Themis Final 2011

Team Germany 1

Paper concerning

Answers to the Question on the Practical Case

1.[1] Rosa and Franz can choose Belgian or German jurisdiction

It is assumed, that today is 4th October 2011 and Rosa and Franz are not legally divorced yet. Council regulation (EC) 2201/2003 is applicable as it is a case of civil matters relating to divorce, Art. 1 lit. a.[2]

If the spouses file in a joint application, they can choose between the jurisdiction of that state where one or the other of them is habitually resident (Art. 3 § 1 lit. a.4), German jurisdiction for Franz or Belgian jurisdiction for Rosa.

If Franz files in the divorce he might choose Belgium jurisdiction because of Rosa's habitual residence, who is the respondent (Art. 3 § 1 lit. a.3), or German jurisdiction, either as he is living in Berlin for at least one year, Art. 3 § 1 lit. a.5, or as he is of German nationality and living in Berlin for at least half a year, Art. 3 § 1 lit a.6.

Accordingly Rosa might choose German jurisdiction, because of Franz as respondent, Art. 3 § 1 lit. a.3; or she can choose Belgium jurisdiction because of her habitual residence, Art. 3 § 1 lit. a.5. As she is not of Belgium nationality, Art. 3 § 1 lit. a. 6 does not apply.

Art. 3 § 1 lit. a.1 is not applicable because both spouses are not living together anymore. Neither can Art. 3 § 1 lit. a.2 be applied. "Habitually residence" demands a residence longer than the two months Franz lived in Brussels, because the underlying concept is based on a special connection to the legal system of that state, which can be deducted from the Considerations 16, 18 of Council regulation no. 1259/2010.

2.a. In relation to the maintenance payments of the children, the jurisdiction lies with the competent court of Berlin, Germany or the competent court of Brussels, Belgium.

According to Art. 1 § 1 of EC 4/2009, the council regulation of EC 4/2009 is applicable on the case, since the maintenance obligations for the children are a maintenance obligation arisen from a family relationship. An argument relating to the maintenance payments only arises if Franz refuses to pay. He would be the defendant, Rosa would be the creditor. The creditor can file a suit within the jurisdiction according to the defendant's habitual residence (Berlin), Art. 3 lit. a. Alternatively, the creditor can chose the jurisdiction of his habitual residence (Brussels), Art. 3 lit. b. Alternatively, any court in the European Union has jurisdiction if Franz or Rosa files the case in there and the other one enters an appearance at that court, Art. 5 of EC 4/2009.

2.b.

Franz and Rosa must have consented on the enforceability of the agreement, Art. 6 § 1 of 2008/52/EC. If their agreement is not automatically enforceable under the respective national law that is applicable on the

[1] When answering the question, we assume it is now the date 4th October 2011. It is assumed, that the "arrangement" Franz and Rosa agreed on in 2007 was only a private agreement and has not yet been formalized in a judgement or any other enforceable legal instrument.

[2] Unless stated otherwise, all quotes refere to the legal instrument first mentioned within the respective answer.

mediation agreement, the mediation agreement must be made enforceable. This is supposed to be possible in any Member State, Art. 6 § 5,[3] provided that neither the content of their agreement is contrary to the law of the respective Member State nor that the law of that Member State does not provide for its enforceability. Once being enforceable, the agreement can be enforced in the way any ordinary judgement in civil matters can be enforced.

3. On a national level Belgian jurisdiction, on a local level the jurisdiction of Brussels is competent in relation to parental responsibility and the visits to the children by Franz:
Council Regulation (EC) 2201/2003[4] is to be applied in matters of rights of custody and of access as particular aspects of parental responsibility, Art. 1 § 1 lit. b, § 2 lit. a. Such rights are also encompassed if given by an agreement having legal effect - as the one between Franz and Rosa, Art. 2 § 7. 'Rights of access' include the visits as the right to take a child to a place other than his or her habitual residence for a limited period of time, Art 2 § 10. Jurisdiction depends on the child's habitual residence, Art. 8 § 1. The children's habitual residence remained in Brussels. The term habitual residence is not clear. Deducting from consid. no. 12, the regulation must be interpreted in the "*light of the best interests of the child*". Considering this in its conjunction with cons. no. 33 and with Art. 24 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), the center of a child's life has to be determined from a child's point of view and its psychological dispositions. This center is where the child experiences the social life it is accustomed to, e. g. where it has its friends, attends school. From that point of view the weekends and the summer holidays with Franz are extraordinary circumstances and not relevant for determining the habitual residence. To strengthen this conclusion one might also point out as a kind of general idea shown by Art. 8 that changes within a three- months-period can be neglected.

