



PRACTICAL CASE

Written Paper

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QUESTION 1

Regulation 2203/2001 Brussels II bis indicates in its article 3, among other criteria, that in matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State in whose territory the spouses are habitually resident, or the spouses were last habitually resident, insofar as one of them still resides there, or the respondent is habitually resident, or in the event of a joint application, either of the spouses is habitually resident, or the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made.

In our case study, the couple resides in Brussels, when they make a decision to get a divorce, Brussels being their last common domicile, and Rosa still lives there.

Their options are:

- In the event of a joint application for divorce, they may resort to the courts of the country where either spouse is habitually resident, i.e Germany or Belgium
- In the event of a solo application for divorce, jurisdiction will depend on the applicant:
 - if Rosa is petitioning for divorce, both Belgium, where she habitually resides, or Germany, where Franz habitually resides, may have jurisdiction.
 - If Franz is petitioning for divorce, Belgium may have jurisdiction as Belgium is the last common residence of the couple and also still Rosa's domicile

In so far as the couple's children are living in Brussels and since the couple owns a place to live in Brussels, the most appropriate court to solve their dispute would be Brussels. In that case, and if the couple decides on a joint application, a first instance court of their choice may have jurisdiction (article 1288 bis of the Berlian judiciary code). Alternately, courts of the couple last common domicile or of the defendant's domicile may have jurisdiction, i.e. a court located in Brussels (article 628 of the judiciary code).

QUESTION 2

On the one hand, the 4/2009 regulation (december 18, 2008) provides for tools to facilitate the payment of alimony from one EU country to the other. Alternate competency criteria are instituted to determine jurisdiction (article 3) among which the residence of the plaintiff and creditor of alimony is listed.

In our opinion this is the most appropriate and stable criterion. As a matter of fact, the children are the final beneficiaries of alimony, and they live in Brussels with their mother. Furthermore, the choice of Brussels would make matters easier for the Becker family, since divorce proceedings are already taking place in Brussels (cf question 1)

On the other hand, and regarding mediation, directive 2008/52/CE of the European parliament and the Council requests all member states to ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable by a judicial decision.

In Belgium, a statute of February 21, 2005 provides a legal framework for mediation, either judiciary (ordered by a judge at the parties request or with their consent) or voluntary (at the parties command without any involvement of the Judiciary)

To make their agreement, reached through mediation, enforceable, Rosa and Franz will have to have it homologated by a court (article 1043, 1736 al 3 of the Belgian Code judiciaire)>
The court may refuse enforceability of the agreement only if its provisions may infringe public order or the children's interests.

QUESTION 3

The Courts of a Member State have jurisdiction in matters of parental responsibility upon a child who usually resides in that Member State at the time the Court is seized (article 8 of the Brussels II Regulation).

The Court of the Member State which is exercising jurisdiction on an application for divorce can have jurisdiction in any matter related to parental responsibility and connected with the demand, when the jurisdiction of the Court has been expressly accepted or in an unequivocal

manner by the spouses and by the holder of parental responsibility when the Court is seized and when it is in the superior interest of the Child (article 12).

In this case, Brussels Court is already seized by the application for Franz and Rosa's divorce. This Court can have jurisdiction in matters of parental responsibility about their children.

QUESTION 4

Belgium Court has jurisdiction as for the right to use the apartment :

- On the one hand, Belgium jurisdiction is competent for the divorce and questions linked to the apartment are to some extent "incidental" to this main demand (cf. question n°1)
- On the other hand, since the apartment is in Brussels, it will be more efficient to give competence to Belgium jurisdiction to deal with questions about the right to use the apartment

QUESTION 5

Determination of the law that could be applied to the divorce is tricky : firstly, the conflict-of-law rules in matters relating to divorce are foreseen in a European regulation ("Rome III") which is not effective yet ; secondly, the Council Regulation 2201/2003 (Bruxelles II) which refers to matrimonial matters does not foresee this question ; Thus, the solution may be found in the "Hague convention" of 1968 on matters concerning the conflict of law in the matrimonial property regimes.

