Portuguese team

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1.

The Council Regulation (EC) 2201/2003 of 27.11.2003 concerns our case specifically, since there is a joint request for divorce in April 2007 and the Regulation entered into force in 1.8.2004.

According to its Article 3, 1, (a) both German and Belgian courts have jurisdiction over the joint request entered on 15.4.2007, the time when Franz had his habitual residence in Berlin and Rosa in Brussels. In fact, the mentioned provision states that in matters relating to divorce, jurisdiction shall lie with the courts of the Member States in whose territory either of the spouses is habitually resident, in case of a joint application.

2.

Part I

Although Council Regulation (EC) 2201/2003 of 27 November 2003 addresses matters of parental responsibility, it doesn't encompass maintenance (article 1/ 3, e)).

Council Regulation (EC) 4/2009 of 18 December 2008 rules on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation. However, the Regulation was not in force (article 76) when the divorce was requested (2007).

The mentioned Regulation replaced Regulation 44/2001 in matters of maintenance obligations (recital 44), whose article 5/ 2 provides a special criterion of jurisdiction: a person domiciled in a Member State may, in another Member State, be sued "if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties".

Therefore, the jurisdiction in relation to the maintenance payments of the children lies either in Belgian courts or in German courts, depending on the jurisdiction which was chosen by the divorce applicants.

Part II

Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters states, in article 6/ 1, that the 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. The content of such an agreement shall 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 that Member State does not provide for its enforceability.

Recital 10 of the Directive apparently excludes from its range of application family matters, but, accompanying David Hodson, we consider that there are relatively few disputes that are inappropriate in themselves for family law mediation[1]

Once more, however, when the divorce application was submitted this Directive was still not approved nor was the delay of transposition over.

Consequently, the procedures to follow if Franz and Rosa need to enforce the agreement reached through mediation are those of the domestic law of the competent jurisdiction, already mentioned in Part I of our answer.

Admitting, for instance, that mediation takes place in Belgium, we still have to pay attention to the broad concept of judgment included in article 32 of Regulation 44/2001, according to which 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. In connection with articles 57 and 58 of the same Regulation, we can conclude that an homologatory judgment of the mentioned agreement in fully enforceable.

Under this hypothesis, the answer must be seeked in domestic Belgium law, where there are rules on mediation since 2005 in the civil procedure code, which foresees both voluntary and judicial mediation (articles 1733 and 1734, respectively).

For the purpose of enforcement, a confirmation by court (*homologation)* of the agreement reached through mediation is needed: "*En cas d'accord, et si le médiateur qui a mené la médiation est agréé par la commission visée à l'article 1727, les parties ou l'une d'elles peuvent soumettre l'accord de médiation obtenu conformément aux articles 1731 et 1732 pour homologation au juge competent (…). L'ordonnance d'homologation a les effets d'un jugement au sens de l'article 1043 (article 1733)*".

3.

Council Regulation (EC) 2201/2003 of 27 November 2003 rules namely on jurisdiction in matters of parental responsibility.

[1] David Hodson – "The EU Mediation Directive: The European encouragement to family law ADR", available in http://www.davidhodson.com/assets/documents/EU_Mediation_Directive.pdf (last access in 4.10.2011).

Article 2 no 7 contains the definition of parental responsibilities, that also includes access rights.

Article 8 contains the general rule, according to which in matters of parental responsibility over a child, the competent jurisdiction is that of the habitual residence of the child at the time the court is seized – in our case, the Belgian courts.

Although article 9 contemplates an exceptional rule, relating to access rights, it has no application in our case.

4.

The right of use of the apartment which Franz and Rosa had bought during their marriage constitutes a matter of property law. In fact, their property rights over the apartment are essentially not questioned by the fact that it is put to use as the marital home (family residence of Rosa and the children). The agreement they reached addresses only the use (*rectius*, the exclusive right to use and occupy the marital home after the divorce is final) of their community property[2], a matter submitted to the Regulation 44/2001, in article 22, a mandatory rule providing as having exclusive jurisdiction the courts of the Member State where the property is located – in our case, the Belgian courts.

Even if Rosas's agreed right of use is considered a tenancy – as she pays a larger amount of the mortgage comparing to Franz – the conclusion we arrived would be the same in what respects jurisdiction (article 22/ 1).

5.

As we stated in question 1, regarding the jurisdiction competent for the divorce, the plea for divorce can be demanded in Germany or Belgium (art.3/1, a), §4 Reg. 2201/2003).