4. German or Belgian jurisdiction is competent in relation to the right of use of the apartment.
Considered as an agreement of Franz and Rosa, European citizens as they are, the agreement on the apartment would be a case of civil matters in terms of Art. 1 § 1 EC 44/2001. Rosa's claim to use the apartment because of the agreement would be a claim based on contract. An exclusive jurisdiction of the courts of Brussels, Belgium for this precise claim might exist, since the object of the proceedings concerns a right *in rem* in immovable property, Art. 22 § 1. Yet, this regulation cannot be applied, as the basis of the claim is the matrimonial relationship between Franz and Rosa and such claims are excluded, Art. 1 § 2 lit. a. The right to use the apartment stems from the still existing matrimonial relationship between Franz and Rosa. Neither EC 44/2001 (Art. 1 § 2 lit. a) nor EC 2201/2003 (Art. 1) are applicable.

[3] The exception of Denmark according to Art. 1 § 3 of 2008/52/EC is neglected as Denmark is not supposed to be of any interest to the spouses.
[4] For the background of the application of similar principles as in the Brussels I Regulation (Council Regulation (EC) No 44/2001) to the concerns of family law, cf. Haimo Schack, Festschrift fuer Dieter Leipold zum 70. Geburtstag, Mohr-Siebeck, Tuebingen 2009, p. 317 (318).

As the use of the apartment is an aspect of spouses' maintenance obligations, regarded as annex to maintenance obligations or as maintenance *in natura*, Regulation (EC) No 4/2009 is to be applied, Art. 1 § 1. According to Art. 3 lit. a resp. lit. b. of this regulation, either the jurisdiction of the country of the habitual residence of the defendant resp. of the creditor is competent. Thus German or Belgian jurisdiction is competent.[5]

5. Franz and Rosa can agree that Belgian, Dutch or German law is applied to the divorce; otherwise the national International Private Law of the Member State of the court is applicable:
Council regulation no. 1259/2010 can be applied to an agreement of the spouses, Art. 1 § 1, 18 § 1 sec. 2. Thus, Franz and Rosa can choose Dutch or German law according to their respective nationality, Art. 5 § 1 lit. c. They can also agree on the law of the *forum*, Art. 5 § 1 lit. d. Thus they might choose Belgian or German law depending on whether they haven chosen Belgian or German jurisdiction (cf. question 1). Art. 5 § 1 lit. a cannot be applied, as both spouses must be habitually resident in a certain state; this can be deducted from the wording of Art. 5. § 1 lit.a ("*the* state") and *e contrario* Art. 5 § 1 lit. b, Art. 5. § 1 lit. b cannot be applied as Franz, staying in Belgium for less than two months, was not habitually resident there. After two months he does not have a special connection to Belgian law. But such a special connection is the reason why spouses shall be able to choose a law, cf. cons. 16, 18 of the regulation.
If there is no agreement of the spouses, council regulation No. 1259/2010 is not to be applied before 21 June 2012. Thus the law applicable to the divorce must be determined by the law on the collision of laws of the respective member states.