According to this convention, the factor used to determine the law applicable to matrimonial property regime is the spouses' first habitual residence. In this particular case, Italian law could be applied to the divorce.

QUESTION 6

According to the Hague Convention of 19 october 1996, the factor used to determine the law applicable to parental responsibility is the child's habitual residence.

In this particular case, Belgium law will be applied to the custody and visitation of the children.

QUESTION 7

ROSA and FRANZ bought their apartment during their marriage. So, the question should be studied in the light of the Hague Convention of 14 march 1978 which deals with the conflicts of law in the matrimonial property regimes. The factor used to determine the law applicable to matrimonial property regime is the spouses' first habitual residence (article 4).

In this particular case, Italian law could be applied in relation to the maintenance and right of use of the apartment.

QUESTION 8

To address this question, one must first determine which law is applicable. In our case the Belgian law, where the creditor habitually resides, according to article 15 of European regulation 4/2009 and 3 of the November 23, 2007 protocol.

Rosa has several options:

- If no decision has been taken regarding the divorce, and according to article 1413 of the Belgian Code judiciaire the creditor of alimony not yet in possession of an enforceable judiciary decision may ask for a judiciary conservatory seizing of the debtor's goods and assets
- If a decision regarding the divorce has been taken and is enforceable, the creditor may choose to have that decision enforced through seizing the debtor's assets or salary, should he fail to his obligations of alimony. The judiciary decision may acquire the force of a European enforcement order, as claims are uncontested since they were recognized as grounded and justified by a judiciary decision (EU regulation 805/2004)
- She may also lodge a formal complaint to the police for failure of the father of her children to pay alimony, such a failure being a criminal offence under article 369bis of the Belgian criminal code

QUESTION 9

First of all, concerning the changes of the modalities of the parental responsibility exercise, the jurisdiction and the law that would be applied will be determined regarding to the

habitually residence of children (article 17 of the 1996 Hague convention and the European regulation n°2201 (2003). It is throughout the answer lays in the Belgian law.

On the one hand, FRANZ would have measures in order to force ROSA to give the children according of the arrangements they had conventionally fixed.

FRANZ could apply to the Belgium judge (art. 387 ter of the civil code), whom could order the forced respect of this arrangement. FRANZ could take his children with the assistance of a bailiff and if necessary with the police. The judge could also pronounce a legal constraint (article 1412 of the judiciary code).

On the other hand, FRANZ could lodge a complaint against ROSA failure to give children access to their father, as this is an offence which can be punished by 5 years of prison (when children are denied access to their parents for 5 days or if they are abroad – art. 431 of the Belgium penal code). In our case, FRANZ couldn't see his children for two consecutive months.

Secondly, regarding to the hearing of the children, article 17 of the 1996 Hague convention says that in case of a change in children's habitual residence, the exercise of parental responsibility is under the national laws of the state in which child has her/his new residence. Thus, French law will apply.

The hearing of the children will be possible in so far as they will be deemed sufficient by discerning (under the provisions of article 388-1 of the French Civil code). This should not be the case for Andrea, aged 6, and Ulrike, aged 5. For this reason, their hearing by the judge seems unlikely.

QUESTION 10

Brussels III bis Regulation gives more details and efficiency to the child abduction proceedings. Both the Hague Convention and the European Resolution give jurisdiction to the Court of the Member State in which the child habitually resides on before the wrongful removal. Because of the fact that wrongful removal took place less than a year ago, Rosa will have to petition Brussels Court, which is the place of the habitual residence of the children before their removal to Germany. In case of emergency, Rosa could also petition the German Court which has territorial jurisdiction.

The 1980 Hague Convention, providing a cooperation between judicial authorities, the Court which has territorial jurisdiction (in this case Germany) shall issue its judgment not later than 6 weeks after the application is lodged, according to the articles 12 of the 1980 Hague Convention and articles 11, 3 alinea 2 of the European Regulation. If this Court did not issue its judgment on time, Germany would engage its responsibility in front of the European Court of Justice for non-respect of the European law. In these proceedings, children should have the opportunity to be heard unless it seems inappropriate as regards to their age and degree of maturity.

