CHAPTER 2: International Jurisdiction in Cases of Marital Breakdown

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Contents

1. Introduction

Rules on jurisdiction in matrimonial matters are set out in Articles 3-7 of the Brussels IIbis Regulation. Article 3 is the cornerstone of the rules on international jurisdiction dealing with a marital breakdown. Other relevant provisions are found in Articles 4 and 5 on jurisdiction over a counterclaim and the conversion of legal separation into divorce, respectively. Application is subject to the rules in Articles 6 and 7 relating to the personal scope of application (*ratione personae*). The grounds of jurisdiction contained in the Brussels IIbis Regulation are, to a large extent, identical to those provided in its predecessors – the Brussels II Convention and the Brussels II Regulation. Consequently, the three main features highlighted in the Explanatory Report to the former also define the grounds adopted in the text.[1]

1) The jurisdictional grounds in matters of marital breakdown are objective. This implies that it is not possible for the parties to make a choice of court agreement designating the competent court under the Regulation. Furthermore, it does not allow for the submission of jurisdiction, which makes it impossible for the spouses to 'make an implicit choice by simply appearing before the court and not contesting its jurisdiction'. [2]

Whether a revised Regulation should provide for such rules has been debated for many years. In July 2006, the Commission proposed to amend the Brussels IIbis Regulation by introducing new rules on international jurisdiction and applicable law.[3] In particular, that Proposal allowed for a limited choice of court by the parties. This included any of the grounds of jurisdiction contained in Article 3 and two additional criteria. These were the last common habitual residence of the spouses for a period of three years and the nationality or domicile of the applicant in the United Kingdom and Ireland. As there was no unanimity by the Member States, the Proposal was rejected and became the current Rome III Regulation, which is restricted to the area of conflict of laws. This question is still open, but it is important to note that the current 2016 Commission's Proposal does not foresee choice of court agreements.

2) The jurisdiction grounds contained in Article 3 are alternative: there is no order of priority and they are equal to one another. The Regulation clearly follows the principle of *favor divortii*. This means that the spouses are provided with different forums in order to ensure that there will be at least one court of a Member State that has jurisdiction in those instances where there is a real connection with the European Union.

3) As for the exclusive nature of jurisdiction under Articles 3, 4 and 5 according to Article 6, it is important to clarify that the term 'exclusive' has a different meaning to that in the Brussels Ibis Regulation. It follows that the list of grounds of jurisdiction contained in the Regulation is 'exhaustive and closed'.[4] It applies to situations in which the defendant is habitually resident in the territory of a Member State or is a national of a Member State, or in the case of the United Kingdom and Ireland has his or her 'domicile' in the territory of one of

[1] Borrás Report, para 28.
[2] Kruger and Samyn, *op. cit.*, p. 143.
[3] Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 final.
[4] Borrás Report, para 29.

these Member States. How to deal with defendants who are not habitual residents or nationals of a Member State, or in the case of the United Kingdom and Ireland do not have their domicile in the territory of one of these Member States is a question analysed *infra* when dealing with the interpretation of Articles 6 and 7. Attention is also given to those instances in which the defendant is a national of a Member State, but no court of a Member State has jurisdiction under the grounds provided in the Regulation.

2. General remarks

This part analyses some general concepts and principles of international jurisdiction which crucially impact on the Regulation.

2.1 Determination of local jurisdiction

Articles 3, 4 and 5 determine the competent court in Member States in cases of a marital breakdown. These provisions refer only to international jurisdiction, i.e., they determine the courts of which Member State connected with the case will hear a divorce, legal separation or marriage annulment petition. The Regulation does not provide information about the local jurisdiction, i.e., which particular court in a Member State will be competent. This is to be determined according to the domestic procedural rules of each Member State.[5]

2.2 Application of the *perpetuatio fori* principle

As a general principle, once a court has established its jurisdiction, changes in the personal circumstances of the spouses should not be considered.[6]

2.3 Relevant time

The wording of Articles 3, 4 and 5 does not clarify when the jurisdiction grounds of habitual residence and nationality should be considered. Indents five and six seem to refer to the date when proceedings are initiated, but no other indication is given for the remainder of the jurisdictional rules. Consequently, pre or post-petition habitual residences or domiciles could be controversial.[7] Given this lack of information in the Regulation, it seems coherent to take into consideration the time of filing the suit. In this regard, attention has to be given to Article 16, which determines when a court shall be deemed to be seised.[8]

[5] Hausmann, R., 'Article 3', in: Corneloup, S. (dir.), *European Divorce Law* (LexisNexis 2003), p. 238.
[6] *Ibid*., p. 241.
[7] Ní Shúilleabháin, *op. cit.*, p. 133.
[8] Hausmann, *op. cit*., p. 240.