6. Belgian law is to be applied to the custody and visitation of the children
Since Franz and Rosa have consented on a contract regarding custody and visitation of the children, one might think about the applicability of the Rome-I-Regulation EC 593/2008, which is according to its Art. 1 § 1 applicable on contracts. However, the regulation is not applicable on obligations arising out of family relationships, Art. 1 § 2 lit. b. Seen strictly dogmatically, obligations regulated in the contract between Franz and Rosa are only obligations resulting from the contract. Yet, Art. 1 § 2 of EC 593/2008 would not be applicable at all if this strictly dogmatical view is to be applied, since the only time the exceptions matter is, if there is a contract in the first place. Therefore, for the exception of Art. 1 § 2 to be fulfilled, it is sufficient if the contract deals with obligations that would arise out of family relationships anyway, if there was no contract. Since this is the case with custody and visitation, EC 593/2008 is not applicable.

[5] If the use of the apartment would not be considered an aspect of maintenance, but a different claim stemming from the matrimonial relationship between Franz and Rosa, neither EC 44/2001 (due to its Art. 1 § 2 lit. a) nor EC 2201/2003 (conf. its Art. 1) nor any other European legal instrument is applicable. Jurisdiction for this claim could then only be found by applying the national law on international jurisdiction of that member state in which such a claim is filed to court (*lex fori*).

The Hague Convention of 19th October 1996 is applicable, since its provisions of Artt. 1 - 4 are met and there is no European Union Law governing the legal question. As custody and visitation are aspects of parental responsibility, according to Art. 16 § 1 of the Hague convention of 19th October 1996, this legal aspects are governed by the law of the habitual residence of the children, which is Belgium.

7.

Maintenance obligations are excluded from the scope of Regulations (EC) No 593/2008 (Art. 1 § 2 lit. b, "Rome I") and (EC) No 864/2007 (Art. 1 § 2 lit. a). According to Art. 15 of Regulation (EC) No 4/2009, the regulation is applied on maintenance obligations (Art. 1 § 1). The applicable law shall be determined in accordance with the Hague Protocol of 23 November 2007 (2007 Hague protocol). No designation of the applicable law has been made in accordance with Art. 7, 8 of 2007 Hague Protocol; concerning child maintenance such a designation would have been irrelevant anyway, Art. 8 § 3. Therefore Art. 3 and 5 of 2007 Hague Protocol are decisive. Generally the law of the State of the habitual residence of the creditor is applicable (Art. 3), which would be Belgian law. Art. 5 states a special rule with respect to (ex-)spouses: One of them can object the application of Art. 3 and demand the application of the law of a state with a closer connection to their matrimony. Designated is the state of their last common habitual residence. As already shown regarding Franz' residence (cf. quest. 1, 5), Belgium cannot be considered as their last common habitual residence. The period of less than two months they both stayed in Brussels can be neglected. But Italy as their last common habitual residence before and additionally as the state where they first raised their children is connected more closely to the matrimony than Belgium. This means that if one party objects the application of Belgian law, Italian law should be applied considering the spouses' maintenance.

The right to use the apartment might be considered as a contractual obligation. Yet, the use of the apartment is an aspect closely linked with the matrimony of Franz and Rosa. The right to access or use of the shared apartment is a question of matrimonial property which means that Rome I is not applicable, Art. 1 § 2 lit. c of Rome I. The use of the apartment is an aspect of spouses' maintenance obligations, regarded as annex to maintenance obligations or as maintenance *in natura*. Thus again Belgian or Italian law can be applied, Art. 15 of Regulation (EC) No 4/2009 and Art. 3 or 5 of 2007 Hague Protocol.

8. Rosa can use the following procedures to enforce her claims:

First of all, Rosa would need to make her claim enforceable, e.g. by obtaining an enforceable adjudgement. It is assumed that Rosa already has an enforceable adjudgement concerning the divorce including child maintenance payments.

a. Application area/ Scope of application

Council Regulation (EC) No 2201/2003 (Art. 1 § 3 lit. e) as well as Council Regulation (EU) No 1259/2010 (Art. 1 § 2 lit. e) do not apply to maintenance obligations. So Council Regulation (EC) No 4/2009 of 18 December 2008 and the Hague Convention of 15 April 1958 – possibly modernized by the 2007 Hague Protocol – remain.

