

**THEMIS 2011**

**JUDICIAL COOPERATION IN CIVIL MATTERS**

# **PRACTICAL CASE**



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**(Final: Amsterdam, The Netherlands)**

**OVERVIEW**

**A. CASE SUMMARY .....1**

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**A. CASE SUMMARY**

1. The underlying case deals with various legal issues related to the divorce between two European citizens. Franz Becker (**F**) is a German citizen. He married Rosa Neeskens (**R**), who is a Dutch citizen, in Rotterdam, The Netherlands. The married couple worked and lived in Milan, Italy, for an Italian multinational enterprise (**Enterprise**). Both children of the married couple Andrea (**A**) and Ulrike (**U**) were born in Milan.
2. After relocation to Brussels, Belgium, on 17 January 2007 for employment reasons, the couple first kept working for the Enterprise. In March 2007, however, F relocated to the offices of the Enterprise in Berlin, Germany. Followed by the mutual decision to divorce, the couple agreed on 15 April 2007 on the following conditions for their future:
  - R kept custody of the children, whereas F was to visit and keep the children with him in Brussels every second weekend of the month. After U turns 6, the children would visit F as long as he is resident in the European Union (**EU**). Otherwise the former arrangements remain in force.
  - In addition, F and R met further visit arrangements during holidays. F was also supposed to have weekly two telephone conversations with his children.
  - Further, F was to provide R with monthly maintenance payments amounting 700 €. As additional compensation F agreed to transfer his credit amounting 100.000,00 € against Spanish debtor Constructora Manzanares SA seated in Madrid (**Debtor**) to R. The outstanding credit was due for work of F in Madrid.
  - Finally, R remained living in the apartment which was jointly purchased in Brussels. F was to cover 1/3 and R 2/3 of the respective mortgage amount.

**B. ANSWERS TO THE QUESTIONS**

**1. Jurisdiction Competent for the Divorce**

3. In the present case the spouses have an elective choice to initiate divorce procedure either with a respective court in Brussels or in Berlin. The question of jurisdiction competent for the divorce is regulated by the Council Regulation (EC) No 2201/2003 of 27 November 2003 (*Brussels IIbis*). Article 1 (a) Brussels IIbis specifically stipulates that the Regulation is applicable “*in civil matters relating to divorce*”. According to Article 3 (1) (a) Brussels IIbis

1. In matters relating to divorce, [...], jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or [...]
- in the event of a joint application, either of the spouses is habitually resident [...].

4. Thus, considering the wording of the regulation, it is decisive to define the term “*habitual residence*” to determine respective jurisdiction. Brussels IIbis itself does not define the term. The ECJ has in its turn endorsed a fact-based habitual residence test for the cases under Brussels IIbis.<sup>1</sup> Dealing with the habitual residence of a child, the ECJ ruled that the term must be interpreted as meaning that it corresponds to the place which reflects some degree of integration in a social and family environment. To that end, “*in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State any the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships*” must be taken into consideration.<sup>2</sup>

5. Application of the ECJ’s rationale in the present case leads to the conclusion that R has established her habitual residence in Brussels. Despite the presence in Brussels merely

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<sup>1</sup> See ECJ C-523/07, paras. 30-44, available at: <<http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2009/C52307.html&query=c-523/07&method=Boolean>>.

<sup>2</sup> ECJ C-523/07, para. 44.

during a short period of time, there are no indicators that R intends to move back to Milan. On the contrary, the fact that her place of work is now situated in Brussels and purchase of an apartment in Brussels favour designation of Brussels as habitual residence. In relation to F, Berlin shall be designated as habitual residence. This is the place of his work and for now, no further indicators are available justifying any assumption of possible return to Milan or relocation to any other city. Finally, the conditions for the divorce met by both spouses support these conclusions.

6. Accordingly, analysis of the wording of the provision in view of the above leads to the conclusion that because of the conjunctive element “or” and considering that both spouses mutually agreed on the divorce the spouses have an elective choice between (i) the jurisdiction of the Belgian courts according to the Article 1 (a) 2<sup>nd</sup> bullet point Brussels IIbis as the place of joint residence prior to F’s removal to Berlin; and the jurisdiction of the German courts and Belgian courts according to Article 1 (a) 4<sup>th</sup> bullet point Brussels IIbis. Article 1 (a) 1<sup>st</sup> bullet point Brussels IIbis in its turn does not apply at the case at hand, since the comparative reading of the 1<sup>st</sup> and 2<sup>nd</sup> bullet points suggests that the 1<sup>st</sup> bullet point applies only if both spouses are habitually resident in the same State