3. International jurisdiction in general cases: Article 3

Article 3 is divided into two parts. The grounds of jurisdiction listed in Article 3(1)(a) indents one to six are formulated by reference to habitual residence, regardless of the nationality of the spouses. However, Article 3(1)(b) refers to nationality as a ground for jurisdiction, irrespective of where the parties have their habitual residence. Before analysing the rules contained in this provision, information is presented on the concepts of 'habitual residence' and 'nationality.' These concepts can give raise to different interpretations when applying the Regulation.

Firstly, no definition is provided of the 'habitual residence' of one of the spouses in matrimonial cases. One option could be to follow the case law of the CJEU when interpreting the concept of the 'habitual residence of a child'. However, this interpretation does not completely fit the concept of the 'habitual residence of one of the spouses'. In this regard, 'it must be kept in mind that the determining factors in the life of an adult are not the same as those of a child: it is not strange for an adult to work in one Member State but have most of his or her social life in another'.[9]

To mitigate the drawbacks of the lack of any definition of habitual residence in matrimonial matters, some experts suggest that the Recast should include guidelines to assist legal practitioners in the application of the Regulation. In particular, the following are suggested for consideration: 'the duration, the regularity, the stability, the conditions and reasons for the stay on the territory of a Member State and the settlement in that State, the nationality of the spouse, the location and the integration in a socio-professional environment, the economic interests, the language skills, the family and social relationships and the administrative attachment of the spouse in that State'.[10]

Regarding 'nationality', and in the United Kingdom and Ireland, 'domicile', it has to be remembered that the fact that the spouses might 'have more than one nationality, does not allow the national courts to limit its jurisdiction to what they consider to be the "most effective" nationality of both spouses'.[11] This view follows from the reasoning of the CJEU in its *Hadadi* judgment,[12] which is detailed *infra* in this Chapter, under 3.7.1 '*Difficulties in the application of Article 3(1)(b) – CJEU case law*'.

3.1 First indent: 'the spouses are habitually resident'

This ground for jurisdiction refers to situations in which the spouses have their habitual residence in the same Member State. In practice, this jurisdictional ground is very often applicable.[13] This rule on jurisdiction seems to be suitable for most, but not all couples. For

[9] Kruger and Samyn, *op. cit*., pp. 141-142.
[10] Council of Bars and Law Societies of Europe, *CCBE Position on the proposal for a recast of the Brussels IIa Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction* (2016), p. 2.
[11] Kruger and Samyn, *op. cit*., p. 142.
[12] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.
[13] Borrás Report, para 31.

example, it is not appropriate when the spouses change their habitual residence for a short-term relocation, whilst retaining links with the State of their previous habitual residence.[14]

Habitual residence in the same Member State does not require that both spouses are habitually resident in the same locality, but rather in the same country. Changes to habitual residence during separation or divorce proceedings are irrelevant given the principle of *perpetuatio fori.*

3.2 Second indent: 'the spouses were last habitually resident, insofar as one of them still resides there'

This international jurisdiction rule covers situations in which the couple were habitually resident in the same Member State, but after the marital crisis only one of them retains his/her habitual residence in that Member State. As mentioned in connection with the previous rule on jurisdiction, this rule is reasonable, from a theoretical point of view, for both parties in the majority of cases. Yet, in a few situations it cannot reflect a close connection.[15] The wording of this provision does not specifically refer to any of the spouses – either the respondent or the applicant. However, as 'the habitual residence of the respondent' is a separate ground provided in the third indent, it follows that this rule refers specifically to the applicant. Thus, this jurisdictional ground appears to be important for the spouse who remains in the Member State of the couple's last habitual residence, as he or she can immediately initiate proceedings before the courts of that Member State. In contrast, the spouse who vacates his/her habitual residence must wait for six or twelve months, respectively, if he or she wishes to file a divorce petition in the courts of the Member State of his or her habitual residence in accordance with indents five or six.[16]