b. Procedure

Chapter IV (Articles 16 seq.) deals with the enforceability of an adjudgement concerning child maintenance whereupon section 1 (Articles 17-22) shall apply to decisions given in a Member State bound by the 2007 Hague Protocol and section 2 (Articles 23-38). Germany is whereas Belgium is not among the Member states. For Belgium is not a member state section 2 is applicable. Therefore the adjudgement isn't automatically recognized. So Rosa first has to recognize and after that to enforce the decision on childrens' maintenance payments according to Articles 23-38. After that according to article 30 of Regulation No 4/2009 *"The decision shall be declared enforceable without any review under Article 24 immediately on completion of the formalities in Article 28 and at the latest within 30 days of the completion of those formalities, except where exceptional circumstances make this impossible."*

9. a. Possible procedures Franz could follow if he is not given access to the children by Rosa after being present in Brussels according to arrangements.

For the right of access to the children, EC 2201/2003 is applicable, Art. 1 § 1, § 2 lit. a and Art. 2 § 10.

According to Artt. 40, 41 § 1 an enforceable judgement on the access to children given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with Art. 41 § 2. Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal. As stated in the answer to question 3, Franz' visits of his children are governed by Belgian jurisdiction; more precisely, Franz would need to file the case to the court of Brussels.

According to Art. 47, § 1, the enforcement procedure is governed by the law of the Member State of enforcement. Since the right of access would need to be enforced in Brussels, Belgium, this means Belgian law is applicable on the enforcement procedure. Art 47 § 2 is to be applied as well.

9.b. Rosa moves to Lille

The answer depends on whether the case is already pending at a court when Rosa and the children move.

<u>If the case is not yet pending</u>

Since the children's habitual residence has changed to Lille, France, the jurisdiction has changed to Lille, France as well, Art. 8 § 1, Art. 1 § 1 lit. b, § 2 lit. a, Art. 2 § 7, § 10 of EC 2201/2003 (See answer to question 3 for a detailed explanation of the legal mechanismn). Art. 9 of EC 2201/2003 is not applicable,

since Franz as holder of the access rights does not habitually reside in Belgium, the children's former place of habitual residence. Therefore, the competent court is the court in Lille and the children could be heard in the ordinary way the French law states for such hearings.

If the case is already pending at the competent Belgian court when the movement occurs

In this situation, the children have a particular relationship to France as this is their new habitual residence, Art. 15 § 3 lit. a of EC 2201/2003. Therefore, in accordance with Art. 15 § 1 of EC 2201/2003, the court of Brussels may either stay the case or the part thereof in question and invite the parties to introduce a request before the court of Lille in accordance with § 4; or request the court of Lille to assume jurisdiction in accordance with § 5.

If the court of Brussels stays competent and wants to hear the children living in Lille anyway,

this would be a matter of either requesting the court of Lille to take or of the Brussels court taking evidence directly in France. For both options, according to its Art. 1, EC 1206/2001 is applicable.

Regarding the option of requesting the court of Lille to perform the hearing, the precise steps that need to be taken are regulated in great detail in Art. 2 and Art. 4 - Art. 16 Regarding the taking of the evidence directly by the Brussels court, due to Art. 17 § 2 the children may not be forced to a hearing. Therefore, the chances of getting the evidence this way are smaller.

Since EC 1206/2001 is *lex specialis*, the Hague convention of 18th March 1970 is not applicable.

10.a. Possible procedures to follow by Rosa

Since ordering the children to be brought back to Brussels is a question of rights of custody as defined in Art. 2 § 9 of EC 2201/2003 and therefore a question of parental responsibility, Art. 2 § 7, EC 2201/2003 is applicable, Art. 1 § 1 lit. b of EC 2201/2003.

Additionally, the Hague convention of 25 October 1980 is applicable, Artt. 1 lit. a, 3, 4, 5 of Hague Convention 1980. EC 2201/2003 is not *lex specialis* to Hague Convention 1980, since Art. 11 of EC 2201/2003 states modifications to certain legal provisions of the Hague Convention 1980, therefore implicitely stating its general applicability (cf. also consideration 17 of EC 2201/2003).

Interaction of EC 2201/2003 and Hague Convention 1980 provide Rosa with two possible courses of action.