## 2. **Jurisdiction Competent in Relation to the Maintenance Payments. Enforcement of a Respective Agreement by Mediation.**

7. (i) In the present case claims in relation to maintenance payment can be filed wither with a respective court in Brussels or in Berlin. For all claims filed after 18 June 2011 specific regulations in regard to the maintenance payment issues are met by Council Regulation (EC) No 4/2009 of 18 December 2008 (**Maintenance Regulation**) which replaced the provisions concerning maintenance obligations of Council Regulation (EC) No 44/2001 (**Brussels I**).<sup>3</sup> According to Article 3 (a) and (b), “[i]n matters relating to maintenance obligations in Member States, jurisdiction shall lie with: (a) the court for the place where the defendant is habitually resident, or (b) the court for the place where the creditor is habitually resident [...]”. Thus, applying the same interpretation of the term “habitual residence” as presented above in view of the need for the uniform application of

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<sup>3</sup> See Recital (15) Maintenance Regulation and Final Provisions available at: <[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/jl0024\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/jl0024_en.htm)>.

Community law<sup>4</sup>, maintenance claims can be pursued either at Berlin courts, at the place of F's habitual residence, or at Brussels courts, at the place of the habitual residence of R and the children.

8. (ii) According to the Article 6 (1) Directive 2008/52/EC of 21 May 2008 (***Mediation Directive***) which is applicable in civil and cross-border disputes,<sup>5</sup> “*Member States shall 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 unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of the Member State does not provide for its enforceability.*” Article 6 (1) Mediation Directive further stipulates that the content of the agreement may be made enforceable by a court or other competent authority in a judgement or decision or in an authentic instrument of the Member state where such a request is made. In addition, according to Brussels IIbis, in order to be enforceable in another State, agreements between the parties have to be enforceable in the Member States in which they were concluded.<sup>6</sup>
9. Thus, the spouses should first make sure that they conclude an agreement in writing in a Member State which allows the parties to submit questions of maintenance obligations to mediations. Further on, the parties shall file an application for a declaration of enforceability of agreement reached by mediation. Thereby the parties shall rely on respective national provisions of Belgium or Germany. Should a Member State, however, not have complied with the provisions set out by the Mediation Directive before 21 May 2011,<sup>7</sup> then the parties may base their request for declaration of enforceability directly on the favourable regulations of the Mediation Directive.

### 3. Jurisdiction in Matters of Parental Responsibility and the Visits to the Children

10. The questions of jurisdiction in matters of parental responsibility and the visits to the children are governed by the regulations of Brussels IIbis which is applicable in civil matters relating to the attribution, exercise, delegation and restrictions or terminations of

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<sup>4</sup> See Case C-327/82 [1984] ECR 107, para. 11; Case C-98/07 [2008] ECR I-1281, para. 17.

<sup>5</sup> See Article 1 (2) and Recital (8) Mediation Directive.

<sup>6</sup> See Recital (8) Mediation Directive and Articles 28, 29 Brussels IIbis.

<sup>7</sup> See Article 12 (1) Mediation Directive.

parental responsibility including in particular “*rights of custody and access*”<sup>8</sup>. According to the provisions of Article 8 (1) Brussels Ibis, in the present case Brussels’ courts have jurisdiction in matters of parental responsibility, since as established above both A and U have their habitual residence in Brussels. Courts of the city of Milan, are however, not competent in the present case as a “continuing jurisdiction of the child’s former habitual residence, since this exception to Article 8 Brussels Ibis applies only within the first three month after the relocation.”<sup>9</sup>

#### **4. Jurisdiction in the Question of the Right of the Use of the Apartment**

11. Both Brussels I as well as Brussels Ibis exclude application of the respective regulations to rights in property arising out of a matrimonial relationship.<sup>10</sup> Thus, the question of jurisdiction in disputes relating to the use of the apartment shall be resolved according to the conflict of law rules of international private law. The court of the closest connection shall have the power to decide in such disputes. Respectively, courts in Brussels as the courts at the seat of which the property is situated are competent to rule on questions of the use of the apartment.