3.3 Third indent: 'the respondent is habitually resident'

This jurisdictional ground incorporates the general principle of *actor sequitur forum rei,*[17] which is accepted in national laws worldwide. Also, this is the cornerstone in Regulation Brussels Ibis. A comparison between the third indent and indents five and six clearly shows that the position of the respondent enjoys a higher degree of legitimacy than that of the applicant: the latter has to wait for six or twelve months to be able to issue a divorce petition in the courts of his/her habitual residence.[18] This international jurisdiction rule undoubtedly aims to protect the defendant by assuming that it will be convenient for him/her to litigate in the courts of the Member State of his/her habitual residence.[19]

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[14] Ní Shúilleabháin, *op. cit.*, p. 134.
[15] *Ibid.*, p. 135.
[16] Hausmann, *op. cit.*, p. 244.
[17] Borrás Report, para. 31.
[18] Hausmann, *op. cit.*, p. 245.
[19] Ní Shúilleabháin, *op. cit.*, p. 136.

3.4 Fourth indent: 'in the event of a joint application, either of the spouses is habitually resident'

According to the fourth indent, the courts of the Member State in which either of the spouses is habitually resident will have international jurisdiction in cases where there is a joint application. Although this rule appears to offer a limited choice of forum,[20] it is necessary to determine how a 'joint application' is interpreted. Some authors argue that this forum will only be relevant in those Member States where a joint application is possible. Others believe that it has a broader interpretation so as to cover situations in which one of the spouses commences proceedings while the other consents thereto.[21] Taking into account that choice of court agreements are not permitted under the Regulation, mutual consent should be limited to the time of application and not to a previous moment.[22] In addition, the view has been maintained that an uncontested appearance cannot be considered to be an agreement to consent.[23]

3.5 Fifth indent: 'the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made'

Indent five refers to *forum actoris* as a criterion for jurisdiction. The inclusion of such an international jurisdiction rule has been the subject of controversy in the literature and in the process of drafting the Brussels II Convention. Some Member States considered this ground of jurisdiction to be an abusive privilege for the applicant: it could promote unilateral forum shopping and allow the courts of a Member State with no connection to the respondent to hear the case.[24] Other Member States were not in favour of renouncing such a forum as a similar rule is included in their domestic rules on international jurisdiction. Finally, consensus was achieved by including different requirements for the interplay between the rules contained in indents five and six.[25]

Pursuant to indent five, the courts of the Member State of the applicant's habitual residence will only have jurisdiction provided that he/she has resided in that State for at least one year before the application was made, regardless of the nationality of the parties. Despite the wording 'before the application was made', the previous one-year requirement in the forum state can be achieved, according to some authors, once the proceedings have begun. However, this interpretation is subject to a restriction. The one-year period should expire before proceedings become pending in another Member State.[26] A different interpretation could block the applicant from issuing a divorce petition in another Member State having jurisdiction. In line with this, it is important to note that this ground of jurisdiction requires one year's 'residence' and not one year of the applicant's 'habitual residence'. This has been interpreted by considering that the requirement of the 'habitual residence' of the applicant needs to be

[20] Magnus/Mankowski/Borrás, *op. cit.*, p. 91.
[21] Ní Shúilleabháin, *op. cit.*, p. 137.
[22] *Ibid*.
[23] Hausmann, *op. cit.*, p. 246.
[24] Ní Shúilleabháin, *op. cit.*, p. 143.
[25] Magnus/Mankowski/Borrás, *op. cit.*, p. 91.
[26] Hausmann, *op. cit.*, p. 248.

satisfied at the beginning of the proceedings, while 'residence' during the previous year does not necessarily have to be 'habitual'.[27]

3.6 Sixth indent: 'the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there'

Indent six aims to encompass situations in which one of the spouses has returned to the Member State of his or her nationality after the marital crisis or in the case of the United Kingdom and Ireland has his or her domicile there. The above-mentioned comments on forum shopping and unfair unilateralism are also relevant to this jurisdictional ground. Yet, the applicant's choice may appear to be less surprising for the defendant, given the requirement that the nationality and residence must coincide. Therefore, this rule requires a shorter period of residence in the forum state (six months) compared with the period required in indent five (twelve months).