The German Court cannot refuse to return children on the basis of article 13 b) of the 1980 Hague Convention if it is established that adequate arrangement have been made to secure the protection of the children after their return.

The European Regulation called Brussels II improves the efficiency of the 1980 Hague Convention because it reduces the option of refusing to return children.

Franz cannot invoke the danger which could exist in the Member State of origin if the adequate arrangements have been made. Moreover, the German judge cannot appreciate if the measures taken in Brussels are adequate as soon as they have been made. The German judge cannot refuse to return children.

QUESTION 11

On one hand, concerning the changes of the exercise of the parental responsibility, Franz shall seize the Belgian courts which had previously jurisdiction. In fact, even if the children have a new residence, the courts of the member state of the children`s former habitual residence shall retain jurisdiction (Article 9 of the european Regulation "Brussels II").

On the other hand, as long as the creditor still has her habitual residence in the Member State which issued its judgement about alimony obligations, the debtor cannot petition in an another member state in order to change the first decision (Article 8 of the regulation 4/2009). The court which has jurisdiction should be the Belgian ones. Nevertheless, the creditor, Rosa, can accept that the dispute could be soved by an another court.

QUESTION 12

So that his parents can be heard as witnesses, Franz, in accordance to the 1206/2001 regulation on cooperation between the courts of the Member States in the taking of evidence, will have to make a request before the Court where the proceedings have started or where he is willing to start the proceedings. This request will be directly transmitted to the Court of another State which has jurisdiction in order to carry out the required instruction measure. The demand form will have to contain some particular indications, like the requested instruction measure, the contact details about the person whose hearing is required and the questions that need to be asked to the people in question. In our case, Franz will lodge his request about the instruction measures before Brussels Court which, in accordance to article 916 of the Judiciary Code, and Brussel Court will be able to require the hearing of the witnesses in Germany. Once it receives the request, Munich Court (where Franz' parents live) will have to execute the demand, as foreseen in German Law (articles 355 to 480 of the ZPO), immediately and for the latest by 90 days after reception of the demand. Belgium Courts may ask Munich Courts to resort to video conference or teleconference. Munich Court then has to foresee the terms of the hearings and has to inform the concerned people. Moreover, if Belgium law foresees it, the hearings may be carried out with the parties present or their representatives. Munich Court will then have to inform the parties and if necessary their representatives of the time, the location of the proceedings as well as the conditions of their participation. This hearing could also be carried out with a Belgium State representative. Furthermore, this hearing could be organized before Brussels Court. It must then inform the German Central authority or competent authority that it will have to directly carry out the hearings. The hearing can only be organised on a voluntary basis.

However, if Franz' parents have moved to Zurich, the 1206/2001 Regulation cannot be applied since Switzerland is not part of the European Union. The Hague Convention of 28 March 1970 on the taking of evidence abroad in civil and criminal matters will then be applied. This convention foresees that Brussel Tribunal may ask Zurich Tribunal, by the mean of a rogatory commission, to take any instruction measure and in particular hearing Franz' parents. In the example of what is foreseen in the 1206/2001 Regulation, the rogatory commission will have to contain some particular precisions like the nature, the object of the instance, a quick summary of the facts, names and contact details of the people to hear, as well as questions they will be asked.

This rogatory commission will be transmitted by Brussel Tribunal to the Swiss central authority (Zentralbehörde Rechtshilfe Zivilsachen Internationale Rechtshilfe). The Swiss authority will transmit the rogatory commission to the Court that has territorial jurisdiction. Brussel Tribunal could be informed of the time and the place where the parents will be heard, so that, if necessary, the parties and their representatives will be able to assist. It is also possible that a Belgium magistrate assists to the hearing if he is first allowed by Swiss authorities. The hearing will be executed in accordance to Swiss Law and in any case urgently.