Firstly, Rosa could apply to the Central Authority of Germany for assistance in securing the return of the child, Art. 8 Hague Convention 1980. According to Art. 12 § 1 Hague Convention 1980, the German judicial authority shall order the return of the children forthwith, if less than one year has elapsed and the children were wrongfully retained. Assuming Franz has not returned the children after their summer visit in 2011, today on 4th October 2011, one year has not elapsed yet. Additionally, the retention of the children would need to be wrongful in terms of Art. 12 § 1, Art. 3 Hague Convention 1980. According to Art. 3 § 1 Hague Convention 1980, a retention is wrongful if it is in breach of rights of custody attributed

to Rosa which, according to Art. 3 § 2 Hague Convention 1980, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. Franz and Rosa had consented on an agreement on the rights of custody that attributed the right of custody to Rosa and only allowed Franz access to his children on certain times, namely only for one month during the summer holidays. It is assumed, that this agreement has legal effect under the national law applicable on the agreement. Franz infringed on this agreement by not returning them at the end of the month, therefore, a wrongful retention occurred. Rosa also had actually exercised the rights of custody at the time of the retention as demanded by Art. 3 § 1 lit. b Hague Convention 1980. Therefore, all requirements of Art. 3 Hague Convention 1980 for a wrongful detention are met.
According to Art. 15 Hague Convention 1980, the German judicial authorities may request of Rosa to obtain from the Belgian authorities a decision or other determination that the removal or retention was wrongful in terms of Art. 3 Hague Convention 1980.
Another possibility for Rosa would be to obtain a judgement by the Belgian courts ordering the return of the children which could be enforced in Germany under the provisions of Art. 42 of EC 2201/2003.
For this, jurisdiction lies with the Belgian courts as the courts of the state were the child was habitually resident immediately before the retention, Art. 10 of EC 2201/2003: since a wrongful retention in terms of Art. 2 § 11 EC 2201/2003 occurred and the exceptions stated in Art. 10 of EC 2201/2003 are clearly not met. According to Art. 42 § 1 of EC 2201/2003, a judgement by the Belgian courts is to be recognised by Germany and enforceable there without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified Belgium in accordance with Art. 42 § 2 of EC 2201/2003.

10.b. In which way has EC 2201/2003 contributed solutions of its own in the field of child abduction?
EC 2201/2003 strengthens the right of the parties to be heard. Art. 11 § 2 of EC 2201/2003 makes it mandatory to give the child the opportunity to be heard unless this appears inappropriate having regard to his or her age or degree of maturity, whereas the Hague Convention 1980 does not state the need to hear the child at all. The only remotely referance to the opinions of the child is in Art. 13 § 2 Hague Convention 1980 where it is stated, that the court may take the objections of the child against their return into account if this becomes known to the court somehow. Also, Art. 11 § 5 EC 2201/2003 makes it mandatory to hear the person requesting the return of the child, which is not necessary under the Hague Convention 1980 only. Furthermore, the right to obtain a judicial decision in due time is strengthened. Art. 12 § 2 sub§1 EC 2201/2003 varies from Art. 11 Hague Convention 1980 in the way, that the court is obligated to render a judgement no later than six weeks after the application is lodged, except where exceptional circumstances make this impossible. In Art. 11 Hague Convention 1980, there was only the possibility after 6 weeks to ask the court why there was a delay. Art. 11 § 7 of EC 2201/2003 states also

the duty to quickly inform the applicant if their application for an order of return was unsuccessful, strengthening the principle of fair trial. Other smaller derivations from the Hague Convention 1980 are regulated in Art. 11 § 4 - 8 EC 2201/2003. Furthermore, fort he first time ever Art 41 I, 42 I put foreign enforceable legal instruments on par with domestic ones in order to further a speedy procedure.[6]

11. Franz could successfully seise the court of Berlin only for the maintenance payments, whereas the Belgian courts have jurisdiction to make all the changes Franz wants to attain.[7]

For the change in custody and rights of visitation, EC 2201/2003 is applicable, Art. 1 § 1 lit. b, § 2, Art. 2 § 7, § 9, § 10. According to Art. 8 § 1, the courts of the state on which territory the child is habitually resident have jurisdiction, which is in this case Belgium, as the children are habitually resident in Belgium.