The nationality of the applicant can be attained in the course of the proceedings and there are no temporary limits regarding a lapse of time for acquiring nationality. On the contrary, previous nationalities – before the divorce or legal separation proceedings or marriage annulment have been initiated – should not be taken into consideration. If a person has more than one nationality, any of them can be effective for the purpose of applying this ground of jurisdiction provided that it coincides with the minimum duration of his or her residence.[28]

It has been debated whether indent six could violate Article 18 TFEU[29] prohibiting discrimination on the grounds of nationality, because it requires the shorter period for EU citizens residing in the Member State of their nationality than for those who are not. An argument in defence of the non-discriminatory nature of this international jurisdiction rule could be that all EU citizens are free to move to the Member State of their nationality to make use of the applicability of this jurisdiction rule.[30] In addition, if nationals of other Member States have to be treated equally with domestic nationals under indent six, the application of the Regulation would contradict the intention of the European legislator.[31]

In relation to the United Kingdom and Ireland, domicile replaces the nationality of the applicant. It is important to clarify that the requirement for the applicant to reside in a Member State six months immediately before the application was made as long as his or her domicile is in that Member State, only plays in the United Kingdom or Ireland. In any other Member State, it is only possible to invoke the nationality of the applicant to justify the application of this indent.[32]

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[27] Ní Shúilleabháin, *op. cit.*, p. 143.
[28] Hausmann, *op. cit.*, pp. 249-250.
[29] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (hereinafter also TFEU).
[30] Ní Shúilleabháin, *op. cit.*, p. 145.
[31] Hausmann, *op. cit.*, p. 251.
[32] *Ibid*.

3.7 Seventh indent: 'of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses'

Pursuant to Article 3(1)(b), the applicant can file a divorce petition before the courts of the Member State of the common nationality of the spouses. As mentioned with respect to previous indents, the common nationality of the spouses can be attained in the course of the proceedings, i.e. up until the final oral hearing.[33]

3.7.1 Difficulties in the application of Article 3(1)(b) – CJEU case law

The wording of this provision does not clarify the application in cases of dual or multiple nationalities. However, this question was clarified by the CJEU in the *Hadadi* case.[34] This case involved a Hungarian couple who, after their marriage, moved to France and acquired French nationality. In 2002, the husband issued a divorce petition before a Hungarian court, whereas the wife started proceedings in France.

The CJEU observed that the system of jurisdiction established by the Regulation on the dissolution of matrimonial ties was not intended to preclude the courts of several Member States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.[35] The Court clarified that there is nothing in the wording of Article 3(1)(b) to suggest that only the 'effective' nationality can be taken into account in applying that provision. Such an interpretation would restrict individuals' choice of a court which has jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised.[36]

Consequently, where the spouses each hold the nationality of the same two Member States, Article 3(1)(b) 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 Member 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'.[37]

It should be emphasised that the issue of jurisdiction must be determined separately for each of the claims submitted. Thus, the court seised of a claim for divorce may not decide upon the request relating to parental responsibility if they lack jurisdiction under Article 8 or any other provision of the Regulation, even if the national law of that Member States imposes the obligation to rule *ex officio* on the right of custody, access rights and alimony.[38]

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[33] *Ibid*., p. 252.
[34] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.
[35] *Ibid*., para. 49.
[36] *Ibid*., paras. 51-53.
[37] *Ibid*., para. 58.
[38] CJEU Case C-604/17 *PM v AH* [2018] ECLI:EU:C:2018:10. The facts of the case and the reasoning of the CJEU is detailed *infra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*'.

3.7.2 Difficulties in the application of Article 3(1)(b) – National Reports

According to the majority of the National Reports, the *Hadadi* case offers sufficient guidance in applying this ground of jurisdiction (Austria, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Hungary, Ireland, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia and Sweden).[39] In some cases, this is due to the fact that no national case law has specifically referred to the *Hadadi* case (Belgium, Estonia, Finland, Latvia, and Lithuania).[40] Despite this, some experts propose to include a reference to cases of multiple nationalities in the recast (Italy).[41]

In addition, two important aspects have been highlighted in some National Reports. Firstly, some of the specialists consulted have argued that the interpretation underlying the *Hadadi* case could favour forum shopping, since the applicant is provided with another potentially competent court (France and Spain).[42] Secondly, the *Hadadi* case does not cover cases of mixed double nationality (i.e., one of a Member State and the other of a third State), although it can be assumed that the applicant could start proceedings in the courts of the Member State of the common EU nationality (France, Spain). As a means of illustration, the French specialist can be quoted:

> 'The jurisdiction ground "nationality" is often used by French courts to establish jurisdiction pursuant to Article 3(1)(b). The main problem with the jurisdictional ground nationality is that it leads to a rush to the court, and even a rush to the divorce. Indeed, lawyers confront situations in which one of the spouses, while neither are entirely ready to divorce, nevertheless brings an action for divorce in the "best" forum in order to protect his or her interests (see question 11 for proposals). As to the situation of dual nationality, it was of course problematic before the CJEU rendered the *Hadadi* judgment. This last judgment appears to give sufficient guidance on the application of Article 3(1) in situations of dual Member State nationality. However, the *Hadadi* case doesn't say anything about the question when the dual nationality combines a nationality of a third State with one of a Member State (for the sake of the application of Article 6 and/or 7). The solution in such a case would be that the Member State nationality should take priority. In case of a change of nationality ("*conflit mobile*"), legal doctrine is in favour of giving priority to the nationality possessed at the moment when the court was seized (when the proceedings become pending). The same applies

[39] National Report Austria, question 10; National Report Bulgaria, question 10; National Report Cyprus, question 10; National Report the Czech Republic, question 10; National Report Germany, question 10; National Report Greece, question 10; National Report Hungary, question 10; National Report Ireland, question 10; National Report Malta, question 10; National Report the Netherlands, question 10; National Report Poland, question 10; National Report Portugal, question 10; National Report Slovenia, question 10; National Report Slovakia question 10 and National Report Sweden, question 10.
[40] National Report Belgium, question 10; National Report Estonia, question 10; National Report Finland, question 10; National Report Latvia, question 10 and National Report Lithuania, question 10.
[41] National Report Italy, question 10.
[42] National Report France, question 10; National Report Spain, question 10.

to the principle of *perpetuatio fori* under which the jurisdiction of a court – once established – shall not be disturbed by a subsequent change of nationality or domicile'.[43]

The seventh indent also refers to the common domicile of the spouses in the case of the United Kingdom and Ireland. In this regard, two situations can be distinguished. Firstly, if the spouses have their common domicile in the United Kingdom or Ireland and, at the same time, have a common nationality – that is not citizenship of the United Kingdom and Ireland – then this rule on jurisdiction allows them to choose one of the two jurisdictions. Secondly, in the case of different nationalities the spouses will only be able to start proceedings before the courts of the Member State of their common domicile.[44] A different question that should be highlighted with regard to the common domicile is that it seems to avoid the application of an inappropriate forum: having the spouses' domicile in the same State implies a real – and current – connection, whereas a common nationality in cases where spouses are not living together can be, in some cases, unexpected by the defendant.[45]

4. International jurisdiction in specific cases: Articles 4 and 5

International jurisdiction established according to Article 3 can be influenced by Article 4 relating to cases involving a counterclaim, and Article 5 on the conversion of legal separation into a divorce.

4.1 International jurisdiction in cases involving a counterclaim (Article 4)

Article 4 of the Regulation mirrors Article 5 of the Brussels II Convention and the Brussels II Regulation. This rule aims to grant jurisdiction to hear a counterclaim to the same court hearing the initial proceedings. The counterclaim has to fall within the scope of application of the Regulation. This means that petitions on maintenance or the division of property and assets are excluded.[46] Thus, Article 4 only covers counterclaims following the limitation established in Article 1(1)(a) of the Regulation. Examples are counterclaims for divorce following a separation, and counterclaims for nullity preceded by a divorce application.[47]

Article 4 has to be considered in conjunction with the *lis pendens* rule of Article 19(1). Which provisions are applicable to a particular situation can be controversial, despite the fact that they cover different cases. Article 19(1) deals with instances in which each spouse initiates proceedings in different Member States. In contrast, the purpose of Article 4 is to join subsequent petitions based on a different cause of action in cases of marital breakdown before the courts of the same Member State. For example, if one of the spouses has commenced separation proceedings in a Member State, the other spouse cannot start divorce proceedings in another Member State. He/she is only able to counterclaim for divorce in the Member State in which the other spouse has initiated separation proceedings.[48] However, the application of

[43] National Report France, question 10.
[44] Hausmann, *op. cit.*, p. 252.
[45] Ní Shúilleabháin, *op. cit.*, p. 147.
[46] Magnus/Mankowski/Borrás, *op. cit.*, p. 95.
[47] Ní Shúilleabháin, *op. cit.*, p. 148.
[48] Hausmann, *op. cit.*, p. 255.

