THEMIS 2011

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JUDICIAL COOPERATION IN CIVIL MATTERS

PRACTICAL CASE

Italian

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Question 1

According to the Art. 3 Reg. EU 2201/2003, the spouses can choose a number of jurisdictions as the one of the State of habitual residence of the spouses, the one where the spouses were last habitually resident if one of them still resides there, the one of the habitual residence of the respondent, or, in case of joint application, the one of the habitual residence of either spouse. In this case, the authorities with jurisdiction must be identified as those of Belgium.

This conclusion is reached under Article. 3, para. 1, Lett. a) No 1 (i.e. on the basis of the habitual residence of the spouses) assuming that Franz will continue to be resident in Belgium. In particular, the fact that Franz had moved to Berlin does not appear to affect this profile, because it can be assumed that it is only a transfer connected with his work, and that his children still reside in Brussels: it's possible to conclude that Franz still have a significant connection with that city (by the presence of his children) and that makes Brussels the main center of his interest[1].

The same conclusion is reached if we admit that the transfer of Franz in Berlin has led to a consequent change of habitual residence (from Belgium to Germany): in this case the criterion of Article 3, para. 1, Lett. a) No 2 (last habitual residence of the spouses if one of them still resides there) shall be apply, considering that Belgium was the state in which Franz and Rosa had their last habitual residence and that Rose still has his residence there.

However, if we assume, again, that Franz, after the transfer to Germany, has changed its habitual residence, and that in this case was submitted a joint application, it can be argued that the courts are competent either two (one Belgian and German) on the basis of Article. 3, para. 1, Lett. a) No 4 (habitual residence of one of the spouse in case of a joint application).

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1 The answer to this question depends on the concept of "habitual residence" that may be accepted. In this regard, Sent. EU Court Justice 15. '9 .1994 C 492/93 Magdalena Pedro Fernandez specified that habitual residence must be considered as "the place where the person has established, with the character of wanted stability, the permanent or stable center of usual interests"; the continued presence in a certain place in order to fix in it the habitual residence should not be considered in absolute terms: in fact, it's possible that could occur periods of interruption, unable to produce consequences about the continuation of the residence (see Decision of The first grade Tribunal October 25, 2005, Case T - 298/02, Anna Herrero Romeu - Commission.

Question 2

- In this case, the Council Regulation 4 / 2009 will apply. In fact, the term "maintenance" - as the French term *obligations (or prestation) alimentaire* or the German term *Unterhalt* – must be considered as comprehensive of all the features that, inside the family or parafamiliar contest, tend to ensure the maintenance of beneficiary[2]. Therefore, pursuant to art. 3[3] Reg 4 / 2009, provided that the conditions of divorce indicates that Franz is obliged to the payment, and assumed that Franz resides in Berlin[4], there will be two competing jurisdictions: a) the Germany jurisdiction as the place where the defendant Franz lives; b) the Belgian one as the place where Rosa, creditor (such as the legal child) lives. Is must be underlined that conceivable that Art. 4, paragraph 3 of Regulation 4/2009 doesn't permit any choice of jurisdiction for – as in our case - maintenance obligations towards a child under 18 years (and in this case Andrew and Ulrike are less than eighteen).

It's clear that the Regulation 4 / 2009 will be applicable only if the dispute in relation to maintenance obligations have been incurred after the its entry into force (November 18, 2011).

- With regard to the profile of the agreement between the parties concerning the children maintenance, the rule of art. 48 Reg. 4 / 2009 prescribes that court settlements and authentic instruments enforceable in the member State of origin are recognized in another member State and have the same enforceability of decisions under Chapter 4 (ie there is no need for any procedure, particularly for the recognition and enforcement). In our case it could be argued that the agreement reached through mediation by Franz and Rosa - when authenticated by the rules of the law of the state where the agreement was concluded – could be enforced as what the rule prescribes.

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2 Court of Justice, Decision 27 February 1997, n. 220/95 *Van den Boogaart* v. *Laumen*

3 Article 3 - General provisions: "*In 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, or (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties".*

4 About the conceptual difficulties of the clear definition of "habitual residence", see *supra*, note 1.

It's clear, however, that this solution will only apply to matters relating to the post-November 18, 2011).

Otherwise, the execution of the agreement must respect the internal rules of the state where the agreement must be executed.

Moreover, we should apply the Directive 52/2008 on certain aspect of mediation in civil and commercial matters. However it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law such rights and obligation are particularly frequent in family law.

But assuming that the State law that applies to the agreement between Franz and Rosa also allows the parties to dispose of rights related to family matters, the directive mentioned above can be applied to our case. In particular, pursuant to art. 6 the content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instruments in accordance with the law of the member State where the request is made.