For the change in maintenance payments, EC 4/2009 is applicable, Art. 1 § 1 of EC 4/2009. Since Rosa is the defendant, according to Art. 3 lit. a of EC 4/2009, the court of Brussels has jurisdiction as this is the place of Rosa's habitual residence.

According to Art. 2 § 10 of EC 4/2009 the term 'creditor' means any individual to whom maintenance is owed or is alleged to be owed. Therefore, "creditor" in terms of Art. 3 lit. b of EC 4/2009 would be Franz, as Franz argues that Rosa is obligated to pay maintenance to him. Therefore, under the terms of Art. 4 lit. b of EC 4/2009, the court of Berlin has jurisdiction as well, since this is the place of Franz' habitual residence.

Since no proceeding about the status of Franz or Rosa is pending, Art. 5 lit. c of EC 4/2009 is not applicable. The matter of the maintenance payments is ancillary to the matter of parental responsibility, as in general the parent who does not live together with the child needs to pay money to the other parent. According to Art. 5 lit. d of EC 4/2009 the Belgian courts who have jurisdiction for the matter of parental responsibility have jurisdiction as well for the maintenance payments, since the Belgian jurisdiction is not based solely on the nationality of one of the parties but on the habitual residence of the child.

12.a. Parents live in Munich; Requesting the courts in Germany to take evidence

For obtaining evidence in this civil procedure by way of either requesting the German court to take the evidence for the Belgian court or by directly taking evidence by the Belgian court, EC 1206/2001 is applicable, Art. 1 § 1 EC 1206/2001.

According to Artt. 2, 4, 5 the request of the Belgian Court is directly transmitted to the competent court (presumeably court of Munich) using the form A or I of the Annex in the German language. This is

[6] Schak (wie oben) S. 319

[7] It is assumed that a judgement declaring the legal divorce of Franz and Rosa has already been given, that this procedure therefore is not pending at any court anymore, that this judgement also regulates custody, visiting rights and maintenance payment and that Franz now wants to change this judgement by starting a new proceeding at court.

transmitted in the fastest way possible to the Munich court (Art. 6) which will inform the Belgian court of the receipt using form B (Art. 7). Then the evidence is taken by the German court within 90 days, applying the German law. According to Art. 10 § 4 it is possible to use videoconference or teleconference. The parties may be present when the German court takes the evidence, if this is consistent with German law (Art. 11 § 1). If Franz' parents are not cooperative the German court may use coercive measures that are allowed under German law (Art. 13). Art. 14 states rules for the situation when the parents claim to have the right to refuse evidence. After the evidence is taken, the German court sends the documents establishing the execution of the request and, where appropriate, documents received from the Belgian court as well as a filled in form H back to the Belgian court, Art. 16.

12.b. Parents live in Zürich, requesting the Swiss courts to take evidence

As Switzerland is not a Member State of the EU; EC 1206/2001 is not applicable. The Hague convention of 18th March 1970 is ratified by Switzerland but not by Belgium, therefore it is not applicable. However, Switzerland and Belgium have signed a bilateral treaty, RS 0.274.181.721, which permits the Belgian courts to directly contact the Swiss courts with a letters rogatory asking to hear the witnesses.

12.c. Belgian court hears witnesses directly; parents live in Germany[8]

The most commonly used way of transmitting the letter would be by the official channels as regulated in EC 1393/2007, Art. 1. According to Art. 4, the letter must first be sent from the Belgian Court to the Belgian transmitting agency (Art. 2 § 1) which forwards it to the German receiving agency, Art. 2 § 2. The German agency will send a receipt to the transmitting agency (Art. 6 § 1) and will take the necessary steps under German law to forward the letter to the parents.

Alternatively, the Belgian court may also use consular or diplomatic channels (Art. 12) or diplomatic or consular agents (Art. 13) to forward the letter.