Articles 4 and 19(1) leads to the same results: the court first seised has jurisdiction for marital breakdown proceedings.[49]

4.2 International jurisdiction in cases of a conversion of legal separation into divorce (Article 5)

As with all the rules on international jurisdiction in cases of marital breakdown, this provision reproduces a previous article from the Brussels II Convention and the Brussels II Regulation. Its objective has been discussed since the preparation of the Brussels II Convention, given the differences in national laws on this issue. Differences arise because a legal separation is a compulsory legal step before applying for a divorce in some Member States, while this institution is unknown in other Member States.[50] Therefore, the application of Article 5 of the Regulation is apparently reserved for Member States in which legal separation exists and can be converted.[51]

According to Article 5, the court that had jurisdiction for the legal separation could also have jurisdiction for the subsequent divorce. In practical terms, Article 5 is an alternative ground to those included in Article 3. All of these jurisdiction criteria are placed on an equal footing for the divorce petition and can be chosen by the applicant.[52] The application of Article 5 does not require that the circumstances of the spouses fit any of the grounds provided in Article 3 at the time the divorce is filed. In other words, Article 5 is an independent rule on international jurisdiction.

It seems to be controversial whether the court having jurisdiction for the legal separation has to be determined according to Article 3 or can be determined according to the domestic international jurisdiction rules of a Member State. In this context, the discussion on the application of Articles 6 and 7 *infra* is also relevant here. Initially, one can assume that the application of Article 5 depends on the previous application of any of the grounds under Article 3.[53] However, it seems logical to accept that if courts having jurisdiction for the legal separation were competent according to the application of their domestic international jurisdiction rules – upon a consideration of Articles 6 and 7 – then Article 5 allows for divorce proceedings to be commenced in the courts of that Member State.[54] Article 5 makes no reference to a specific rule on international jurisdiction which is applicable to the legal separation.

Conversion of a legal separation into a divorce has to be possible according to the *lex fori;* this is in a flexible and wide sense. However, if the conflict of laws rules of the Member State having jurisdiction designate the law of a Member State where that conversion is possible, Article 5 can perfectly work. [55]

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[49] Borrás Report, para 42.
[50] *Ibid*., para 43.
[51] Commission staff working paper, *Annex to the Green Paper on applicable law and jurisdiction in divorce matters*, COM (2005) 82 final.
[52] Magnus/Mankowski/Borrás, *op. cit*., note 24, p. 96.
[53] Ní Shúilleabháin, *op. cit*., p. 148.
[54] Hausmann, *op. cit*., p. 258.
[55] *Ibid*.

5. Application of Articles 6 and 7 of the Brussels IIbis Regulation

The relationship between Articles 6 and 7 has been controversial for many years. In fact, based on the Brussels II Convention and Brussels II Regulation, many authors have tried to clarify the application of these provisions. In the *Sundelind Lopez* case[56] the CJEU offered some guidelines on interpreting them. But this judgment does not cover all situations. For example, it does not provide an answer in cases where the defendant is an EU national but has his/her habitual residence outside the EU.

5.1 Relationship between Articles 6 and 7 on the personal scope of application: a general overview of the different theories

As already mentioned, Articles 6 and 7 have been subjected to different interpretations. Various doctrinal positions can be summarised as follows.[57]

1) A group of authors believe that rules on jurisdiction contained in the Regulation are going to be applicable as long as possible, regardless of the personal circumstances of the spouses. In practical terms, the personal scope of application of the Regulation would be determined by the self-application of Article 3. Where this article does not allow the claimant to litigate in the EU, it would be possible to apply domestic rules on international jurisdiction. Under this theory, Article 6 loses its *raison d'être*, since the Regulation would work perfectly by considering solely the content of Article 7(1).[58]

2) Another doctrinal position focuses on the importance of firstly check if a particular situation falls under the personal scope of application of the Regulation, i.e., the defendant is habitually resident in the territory of a Member State or is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States. It is only in these situations where it makes sense to consider the application of the forums contained in the Regulation. In those instances where the Regulation would not be applicable, domestic international jurisdiction rules could be applicable, regardless the potential applicability of any of the forums contained in Article 3 of the Regulation. [59]

3) A large number of authors distinguish between situations in which the defendant is habitually resident in or is a national of a Member State or has his or her domicile in the United Kingdom or Ireland, and those situations in which the defendant has no such connection with a Member State. In the former, it is not possible to apply the domestic international jurisdiction rules, and in the latter it is perfectly possible to apply these rules when the Regulation is not