Regarding the applicable law, in the absence of a convention[3], when one pleas for divorce before the courts of a Member State, the applicable law is determined in accordance with the conflict rules in force in that country.

If the plea for divorce is made before the Belgian court:

Divorce proceedings filed in Belgium must be followed before the Belgian courts, in accordance with the provisions of Belgian law; these provisions concern in particular, the territorial competence of the court of first instance. As regards the basic conditions, in principle, an individual's status is

[2] Reaching the same conclusion with similar arguments, Tribunal da Relacao de Lisboa from 1.7.2010 (Pereira Rodrigues), available in www.dgsi.pt (las access in 3.10.2010).
[3] Council Regulation 17523/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, recently entered into force. However, it is not applicable to our case, since it the divorce prior to the approval of the Regulation.

governed by his national law [Section 3(3) of the Civil Code]. Problems arise when concurrent laws do not agree on the solutions. The Act of 27 June 1960, on the admissibility of divorce when at least one of the spouses is a foreigner, has resolved certain issues. Unresolved problems remain subject to Section 3(3), mentioned above[4].

- If the plea for divorce is made before a German court:

The issue of which law is applicable to the requirements for and the consequences of a divorce where the facts are connected with the law of another state is determined by Section 17 of the German Introductory Act on the Civil Code [*Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB)]. The divorce is primarily subject to the law which, at the time when the divorce petition becomes legally pending, is applicable for the purposes of the "general effects of the marriage". Where no admissible choice of law has been made by the spouses, the general effects of the marriage are in principle subject to the law of the state of which both spouses are nationals or were last nationals during the marriage, if either of them is still a national of this state. If no joint nationality exists for this purpose, the general effects of the marriage are subject to the following law:

- the law of the state in which both spouses are usually resident or were last usually resident during the marriage, if either of them is still usually resident there, <u>in the alternative</u>
- the law of the state with which the spouses otherwise are jointly most closely associated[5].

All things concerned, the Belgian Law could be applied to the divorce.

6.

We have already said that, according to Regulation 2201/2003, the courts of the member state where the child has its habitual residence have jurisdiction over matters of parental responsibility. However, it doesn't establish the law applicable in these cases.

Ruling over this matter we can find the Convention on parental responsibility and protection of children from 19 October 1996, which entered into force in 1.1.2002. According to this convention, the country exercising its jurisdiction does so under the rules of its own law. Under exceptional circumstances, it may apply or take into consideration the law of another country that is closely connected to the situation, provided that this is in the best interest of the child (article 15).

However, Belgium signed but didn't ratify the Convention, thus, is not applicable to our case.

There is a prior Hague Convention from 1961 on the subject, but Belgium is not part on it.

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[4] http://ec.europa.eu/civiljustice/divorce/divorce_bel_en.htm#16.

[5] http://ec.europa.eu/civiljustice/divorce/divorce_ger_en.htm#16.

Therefore, the answer must be found in the Belgium private international law (*Code de droit international privé* of 16.7.2004), which determines the application of the law of the habitual residence of the child, which, in this case, is the Belgian law.

7.

Since there is not any European act or international convention on the law in relation to the maintenance and right of use of the apartment, the domestic conflict rules of the competent jurisdiction[6] (*Code de droit international privé of Belgium of 16.7.2004*), determined upon situation of the apartment, shall be applied.

8.

Admitting that the question arises today, although the 15.04.58 Hague convention and 20.06.1956 New York convention are applicable, at the present moment we have Council Regulation (EC) n. 4/2009 of 18 December 2008 (EV 18.06.2011), ruling on those matters, (article 2/1, §2 of the Regulation).

Rosa can opt for the enforcement of the decision or for a protective measure.

In both cases, Rosa can choose the Belgian court (article 3), where she lives.

As stated in article 17 of the regulation, the *exequatur* was abolished, so, according to article 20, for the purpose of enforcement of a decision in another Member State, the claimant, in this case Rosa, shall only provide the competent enforcement authorities with:

(a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;

(b) the extract from the decision issued by the court of origin using the form set out in Annex I;

(c) where appropriate, a document showing the amount of any arrears and the date such amount was calculated;

(d) where necessary, a transliteration or a translation of the content of the form referred to in point (b) into the official language of the Member State of enforcement or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the application is made, in accor dance with the law of that Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.

[6] The question relating to the jurisdiction was already answered in 4.

The translation is not, *prima facie*, required, although may be necessary if the enforcement of the decision is challenged.

On the other hand, Rosa can opt for a protective measure, in terms of article 14. For that matter, the application for the measure can "be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter".