Lastly, according to Art. 14, the letter may also simply be send by postal service by registered letter with acknowledgement of receipt or equivalent.

12.d. Belgian court hears witnesses directly; parents live in Switzerland

In order to inform the parents on the day, time and conditions of their hearing in front of the Belgian court, a letter of the Belgian court must be forwarded to them. This is governed by the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The mechanism is the same as described as most commonly used way for subquestion c.

[8] It is assumed, that the Belgian court wants the witnesses to come to its seat in Belgium and not that it wants to hear the witnesses in Germany as regulated in Art. 17 of EC 1206/2001.

13.a. Hearing of sister living in Copenhagen, Denmark

EC 1206/2001 is not applicable on Denmark, Art. 1 § 2. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters is not applicable either, since Belgium has not ratified it. Therefore, the sister may only be invited to appear in front of the Belgian court by letter which can be forwarded the way the Hague Convention of 15 November 1965 regulates and is described as answer 12d.

13.b. Hearing of sister living in Lisbon, Portugal

For this, EC 1206/2001 is applicable. The procedure is as described in the answer to subquestion 12a and 12c.

14. Procedure if Franz wants to apply for legal aid

It is assumed that Franz seises the court in Belgium and not in Germany (cf. quest. 11). In that case, Council Directive 2003/8/EC can be applied, Art. 2 § 1.

Franz may submit a legal aid application with the help of the competent German authority, Art. 13 § 1 lit. a, § 4. This authority may already refuse to transmit the application if it is obviously unfounded or out of the scope of the directive, Art. 13 § 3. Otherwise Franz' demand for legal aid is to be transmitted within 15 days (Art. 13 § 4) by using the standard form annexed to the Commission Decision 2005/630/EC. Franz may also directly submit a legal aid application to the competent authority in Belgium, Art. 13 § 1 lit. b.

The information included in the standard form shall enable an institution of the member state of the competent court to grant legal aid or not, Art. 12. This institution will decide whether the economic situation of the person demanding legal aid is of the kind that legal aid should be granted, Art. 5 § 2. It can also deny legal aid if the action is obviously unfounded, Art. 6 § 1.

15. Spanish or Italian jurisdiction is competent in relation to Rosa's request.

Franz and "Constructura Manzanares SA" (CM-SA) agreed on a contract including a credit of Franz to CM-SA.[9] The contract is a civil matter, Council Regulation (EC) 44/2001 can be applied, Art. 1 § 1.

General jurisdiction depends on the domicile of the person to be sued, Art. 1 § 1, for CM-SA as a legal person the domicile is Madrid, Art. 60 § 1. Spanish jurisdiction is competent.

Special Jurisdiction depends on the place where the main obligation of a contract has to be fulfilled, which is Spain according to Art. 5 § 1 lit. a, lit. b.2: The repayment of the credit is relating to a contract in the sense of Art. 5 § 1 lit a. A credit is a service in the sense of Art. 5 § 1 lit b.2. While because of Art. 13 § 1 lit 3 Brussels Convention it was argued that credits cannot be considered as services, EC 44/2001

[9] It is assumed that Franz did not work as an employee.

does not provide such a norm. Therefore a credit can be considered as a financial service in accordance with its determination throughout the rest of European Law.[10]

The place of fulfilment for all of the obligations deriving from a contract is determined by the place of fulfilment of the main obligation of the contract. Yet, in a contract on credit the obligation of payment to the credit user and his obligation of repayment are two obligations of equal value. Yet, the place of fulfilment for the payment is more likely to be stable whereas a legal change of the place of fulfilment for repayment is more likely to occur, due to the long period the repayment may take, e.g. in case when the person giving the credit moves and the principle of *bona fide* demands to change the place of fulfilment. Therefore a reliable solution is to regard the payment to the credit user as the main obligation. The place of fulfilment of this payment is the domicile of the person giving the credit, thus it would be Italy as the place where Franz was habitually resident when the contract was concluded.