The issue, according to some writers, might be resolved under Article. 5, par. 1 of the Regulation 44/2001: therefore, the competent court will be identified in the one of the State where the defendant debtor has his residence (Berlin) or where the debt raised (so called "*forum contractus*": Brussels) or where the obligation must be performed (so called *forum destinatae solutionis*", which is the place where the creditor Rosa lives if we consider that the credit of a sum of money must be generally performed at home of the creditor: Brussels). This solution is justified according to part of the writers[5] who underlined that Regulation 4 / 2009 hasn't regulated maintenance obligations created by contract (the "agreement" that the spouses has performed): the consequence is that this particular aspect should be covered by that paragraph 5 of Regulation 44/2001 that, therefore, at least in this part, would not have been replaced by the next 4 / 2009.

Question 3

- Based on art. 8 of Regulation 2201/2003, the court having jurisdiction in matters of parental responsibility is identified primarily on the children's habitual residence at the

5 M. Castellaneta, A. Leandro *Obbligazioni alimentari*, in *Nuova Legislazione Civile Commentata*, 2010, 1064

time when the court is seized: on the basis of this general criterion, the competent court of the state where Andrew and Ulrike reside (i.e. the Belgian court) will be provided with jurisdiction.

However, Article. 12, par. 1 of the Regulation provides an extension of jurisdiction in favor of the court which decided on the divorce petition, under the conditions of a) and b) of that Article. The first condition is met, certainly in this case (at least one of the spouses - certainly Rosa - has parental responsibility for children). Assuming that there is also the second condition (i.e. that the jurisdiction has been accepted expressly or otherwise unique to Franz and Rosa), the competent court is the one already identified in the answer to question 1.

However, pursuant to art. 12, par. 3 thereof, it is also possible the extension of jurisdiction in favor of a court of a State in which the child has a substantial connection and meeting points a) and b) of that Article. In our case, therefore, it seems more correct to think that the competent court is the Belgian [a] given that Belgium is the country with which Andrew and Ulrike have a strong bond material (Rosa, who has the parental responsibility of them, I s resident in Brussels) and [b] assuming that the jurisdiction of Belgium has been accepted expressly or unequivocally by Franz and Rosa.

With regard to rights of access, the definition given by Regulation 2201/2003 art. 2, in accordance with point 7[6] permits to refer at what was shown on parental responsibility.

Question 4

Since we are considering the economic consequences of the divorce, the jurisdiction is not subject to any EU regulation, with the result that the question of the right to use the apartment will be governed by the substantive law of the rules of private international law of the State of the court issued by the litigant. In this case, therefore, there is a high risk of forum shopping.[7]

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6 "*The term 'parental responsibility' shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access*".

7 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 16.3.2011 that has underlined all the problems connected with the lack of regulation about the international private law concerning matrimonial property: *"nothing in these instruments covers issues of private international law relating to the property*

Question 5

All countries involved in this dispute (Belgium, Germany, Holland, Italy) participated in the cooperation that gave birth to the Council Regulation 1259/2010. According to it, the spouses have the right to choose the law applicable to their divorce, with the forms and limits of art. 5 of the Regulation; in case of failure of this choice, the competent forum will be the *forum necessitatis* provided by art. 8.

However, since the regulation will enter into force 21 June 2012, the discovery of the law applicable to the case, is based on the rules of private international law of the state court for divorce on the basis of rules of jurisdiction (the question, see answer to question 1).

Question 6

Because the visit rights are within the concept of parental responsibility and the responsibility of the parent is not being included in the scope of Regulation 1259/2010 art. 1 (in the case, however, not applicable *ratione temporis*), the applicable law must be identified according to the rules of private international law of the State where is located the court provided of jurisdiction in matters of parental responsibility (ie, according to the answer to question 3, the Belgian court).

Question 7

Considering the fact that the obligations of maintenance of the children are not included within the scope of Regulation 1259/2010 (that, in this case, is not applicable *ratione temporis*), the applicable law in relation to those obligations is established in accordance with Regulation 4/2009 applicable to the proceedings pending after its entry into force (November 18, 2011).

Article 15 of this Regulation - concerning the applicable law - recalls the Hague Protocol of 23 November 2007, ratified by the European Union, that specifies that the applicable law is that of the State of the habitual residence of the creditor8. Particularly,

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relationship of international couples"..

8 Article 3, Hauge Protocol, "General rule on applicable law", prescribes that: 1.- *Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol*

Art. 4 of that Protocol provides, in the case of obligations of the maintenance of children, (as in our case), that, if the creditor is unable, by virtue of the law referred to in Art. 3, to obtain the maintenance from the debtor, the law of the forum shall apply[9].

Instead, in disputes relating to the maintenance pending before November 18, 2011, the law applicable has to be identified on the basis of the rules of private international law of the State the competent jurisdiction.