#### **5. Law Applicable to the Divorce**

12. Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation is the first European regulation regulating the question of law applicable to divorce. However, its legal framework shall apply from 21 June 2012.<sup>11</sup> Thus, until this regulation comes into force the question of law applicable to the divorce shall be resolved according to the conflict of law rules of international private law. The law with the closest connection shall be applicable to the divorce at hand. In view of the demand of the uniform interpretation of Community law a court seised with the divorce proceedings may apply the law applicable at the last joint habitual residence in Brussels, where R still has her residual residence. Besides the court might consider applying Dutch or Germany laws as the law of the State of nationality of a spouse.

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<sup>8</sup> Article 1 (1) (b) and (2) (a); Article 2 (7), (9), (10) Brussels Ibis.

<sup>9</sup> See Article 9 (1) Brussels Ibis.

<sup>10</sup> See Article 1 (2) (a) Brussels I; Article 1 (a) and Recital (8) Brussels II bis.

<sup>11</sup> See Article 21 Council Regulation (EU) 1259/2010.

## **6. Law Applicable to the Custody and Visitation**

13. According to Article 2 (7) Brussels Ibis the term ‘parental responsibility’ shall include rights of custody and rights of access. The Regulation thus fails to provide rules in the field of applicable law for these matters. Further, Brussels Ibis does not contain any other set of conflict of law rules. Moreover, Parental responsibility matter are excluded from Regulation (EC) No 1259/2010, Article 1 (2) (f) excludes the matter. Consequently, the courts having jurisdiction, here in Brussels, Belgium (see Answer No 3) have to apply their domestic conflict of law rules to establish the applicable law, much likely being the habitual residence of the children. As the most important goal is to safeguard the children, only the law applicable at their habitual residence or a more favourable law should be applied depending on a case by case basis.

## **7. Law Applicable to the Maintenance and the Right to Use the Apartment**

14. (i) The Law of the Belgium is applicable to maintenance obligations of F in the case at hand. Article 15 Maintenance Regulation states that the applicable law should be determined in accordance with the Hague Protocol of 23 November 2007<sup>12</sup> on the law applicable to maintenance obligations. According to Article 3 of the 2007 Hague Protocol “maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor.” Here the children and the mother, both creditors, have their habitual residence in Brussels, Belgium. Thus, Belgian law is applicable to the maintenance obligations of F.
15. (ii) In absence of a special conflict of law rules for property of a matrimonial relationship, the principle of *lex situs* determines the applicable law, namely the law of the place the property is to be found. Although there exists a Green Paper<sup>13</sup> in that matter, no legal consequence can be derived from it.

## **8. Enforcement Procedures in Case of the Disruption in Maintenance Payments**

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<sup>12</sup> To which the EU is signatory, available at: <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=133](http://www.hcch.net/index_en.php?act=conventions.status&cid=133)>.

<sup>13</sup> Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

16. In order to swiftly and effectively restore child maintenance payments by F, R should address the court that has jurisdiction for maintenance, a court in Brussels or Berlin, and seek provisional and protective measures under law that is applicable to maintenance, Belgian law. Such measures are recognised and enforceable in any other Member State of the European Union without any special procedure being required and without any possibility of opposing recognition.
17. Recital 22 Maintenance Regulation states that “*decisions in matters relating to maintenance obligations given in a Member State should in principle be provisionally enforceable. [...] even if the national law does not provide for enforceability by operation of law and even if an appeal has been or could still be lodged against the decision under national law.*” Accordingly, in Section 1 of Chapter IV Maintenance Regulation, which is applicable to decisions in a Member State bound by the 2007 Hague Protocol<sup>14</sup>, the abolition of exequatur is included in Article 17 Maintenance Regulation. Article 17 (2) Maintenance Regulation deems decisions enforceable in other Member States without the need for a declaration of enforceability. Further, Article 18 Maintenance Regulation rules that “*[...] decision[s] shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State of enforcement.*”
18. Applying this to the case at hand, R should seek a decision by a competent court in Brussels or Berlin. Such a decision will then be enforceable against F without any special procedure and could carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State of enforcement, here Germany.

## 9. Procedures in Case of the Denial of Access to and Relocation of the Children

19. (i) If F is not given access to the children, F should claim his right of access according to the divorce conditions both him and R consented to at the Central Authority in Brussels, where the children are habitual resident, or seek a court decision in that matter. According to Article 6 of the Hague Convention of 25 October 1980 (*HC 1980*) on the

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<sup>14</sup> Signatory of the 2007 Hague Protocol is the European Union to which Belgium is a Member State; available at: <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8221>>; <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=133](http://www.hcch.net/index_en.php?act=conventions.status&cid=133)>.



civil aspects of child abduction every Contracting State<sup>15</sup> has to designate a Central Authority. Under Article 7 (f) HC 1980 on the civil aspects of child abduction this Central Authority in particular takes all appropriate measures “to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing effective exercise of rights of access.” In order to get the Central Authority involved F could file an application under Article 21 HC 1980 on the civil aspects of child abduction referring to Article 8 HC 1980 on the civil aspects of child abduction for formal requirements of such an application.

