international jurisdiction, the Spanish courts having jurisdiction to settle the case.

The court also rightly found that the common citizenship of the parties is not sufficient to attract the competence of the Romanian courts, when there are special rules of jurisdiction such as those mentioned above.

The provisions of art. 1070 CPC relating to the forum of necessity are also not applicable, given the direct applicability of Regulation (EC) no. 4/2009 and the fact that no proof has been made that an application for an increase in maintenance pension could not be lodged on the territory of Spain.

We believe that the Judgement of Novaci has thoroughly rejected the claimant's argument regarding the establishment of the Romanian court's jurisdiction as a forum of necessity, since the first condition is not fulfilled - that no court in a Member State is competent under art. 3, 4 and 5 of Regulation (EC) no. 4/2009.

Although it was no longer necessary, the Novaci Court stated that the second requirement of the forum of necessity was also not met, since access to justice is not restricted in Spain, the complainant being able to make a request to the courts of that State and having the possibility of resorting to the instruments for the provision of legal assistance.

7. Conclusions

A first point that we want to highlight is that the jurisdictional provisions issued by the European Union have priority over the provisions of private international law of the Member States, but the latter are not excluded from application in full, but are complementary on the basis of residual jurisdiction. Residual jurisdiction provides flexibility in the EU legal system, allowing the courts of the Member States to deal with cases which, although they would not be competent under the provisions of the regulations adopted by the Council, could be settled by those courts under the provisions of national law of the State on whose territory they are located.

In analysing the CJEU case-law on residual jurisdiction, I have found that this type of competence cannot under any circumstances intervene if a court of another Member State is competent pursuant to the judicial rules laid down in the Regulation, even if the defendant does not have his or her habitual residence in a Member State and is not a national of one of the Member States.

After comparing residual jurisdiction under the Brussels II bis Regulation with the *forum necessitatis* under Regulation no. 4/2009 (commonly referred to as the Maintenance Obligations Regulation), we concluded that the main differences lie in the scope (matrimonial matters and matters of parental responsibility versus maintenance obligation), the actual application and the circumstances under which they are invoked. Essentially, while both the residual jurisdiction and the *forum necessitatis* aim to address the gaps in jurisdictions, they apply in different areas of family law and have distinct criteria and procedures for invoking them.

Another relevant conclusion is that there is no identity between the forum of necessity and residual jurisdiction, as species of universal civil jurisdiction, nor are they in a part-whole relationship, there being common aspects only where the court seised belongs to a Member State which has regulated the forum of necessity in national law and only if there are no other jurisdictional provisions applicable.

Although the Commission has proposed to the European Parliament, the Council and the European Economic and Social Committee to amend the Brussels IIa Regulation by regulating the *forum necessitatis* principle, in the new Bruxelles IIb (ter) Regulation the Council has retained residual competence, because of the differences between the jurisdictional rules of private international law of the Member States, since only 10 Member States have recognised and legislated this institution.

However, we believe that it is necessary to uniform the provisions of international private law adopted by way of regulations by the EU legislature in different areas of family law (particularly in matrimonial matters, parental responsibility matters and maintenance obligation) for the sake of efficiency and clarity, given that two different solutions (residual competence and the forum of necessity) have been applied to the same problem (gaps in jurisdiction provisions), but without an objective justification, which is likely to create confusion among the courts in the Member States.

Since the principle of the forum of necessity is much better characterised, including the concrete requirements needed to be applied, we propose to amend art. 6 and 14 of the Brussels IIb Regulation by replacing the rule on residual jurisdiction with the *forum necessitatis* principle, as provided for in Regulation (EC) no. 4/2009.

Nevertheless, there is still another important part to research and cover in the future, the regulation of universal jurisdiction in conflict of laws in matrimonial matters.

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Case-law:

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- Council Regulation (EC) no. 4/2009 of 18.12.2008 on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters relating to maintenance obligations;
- Council Regulation (EU) no. 2019/1111 of 25.06.2019 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility and on international child abduction;
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