The same conclusion applies to the identification of the law applicable to the right of use of the apartment (in this case we should apply the private international law of the State of the competent jurisdiction) considering that the financial consequences of the divorce are not within the scope of the Regulation 1259\2010 (Rome III).

Question 8

Since November 18, 2011, the matter is regulated by Regulation No 4/2009 which, in art. 17, provides that, for states parties to the Hague Protocol of 23 November 2007, the decision concerning the right of the child maintenance should be carried into execution without the need of any form of enforcement by the bodies of the State wherein the decision must be executed10. Since the states involved in this practical case are all members of the Hague Protocol of 2007, Rose in the case of violations of the maintenance obligations by Franz, will be able to use this simplified procedure.

Question 9

- In the event that Rose does not allow the former husband to exercise his right of visitation in Brussels in accordance with their agreements, Franz will invoke the application of the decision issued by the judge who ruled on parental responsibility. Particularly, Franz will be allowed to ask for the enforceability of that decision against

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provides otherwise. 2.- In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs.

[9] Article. 4 provides other jurisdictions which the creditor of the maintenance payments can apply to (para. 3 and 4).

10 Council Regulation 4/2009, Article 17, named Abolition of exequatur, prescribes that: *1. A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition. 2. A decision given in a Member State bound by the 2007 Hague Protocol which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability.*

the former wife who lives in Brussels according to the simplified procedure provided by art. 41 of Reg. 2201\2003[11]. Another procedure can be found in art. 21 of the Hague Convention of 25 October 1980 that provides that "*a question concerning the protection and the effective exercise of the right of visitation may be forwarded to the central authority of a Contracting State the same way as those for demand for return of the child*". The procedure to obtain the return of the child is provided by Art.8, which statutes that "*every person who claims that a child has been removed or retained in violation of custody rights may apply either to the central authority of the child's habitual residence or that of any other state party, in order to obtain assistance to ensure the return of the child*".

- In the case that Rosa has moved to another State (France) with the children, if the necessity to hear the children arises by the competent Court, art. 17 of Regulation n.1206/2001 (concerning the cooperation between the Judicial Authorities of the Member States in the taking of evidence abroad in civil and commercial matters) provides for the forms of the hearing of the child. Therefore, the competent Belgian court should address a request to the French judicial authorities according to the Form I annexed to the Regulation 1206\2001. This evidence, however, is permitted only if it is not necessary to adopt coercive measures (Art. 17, par.. 2).

Question 10

- According to Council Regulation n. 2201/2003 (artt. 10 e 11), Rosa can seize the Court of the residence of the child before the wrongful removal, and applies to it to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or

11 Art. 41 Regulation 2201/2033, Rights of access, prescribes that "1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment 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 paragraph 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."

retention.

- The Regulation has reinforced the procedures set by the Hague Convention of 25 October 1980 providing a direct enforceability of the judgment without any form of recognition or exequatur of the requested Court. (in our case Germany). Furthermore, the Regulation has limited the cases of "exception of non returning" of the child because of the risk that his/her physical and mental health might be effected in the returning State: the Regulation provides that the judge of the State in which the minor has to return is obliged to order the return of the minor if is demonstrated that, in the state of his habitual residence, there are appropriate measures to ensure the protection of the child after his return. Finally, the regulation prescribes that the child must be heard if it might useful for the decision and not dangerous for the child.

Question 11

The various conditions of the divorce that Franz wants to change must be distinguished among them, being subject to different rules on the jurisdiction. In particular, it is possible to make a *summa divisio* between issues regarding the relationship between parents and children (custody and access) and those concerning economic relations between the former spouses.

With regard to custody of the children and right of visit (included in the concept of "parental responsibility"), any modification of the agreement must be issued to the Court of the State where the children have their habitual residence (Brussels, so the Belgian Court). On this point, see the answer to question 3.

Regarding the modification of maintenance of children, art. 8 of Regulation 4/2009 states that if a decision is issued in a member State or a Contracting State of the Hague Convention of 23 November 2007 in which the creditor has his habitual residence, the debtor cannot bring an action to change decision or to obtain a decision in the new member state, as long as the creditor continues to reside habitually in the State in which the decision was issued. It follows that, given that Rosa resides in a member State (Belgium), the debtor (Franz) can only apply to the jurisdiction under Article 2 of Regulation 4/2009 i.e. that of the creditor's domicile (Rosa's one), even if the original

decision was handed down under the same rule in the State of his domicile.

Question 12

- The procedure that Franz will follow so that his parents who live in Monaco are heard as witnesses is the one provided by Art. 17 of Regulation 1206/2001 (for a more detailed description of the procedure outlined by this rule, see the answer to question 9).