20. In the case the aforementioned procedure does not end in the resumption of F being able to carry on his right of access to his children, F should commence court proceedings. According to Article 41 (1) Brussels Ibis the rights of access granted in an enforceable judgement shall be recognized and enforceable in another Member State without declaration of enforceability and without any possibility of opposing its recognition. The only requirement for this is that the judge in the respective proceeding issues the certificate of Article 41 (2) Brussels Ibis using the standard form of Annex III.
21. (ii) In case R took the children to Lille, France and the competent court considers the need to hear the children, it could request the other competent court to take the evidence by hearing the child. According to Recital 20 Brussels Ibis “*[t]he hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of May 2001 on cooperation between the courts of the Member States in taking of evidence in civil or commercial matters.*” Under Article 1 (1) of the Regulation (EC) No 1206/2001 the court can either request the competent court of another Member State to take the evidence or take the evidence directly in the other Member State. The hearing of the child could be undertaken by means of communication technology such as telephone- and videoconference according to Article 10 (4) of the Regulation (EC) No 1206/2001.

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<sup>15</sup> List of Contracting states is available at: <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24)>.

**10. Procedures in Case of Keeping of the Children beyond the Agreed Time Period.**

**Impact of the Brussels IIbis Regulation**

22. (i) R should turn to the Central Authority in order to get the children back from F or go to court and claim her custody rights and demanding return of the children. According to Article 7 HC 1980 on the civil aspects of child abduction the Central Authority in particular takes all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained and especially tries to secure the voluntary return of the child or to bring an amicable resolution of the issues. In this context the Central Authority at the habitual residence, Brussels, Belgium, of the mother and the child will work closely together with the respective Central Authority in Germany.
23. If the Central Authorities fail to find a resolution to the children's wrongful removal, R should pursue her custody right in front of a court. According to Article 11 Brussels IIbis the procedure of the return of the child is laid out and reference is made to Articles 12 and 13 HC 1980 on the civil aspects of child abduction. If these requirements are abided the court can issue an enforceable judgement in accordance with Article 42 Brussels IIbis.
24. (ii) In relation to the impact of the Brussels IIbis Regulation on the HC 1980 on the civil aspects of child abduction it is worth mentioning that by general rule, the courts of the EU country in which the child was habitually resident immediately before the abduction continue to have jurisdiction until the child is habitually resident in another EU country. Further, under the Regulation the court in question must issue its judgment within six weeks after the filing of the claim. And ultimately, the return of the child cannot be refused if the person demanding return has not been heard. Only under very strict circumstances a return could be refused. With regard of the abolition of exequatur, a dissenting judgement is automatically recognised and enforceable in the other EU country without the need for a declaration of enforceability. The judgment cannot be challenged, provided that the judge in the EU country of origin has issued a certificate found in Annex IV.

**11. Jurisdiction in Questions in Relation to Modification of Divorce Conditions**

25. Depending on each single modification of the divorce agreement that R and F want to undertake different Regulations are applicable. It should be further noted that F initiated the divorce procedure already on 10 September 2010.
26. (i) Custody and visitation rights remain to be governed by the Brussels IIbis Regulation. Under Article 2 (7) Brussels IIbis the term parental responsibility includes rights of custody and rights of access. Accordingly, jurisdiction on parental responsibilities stipulated in Article 8 Brussels IIbis is applicable. Therefore, the courts of a Member State where the child is habitually resident shall have jurisdiction.
27. (ii) A monthly payment is defined as a maintenance obligation and is therefore excluded by virtue of Article 1 (3) (e) Brussels IIbis from the scope of that Regulation. The jurisdiction, therefore, has to be determined separately by application of Maintenance Regulation as established in Answer No 2.