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[56] CJEU Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403.
[57] Rodríguez Rodrigo, J., 'Reglamento 1347/2000: ámbito de aplicación personal (arts. 7 y 8)' (2005) 4 Revista colombiana de derecho internacional, pp. 361-378.
[58] Calvo Caravaca, A.L. and Carrascosa González, J., *Derecho internacional privado* (16th edn., Comares 2016), p. 233.
[59] Garau Sobrino, F., 'La interpretación contra *legem* de la normativa de Derecho internacional privado por el Tribunal de Justicia de la Unión Europea. ¿Una usurpación de la función legislativa?' in : Esplugues Mota, C. and Palao Moreno, G. (eds.), *Nuevas fronteras del derecho de la Unión Europea. Liber Amicorum José Luis Iglesias Buhigues* (Tirant lo Blanch 2011), p. 121.

applicable. This position implies that while the scope of application of Article 6 exclusively refers to defendants habitually resident in the territory of a Member State or who are nationals of a Member State, Article 7(1) covers the remainder of situations. This doctrinal position seems to be followed in the 2016 Commission's Proposal.

5.2 Difficulties in the application of Articles 6 and 7 – CJEU case law

The scope of application of the Regulation when the defendant is not an EU citizen, i.e., does not have his/her domicile in the United Kingdom or Ireland and does not have his/her habitual residence in the EU, was addressed in the *Sundelind Lopez* case[60]. This case was the second preliminary ruling on the interpretation of the Brussels IIbis Regulation. According to the facts of the case, Ms. Sundelind, a Swedish national with her habitual residence in France, applied for a divorce petition in Sweden. Her husband had his habitual residence in Cuba and he also had Cuban nationality. A court in Sweden could base its jurisdiction on Swedish legislation due to the Swedish nationality of the applicant. Yet, the Swedish courts declared that they had no jurisdiction, since it was possible to start proceedings in France according to Article 3(1)(a). The CJEU supported the position of the Swedish courts holding that 'if a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that Regulation'.

Taking into account the solution provided in this case, only doctrinal positions 1) and 3) can be maintained. Both of them defend the prior application of international jurisdiction rules contained in the Regulation to respondents who are not habitually residents in the territory of a Member State or are not nationals of a Member State and have no domicile in the United Kingdom or Ireland. Doctrinal position 2 would have directly considered the application of domestic international jurisdiction rules since respondents who are not habitually residents in the territory of a Member State or are not nationals of a Member State do not fall within the Regulation's scope of application and thus its rules shall not be applied.

5.3 Difficulties in the application of Articles 6 and 7 – National Reports

The National Reports show that most Member States consider that the *Sundelind Lopez* case offers sufficient guidance on the application of Articles 6 and 7 (Austria, Bulgaria, the Czech Republic, Cyprus, Germany, Greece, Ireland, Latvia, Malta, Slovakia and Sweden).[61] This is probably due to the fact that, in some cases, there are, as yet, no specific judgments where either the application of these Articles or the guidance of the CJEU has been specifically discussed

[60] CJEU Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403.
[61] National Report Austria, question 6 ; National Report Bulgaria, question 6 ; National Report the Czech Republic, question 6 ; National Report Cyprus, question 6; National Report Germany, question 6; National Report Greece, question 6; National Report Ireland, question 6; National Report Latvia, question 6; National Report Malta, question 6; National Report Slovakia, question 6 and National Report Sweden, question 6.

(Estonia, Finland, Hungary, Lithuania, Luxembourg and Portugal).[62] However, according to the information provided by some National Reports (Belgium, France, Italy, Romania, Slovenia and Spain)[63], the relationship between these two provisions is not sufficiently clear. This is especially so because the ruling does specify whether national rules on international jurisdiction can also apply if the defendant is an EU national but has his or her habitual residence in a third State. This problem will be analysed immediately below. This idea is clearly explained in the Spanish Report:

> 'After the case of *Sundelind Lopez*, some authors were of the opinion that Article 7 prevailed over Article 6, concluding that domestic international jurisdiction rules were going to be applicable only in those instances where any court of a Member State would be competent according to Articles 3, 4 and 5, regardless of the nationality or habitual residence of the defendant in the EU. However, a large number of authors distinguished between those situations where the defendant was a national of the EU or had his/her habitual residence in the EU, and those who were not. While in the former it was not possible to apply the domestic international jurisdiction rules, in the latter it was perfectly possible to apply them when the Regulation was not applicable. Anyway, there is no harmonization in the Spanish doctrine with regard to this particular question'.[64]

5.4 What if the defendant is a national of the EU?

The analysis of Articles 6 and 7 remains problematic in certain situations. For example, this is the case when a defendant who is an EU Member State national has no habitual residence in a Member State and the applicant does not habitually reside or has not resided in the European Union for the period of time indicated in Article 3(1)(a) indents five and six and does not have the same nationality as the defendant.[65] This problem does not arise in relation to Article 6(a), since if the defendant has his/her habitual residence in a Member State, it is always possible to start proceedings according to Article 3(1)(a) third indent.