9.

Part I

Articles 40 and following of the Regulation 2201/2003 concern the enforceability of certain judgments concerning, namely, rights of access.

We should remember that the right of access, agreed within a judicial file, is enforceable, as we have already stated.

The special provision of article 41 determines that the rights of access granted in an enforceable judgment given by a Member State shall be recognized and enforceable in another Member State according to its own procedures (article 47) 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.

However, Franz will seek enforceability of the confirmation judgment in Brussels, Belgium, the children habitual residence and the place where the visits should take place. So, the mentioned certification will not be needed and the judgment can be enforced without any other requisites.

Naturally, the enforcement procedure will be governed by the law of Belgium.

Part II

If Rosa decides to move, because of her work, to Lille, in France, and the Belgian court, seeked for the mentioned enforcement, needs to hear the children, this hearing in another Member State may take place under the arrangements laid down in Council Regulation (EC) n 1206/2001 of 28.5.2001 (recital 20 of the Regulation 2201/2003).

The Regulation 1206/2001 contemplates two methods to obtain evidence in these cross/border cases: transmission of a request to the court of Lille (articles 4 to 16) and direct taking of evidence by the requesting court of Brussels (article 17).

Fundamental is that the hearing of the children takes in consideration the provision of article 12 of the Convention on the Rights of the Child, adopted in 20 November 1989, according to which State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with its age and maturity. So, assuming the children have sufficient maturity, they should be heard according to one of the above mentioned methods.

10.

Part I

Regulation 2201/2003 on civil matters relating, namely to the attribution, exercise, delegation, restriction or termination of parental responsibility, in particular, rights of custody and of access (article 1/ 1. b) and 2. a)) provides in its article 10 a solution for this case, stating that the competent jurisdiction to decide over an illegal retention of the child is the one of his or her habitual residence.

We need to articulate this section with article 12 of the Hague Convention of 25.10.1980 on civil aspects of international abduction of children.

In terms of procedures it is necessary to point out that it must be initiated until a year hasn't passed by on the retention of the child, because otherwise its habitual residence is considered to have changed to the country she has been retained on. Within the mentioned delay, Rosa must, then, lodge the request for the return of the child in the Belgian court, so assuring that the child will be heard during the process (article 12 of the Convention the Children's Rights).

Part II

The Regulation completes the Convention (recital 17, Reg. 2201/2003), particularly its article 11, where it is provided that the state where the delivery of the child is requested, cannot refuse it in the conditions set by that provision.

Additionally, the Regulation states the prevalence of the decision taken under its article 11, no 8 over a decision of refusal taken under article 13 of the Hague Convention.

Finally, the proceedings to ensure the delivery of the child are set by articles 41 to 45 of the Regulation, which constitutes an innovation.

11.

According to article 8º/1, Reg. 2201/2003, in general, with regard to parental responsibility, the responsibility is assigned to the EU country of habitual residence.

In certain cases of lawful change of residence of the child, the courts of the EU country of former habitual residence of the child who has issued a decision on parental responsibility (in particular with regard to access rights) continue to be competent. In addition, parents can accept that the court which pronounced the divorce, is also competent to decide any matter relating to parental responsibility (article 9).

Parents can also agree, under certain conditions, to apply to the courts of another EU country with which the child has a close connection, for example, a national of that country.

As stated in the answer given in question 3, and regarding the practical case given, the Belgian courts are still competent in matters of parental responsibilities, since the children still have their habitual residence in Brussels and we consider that the jurisdiction competent to attribute parental responsibility is also competent to change the measures initially specified.

12.

Part I

The hearing of Franz's parents by the Belgian court, since they live in Munich, another Member State, must take place in accordance with Council Regulation (EC) No 1206/2001 of 28.5.2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

It should also be pointed out that Regulation nº 1206/2001 has no exclusion over family matters, and we cannot assume the exclusion of Regulation 44/2001 extends to these matters. Moreover, there´s another reason that stresses this conclusion - recital 20 of the Regulation 2201/2003 assumes that Regulation 1206/2001 applies to the hearing of the child in parental responsibility files.

Like we have said above, one of the two methods of obtaining proof – direct (article 17) or indirect (articles 4 to 16) – must be observed.

So, if the indirect method is the chosen one, the Belgian court requests the Munich court the hearing of Franz's parents following the rules of article 4 to 9, which shall occur according to the provisions of articles 10 and following, namely within the terms and procedures of the German law.