**12. Introduction of Witnesses Into the Procedure in Relation to the Modification of the Divorce Conditions by F**

28. (i) In case F would like his parents to be heard as witnesses in Germany, the relevant procedures to be followed by the Belgian courts are stipulated in Council Regulation (EC) No 1206/2001 of 28 May 2001 (*Regulation on Taking of Evidence*). According to Article 1 Regulation on Taking of Evidence, the Belgian courts should follow the procedures whenever they (a) request the competent courts of the other state to take evidence or (b) decide to take evidence directly in another Member State. Accordingly, these procedures apply in case the Belgian courts decide to file a request to German courts or take evidence directly in Germany.
29. Thereby, the transmission of the request shall occur directly between the requesting court and the requested court in accordance with Article 2 Regulation on Taking of Evidence and fulfil all formal requirements stipulated in Article 4 Regulation on Taking of Evidence. For the direct taking of evidence, the Belgian court shall first submit a request to the competent authority of Germany and follow the requirements of the Article 17 Regulation on Taking of Evidence. The Belgian Courts might also consider using means of communication such as teleconference or videoconference.
30. (ii) In relation to witnesses situated in Switzerland, outside of the European Union, the Belgian Courts shall apply for judicial assistance to the Swiss Courts according to the

Swiss Rules of the Civil Procedure as well as Swiss International Private law regulations, since Belgium did not ratify the Convention on Taking of Evidence Abroad in Civil or Commercial Matters.

**13. Introduction of Witnesses Into the Procedure in Relation to the Modification of the Divorce Conditions by R**

31. For the procedure of taking of evidence in Portugal the same procedures as stipulated above for Germany apply. Since Denmark did not ratify Regulation on Taking of Evidence and Belgium did not ratify the Convention on Taking of Evidence Abroad in Civil or Commercial Matters, the Belgian courts should seek for judicial assistance of the Denmark courts according to the respective regulations of Denmark.

**14. Jurisdiction in Questions in Relation to Modification of Divorce Conditions in Case of Unemployment of a Party**

32. F should apply for legal aid directly under Article 3 (2) of the Council Directive 2002/8/EC (*State Aid Directive*). The State Aid Directive applies to all cross-border disputes in civil or commercial matters. F has a right to legal aid under the regime of Article 3 State Aid Directive if he meets the conditions for legal aid of Chapter III of the Directive.

**15. Jurisdiction for Enforcement of Outstanding Credit Payments**

33. The courts in Madrid, Spain, have jurisdiction over claims out of the prior employment contract. The contractual relationship between F and Debtor was an individual employment contract and therefore contractual in its nature. The assignment of the claim from F to R against the Debtor does not change the nature of the claim. The Debtor has its business address in Madrid, Spain.
34. According to Article 19 (1) Brussels I courts of the Member State where the employer is domiciled are competent. Accordingly, courts in Madrid, Spain have jurisdiction. The work of F was carried out in Madrid as well; therefore, Article 19 (2) Brussels I is not applicable. Thus, the courts of the Member State of the Debtor as the former employer is domiciled have jurisdiction over claims out of the prior employment contract.

**16. Law Applicable to Enforcement of Outstanding Credit Payments**

35. To work (source of the right of compensation) that was done in Madrid, Spain, Spanish law of employment contracts is applicable. According to Article 8 of Regulation (EC) No 593/2008 (*Rome I*) the law applicable to individual employment contracts is determined in absence of a choice of law clause “*by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.*” In order to get satisfying results one has to interpret the term ‘habitual residence’ within this Regulation according to Article 19 Rome I. Crucial for this determination is Article 19 (2) Rome I, which establishes the relevant point in time at the conclusion of the contract. Within the information given in the case at hand it remains unknown if F resided in Madrid, Spain. Thus, Article 19 (3) Rome I provides the solution and renders Spanish law applicable.

**17. Jurisdiction in Relation to the Request for the Opening of Insolvency Proceedings**

36. As a matter of principle, R may request the opening of insolvency proceedings against the subsidiary of Debtor in Brussels, Belgium. Such proceedings would then be restricted to the assets of the Debtor situated in the territory of Belgium.

37. As of Article 3 (1) of Regulation (EC) No 1346/2000 (*Inso*) the courts of the Member State within the territory of which the centre of a “debtor’s” main interest is situated shall have jurisdiction to open insolvency proceedings. However, under Article 3 (2) Inso it is possible that “courts of another Member State [have] jurisdiction if [the debtor] possesses an establishment within the territory of that other Member State.” In this case, the proceedings are restricted to the assets situated in that territory. Furthermore, Article 3 (3) Inso is applicable, because of the procedure opened in Madrid. In this case R is also not restricted to join the insolvency proceeding in Spain, but could commence such proceedings in Belgium as well. However, only as secondary proceedings and therefore as winding-up proceedings under the requirements of Article 29 (a) and (b) Inso.