The solution which is provided for EU citizens depends on the doctrinal position followed.[66] On the one hand, according to doctrinal positions 1) and 2), it would only be possible to use domestic international jurisdiction rules if none of the jurisdictional grounds in Article 3 establish the jurisdiction of a Member State's court. For example, in such a case it would be possible to rely on the nationality of the applicant to establish jurisdiction, if Member States provide for this rule. On the other hand, according to doctrinal position 3, it would not be possible to apply domestic international jurisdiction rules as EU citizens can only be brought

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[62] National Report Estonia, question 6 ; National Report Finland, question 6 ; National Report Hungary, question 6; National Report Lithuania, question 6 ; National Report Luxembourg, question 6 and National Report Portugal, question 6.
[63] National Report Belgium, question 6 ; National Report France, question 6 ; National Report Italy, question 6 ; National Report Romania, question 6 ; National Report Slovenia, question 6 and National Report Spain, question 6.
[64] National Report Spain, question 6.
[65] De Boer, Th.M., 'What we should *not* expect from a recast of the Brussels IIbis Regulation' (2015) 33 NIPR, p. 13.
[66] Rodríguez Rodrigo, *op. cit.*, p. 375.

before the courts of a Member State by the jurisdictional rules contained in the Regulation. As a result, the defendant spouse could not be sued in any Member State. This doctrinal position aims to protect spouses who are citizens or habitual residents of an EU Member State against exorbitant jurisdictional rules contained in the domestic legislation of Member States, but in return the claimant should wait until the temporal conditions of Article 3(1)(a) indents five and six can be met.

5.5 Situation contained in Article 7(2)

Taking into account that most of the domestic international jurisdiction rules of the Member State are based on the applicant's nationality,[67] Article 7(2) puts the nationals of a Member State and the nationals of another Member State who are habitual residents in that Member State on an equal footing. In other words, Article 7(2) allows a national of a Member State to start proceedings according to the domestic international jurisdiction rules under the same conditions as nationals of that Member State.

In order for the content of Article 7(2) not to overlap with Article 3(1)(a) fifth indent ('the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made'), it can be assumed that the former refers to those instances where the applicant has not resided in that Member State for more than one year before the application is made. As a consequence, what Article 7(2) allows is to accelerate the possibility to issue a divorce petition in those instances where the defendant is not a national of a Member State and does not have his/her habitual residence in the European Union.[68]

5.6 Preferred doctrinal position

In conclusion, taking into account the prevailing view in the literature, the *Sundelind Lopez* case and the content of the 2016 Commission's Proposal, the Brussels IIbis Regulation should be applicable following doctrinal position 3).

[67] Nuyts, A., 'Study on residual jurisdiction (Review of the Member States' rules concerning the "residual jurisdiction" of their courts in civil and commercial matters pursuant to the Brussels I and II Regulations) General Report' (2007), pp. 95-97; Magnus/Makowski/Borrás, *op. cit.*, pp. 105-107.
[68] Ní Shúilleabháin, *op. cit.*, p. 162.

GUIDELINES – Summary

Article 3

To sum up, the international jurisdiction rules of Article 3 of the Regulation are objective, alternative and exhaustive.

Article 4

Article 4 aims to grant jurisdiction to hear a counterclaim to the same courts hearing the initial proceedings.

Article 5

According to Article 5, the court that had jurisdiction for the legal separation could also have jurisdiction for the subsequent divorce.

Articles 6 and 7 – Personal scope of application of the Brussels IIbis Regulation

- If the defendant is habitually resident in the territory of a Member State or is a national of a Member State/has his or her domicile in the United Kingdom or Ireland, he or she can only be sued in a Member State under the forums contained in the Regulation and not by the domestic international jurisdiction rules.

- If the defendant is not habitually resident in the territory of a Member State or is not a national of a Member State/does not have his or her domicile in the United Kingdom or Ireland, an attempt could be made to take action against him/her, first of all, under the rules contained in the Regulation, and should that fail, under the domestic international jurisdiction rules.