However, if they moved to Zurich (Switzerland does not belong to the EU), the Hague Convention of 18 March 1970 on taking of evidence shall apply.

- In the event that the witnesses (parents of Franz) are in Monaco, there may be a direct taking of evidence by the proceeding court (pursuant to Article 17 of Regulation 1206/2001). The execution of this mode is the most innovative profile of the Regulation: with it we have abandoned the principle of territoriality in the gathering of evidence and the opening of the European legal space. This power is limited to cases in which the subject voluntarily comply with the request of evidence and does not require coercive measures against the witness.

To allow witnesses residing in Monaco to know the date, time and conditions of their appearance before the Court, it is necessary to follow the procedure laid down by Regulation 1397/2007 (on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters). This procedure is based on the direct exchange of documents between bodies, designated by member States, responsible for the transmission and reception of the document (Artt. 4 and the followings) and it is expected that the notification shall be made as required by the rules of the requested State (Article 7, par. 1).

Instead, if the witnesses are located in Switzerland, the direct taking of evidence is done through the consular officials of the State where the process takes place, after authorization of the State where the witnesses are located. In addition, in order to allow witnesses to know the date, time and conditions of their appearance before the court, the Hague Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents in civil or commercial matters establishes that the addressed State shall itself serve the document or shall arrange to have it served by an appropriate agency

either: – by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory or – by a particular method requested by the applicant unless such a method is incompatible with the law of the addressed State.

Question 13

With regard to Rose's sister who lives in Portugal the Regulation 1206/2001 will be applied (see above answer to question 12).

The sister who lives in Denmark, a State which does not participate in judicial cooperation in civil matters, will be heard according to the manners prescribed by the Hague Convention of 18 March 1970.

Question 14

The procedure for access to legal aid for cross-border disputes is governed by Chapter IV, Art. 12 et seq. of Directive of January 27, 2003 (2002/8/EC). The standard form for the transmission of legal aid applications has been settled down in the Commission Decision of 26 August 2005 establishing a form for the transmission of legal aid application under Council Directive 2003/8/EC.

According to Art. 12, legal aid will be granted to Franz by the Member State before which the trial for the change of the measures is pending (i.e. that identified in the answer to the question 11). Franz will be able to apply for legal aid the authority of the State where he is domiciled or habitually resident (so called “transmitting authority”, in this case the German one) or the competent authority of the Member State of the forum (so called “receiving authority”, in our case that identified in the answer to question 11).

Question 15

The jurisdiction competent for the request for payment which is advanced by Rosa is that of the State where the defendant debtor (Constructora Manzanares SA) is domiciled (Madrid) *ex* art. 19 of Regulation 44/2001, according to both the No. 1 and No. 2 of that Article. Both points - the first identifying the competent jurisdiction in the

Courts of the member State where the employers is domiciled, the second referring to the place of the working activities of the employee - rooted jurisdiction in Madrid. We come to this conclusion because the credit claimed by Rosa against the Constructora Manzanares SA has an objective nature of "working law credit", originally belonged to Franz on the basis of work activities performed; and with regard to the transfer of the credit, it is insusceptible to influence the nature of the credit and, therefore, the conclusions concerning the jurisdiction.

Question 16

The law applicable to proceedings brought by Rosa against Constructora Manzanares SA is identified by art. 8, paragraph 2 of Regulation 593/2008 that statutes, in the absence of a choice of the parties (the choice seems to be missed in the description of the concrete case) identifies as the applicable law the one of the State where it took place the working activity and, therefore, in the present case, the Spanish law.

Question 17

According with art. 3 of the Regulation n. 1346\2000, "*the courts of the member state within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof of the contrary*".

Instead, according to par. 2 of the same article, "*where the centre of a debtor's main interests is situated within the territory of a member state, the courts of another member state shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other member state*".

The insolvency regulation treats each legal entity as a different debtor. Therefore, a subsidiary company or an independent agent acting in the ordinary course of their business cannot constitute an establishment of the parent company of the principle. The typical premise for the application of article 2, lett. h) (definition of establishment) and 3, par. 2 of the regulation is the case of an establishment of the debtor with non legal

personality; however, in special circumstances, a subsidiary may be deemed to constitute an establishment of the parent company. This can be the case, for instance, if the subsidiary behaves in the market as a branch, performing activities that belong, in economic terms, to the sphere of the parent rather than to their own business operations[12].

Therefore, according to the characteristics of the subsidiary located in Brussels, Rose shall start an insolvency proceedings against that subsidiary (according to Art. 3, par. 2) or enter into insolvency proceedings opened in Madrid (according to Art.. 3, par. 1).

12 See Miguel Virgos Soriano Francisco Garcimartin, Francisco Jargumetin Alferez, "The European Insolvency Regulation: Law and practise".