QUESTION 13

According to Belgium law, instruction measures may be required by one party or the other by main or incidental demand. In the case in point, Franz being the first one to make such a request, Rosa will therefore be able to ask for her sisters' hearing in an incident demand. As for the hearing of Rosa's sister who is leaving in Copenhagen, The Hague Convention of March the 18th 1970 provisions are applicable, since Denmark is not part to the adoption of the 1206/2001 Regulation and is therefore not bound by it. A rogatory commission will be needed, that will be transmitted to the Minister of Justice (Central Authority). This rogatory commission will then be transmitted to the authority with territorial jurisdiction. The hearing of Rosa's sister will be organized according to Danish Law.

As for the sister of Rosa living in Lisbon, the 1206/2001 Regulation is applied.

QUESTION 14

According to the European charter of Human rights of the European Union, Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.(art. 47 § 3). Besides, Council Directive 2003/8/EC is designed to Improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

Should Franz lose his job, and believe to be eligible to legal aid, he would have to fill in a standardized form for the transmission of his application for legal aid (standardized form established by a commission decision of November 9, 2004). With the aforementioned form,

he will be able to apply for legal aid in his country of residency, Germany, and German authorities will have a duty of transferring the request to the country that will, eventually grant legal aid, i.e Belgium. (with the use of yet another standardized form, for the transmission of legal aid applications under Council Directive 2003/8/EC, as decided by commission decision 2005/630/EC)

QUESTION 15

Even if the reasoning behind the transferring to Rosa of a credit Franz held against CONSTRUCTURA MANZANES SA is unquestionably linked to Rosa and Franz's past relationship, we would not deem this credit a form of alimony obligation and qualify it as such, in so far as there is a third party involved. Thus, it would be best qualified as a contractual obligation.

Rules of jurisdiction will be determined according to the rules established by Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels 1)

Various national jurisdictions are to be envisioned

- *According to article 2 persons domiciled in a Member State shall, whatever their nationality, should be sued in the courts of that Member State.*

The residence of a corporation might be the location of their headquarters, its central office, or their main branch. Since we know (cf question 17) that CONSTRUCTURA MANZANARES SA has the center of its interests in Madrid, we're inclined to think that Madrid is also the location of their main branch. Hence the Spanish jurisdiction over the dispute.

- *According to article Article 5, A person domiciled in a Member State may be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question;*

From what we know, payment of the sum owed to Franz was due to take place via bank transfer in 2006, with that transfer taking place in Spain.

All of these considerations leading to the conclusion that Spain (Madrid) has jurisdiction over the conflict.

QUESTION 16

In order to determine the applicable law, one should refer to the Rome convention of June 19, 1980. We hold the Rome I ruling of November 17, 2008 to be non-applicable since it was first put into force and implemented after the contract had been signed.

Since parties have not contractually decided on the applicable law, the contract shall be ruled by the law of the country with which the contract has the closest links and ties, Spain in our case, where the corporation's main branch, debtor of the obligation, is situated

As a result, Spanish law will be applicable.

QUESTION 17

Since CONSTRUCTORA MANZANARES SA has the center of its main interests on the territory of a member state of the union (Spain), regulation 1346/2000 on insolvency proceedings will apply to determine which Court has jurisdiction over the insolvency trial.

The center of a debtor's main interests is the discriminating criterium by which national jurisdiction will be determined, hence the applicable law (article 3 of the regulation)

In this case study, the main insolvency proceedings have already been launched in Madrid.

Nevertheless, proceedings may be undertaken in another member state when a debtor has a branch or chapter on the territory of this other member state. The effects of rulings of these proceedings will however be limited to the goods and assets of the debtor located on this other member state's territory. They will be secondary proceedings aiming at the liquidation of the debtor's assets

Thus, Rosa may opt for insolvency proceedings to take place in Belgium, as long as CONSTRUCTION MANZANARES SA has a branch or chapter in Belgium, but the rulings in Belgium will be of limited effect, and their scope vastly reduced, whereas if Rosa elects to join the main proceedings already in progress in Madrid, all of the debtor's goods and assets will be impacted