The contract might be seen as a *renovatio* or change of the already existing claim out of the contract which was concluded by Franz and CM-SA considering the payment for him because of the "work" done in Spain. Such a perspective is not to be appreciated as it would confuse the legal systems applied on these different contracts. Therefore the contracts should be separated. The payment of the credit by Franz then can be considered as payment *breve manu,* instead of the CM-SA paying the money it owes out of the first contract to Franz and he giving it back to CM-SA.

The jurisdiction applied to a claim cannot be determined according to the *causa* of or leading to the transfer of the claim to a third party.[11] Thus the "legal relation" between Franz and Rosa is indifferent. Otherwise the debtor would have to face a risk he cannot control. Though not to be applied directly, Art. 12 § 2 Convention 80/934/ECC and Art.14 § 2 Regulation (EC) No 593/2008 express this general thought of protecting a debtor in case of assignation.

16. Italian law has to be applied in relation to Rosa's request.

The contract between Franz and CM-SA was concluded before 17 December 2009. Thus Regulation (EC) No 593/2008 cannot be applied, Art. 28. Convention 80/934/ECC has to be applied, Art. 1 § 1 of this convention.

The parties did not choose a law according to Art. 3 of this convention. Art. 12 § 2 states that the law to be applied between the assignee and the debtor is the law governing the assigned claim. The assigned claim concerns the credit between Franz and CM-SA. According to Art. 4 § 1 the law of the country is decisive with which the contract is most closely connected. As already explained (cf. quest. 15) a contract

[10] Cf. Bernd Reinmüller Internationale Rechtsverfolgung in Zivil- und Handelssachen in der Europäischen Union, Deutscher Anwaltverlag Bonn 2009, p. 72/§ 161.

[11] The difference between the causa of the transfer of a claim or a causa leading to the transfer of a claim depends on whether a legal order knows the system of separating causa and fulfilment of a claim (e.g. German "Trennungs- und Abstraktionsprinzip") or they are seen as a unit (e.g. the French principle of consent). This dogmatic difference does not lead to different solutions of the case.

about a credit should be linked to the place where the payment of the credit should be fulfilled, which would be Italy (cf. quest. 15). This would correspond with the presumption in Art. 4 § 2, relying on the habitual residence of the party.

17. Rosa cannot request the opening of an insolvency procedure in Belgium.

Again, the first conditions leading to the existence of the claim must be considered, thus the transfer of the claim must be considered as indifferent to the debtor (cf. quest. 15). The claim is the result of a contract concluded between a German, residing in Italy, and a Spanish firm. It was about to be fulfilled in Spain and in Italy. It has nothing at all to do with Brussels. From the point of view of the debtor the claim only happened to be transferred to a person residing in Brussels.

It is not clear whether the main insolvency procedure in Madrid as the centre of the debtor's main interest (cf. cons. 12 Council Regulation (EC) No 1346/2000) is already opened. Assuming that the main insolvency proceedings that are to be opened in Spain are not yet opened, there is no interest that would legitimate the opening of insolvency proceedings against the Belgian establishment. Such cases are to be limited to the absolutely necessary, cf. cons. 17. Considering that the assignation of a claim shall not have effect on the relation between assignee and debtor (cf. quest. 15), especially in this case the opening of insolvency proceedings against the establishment would be an illicit way of forum shopping by transfer of claims.

Assuming that the main insolvency proceedings are already opened does not lead to a different result: Secondary proceedings are insolvency proceedings parallel to the already opened main proceedings. They take place in a Member State where the debtor has an establishment and are limited to the assets in this state, cons. 12. The regulation does not want to restrict the right to open secondary proceedings (cons. 18). Yet, the opening of secondary proceedings can only be requested by a person that might request the opening of an insolvency proceeding under the law of the Member State (Art. 29 lit. b.), which is Belgium regarding this establishment of the CM-SA (Art. 28). It would be surprising if anybody might request the opening of proceedings in a country against an establishment against which he or she does not have a claim. Such a form of forum shopping which is not grounded on the reasons for the opening of secondary proceedings in cons. 19 still would thwart the *ratio* of the regulation.

Of course Rosa may submit for the admission of her claim in an opened main procedure in Spain.