If the direct method is chosen - direct taking of evidence by the requesting court – the Belgian court shall submit a request to the central body or the competent authority referred to in article 3/3 in

Germany and the inquiry must take place in a fully voluntary manner, according to article 17, either through the placement of the Belgian judge to Germany or by the use of videoconference system provided that is available and admissible in Germany.

If Franz's parents move to Switzerland, the mentioned Regulation is no longer applicable, since they move to a third country. In this case, the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters must apply.

According to its article 1, in civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. Such a request follows the rules of articles 2 to 4.

The Swiss court which will execute the Letter of Request applies its own law as to the methods and procedures to be followed (article 9).

Part II

Regulation no 1393/2007, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, is applicable where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there (article 1), which is exactly the case, assuming Franz's parents live in Germany.

The Regulation provides for different ways of transmitting and serving documents: transmission through transmitting and receiving agencies, transmission by consular or diplomatic channels, service by postal services and direct service.

The Central Body is responsible for supplying information to the transmitting agencies and seeking solutions to any difficulties which may arise during transmission of documents for service.

The Belgian court wishing to serve the competent document may forward an application for service directly to the German court. A request written on a standard form should be enclosed with the documents which are to be served, preferably translated, so avoiding refusal.

In accordance with the conditions prescribed by the receiving state, service may be effected by post directly to persons residing in another Member State, with the competent translation to the language of the witness.

Cases like the one described – service of document to a person outside the European Union, Switzerland, for instance - fall within the framework of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Such matters are sent by the applicant authority to the Central Authority of the other state with a request for service (articles 2 to 4). The Swiss Central Authority shall itself serve the document or shall arrange to have it served by an appropriate agency (article 5).

13.

Concerning the witness that lives in Portugal, it is applicable Regulation nº 1206/2001, 28.05, on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters.

In fact, article 21/ 1 of the Regulation states its prevalence over the Hague Convention 1970.

As for the witness that lives in Denmark, provision 1/ 3 of the Regulation states its exclusion from the Regulation, which means that the law applicable to the taking of this testimony is the Hague Convention.

The procedure that has to be undertaken in order to obtain these testimonies has already been explained in our answer to question 12.

14.

According to the Council Directive 2002/8/CE, 27.01.2003, natural persons involved in a cross-border dispute "shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive" (article 3 (1), which includes pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings and legal assistance and representation in court (article 3, 2)).

The Directive states, in article 5, that "Member States shall grant legal aid to persons referred to in article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in article 3(2) as a result of their economic situation, in order to ensure their effective access to justice".

The Member State in which the legal aid applicant is domiciled or habitually resident shall provide legal aid necessary to cover: (a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred in that Member State until the application for legal aid has been received, in accordance with this Directive, in the Member State where the court is sitting; (b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

In our case, Franz, who lives in Berlin, should apply for assistance under the Legal Advice Scheme, submitted to the local court, in the district where the he is resident.

15.

The debt comes from a contract of provision of services, so the competent jurisdiction to decide over the payment is the Spanish one, according to article 5, b), §2, Regulation 44/2001 (special jurisdiction).

16.

As we have allready answered, as the debt comes from a provision of services contract, the competent jurisdiction to decide over the payment is the Spanish (article 5/ 1, b), § 2º of Regulation 44/2001).

First of all, we have no indication that the parties have selected any forum, which means that the law applicable to this procedure is determined according to the criterion of the habitual residence of the creditor at the time of the conclusion of the contract, which leads to German law (Regulation 593/2008, Roma I, articles 4/ 1, b) and 19, § 3º).

But in our hypothesis we have to consider additionally that this credit has been transferred to Rosa, and for this case article 14, § 2 of the Regulation 593/2008, provides that the law applicable to the relationship between the assignee and the debtor is the law governing the assigned, which leads us again to the German law.

17.

In the Council Regulation (EC) Nº 1346/2000, of 29 May 2000, on insolvency proceedings, the jurisdiction of courts is based on the general rule that the courts of the Member State within the territory of which the centre of the debtor's main interests (COMI) is situated shall have jurisdiction to open insolvency proceedings (article 3/1).

In this case, we know that the COMI of *Construtora Manzanares, S.A.*, is located in Madrid. Therefore, the Spanish courts have jurisdiction over the main proceedings of insolvency of this company, where Rosa could request the opening of an insolvency procedure against her insolvent debtor or claim her credit in an ongoing insolvency proceeding.

Only if the same company has assets in another Member State where it also possesses an establishment is it possible for the local creditors to file another insolvency proceeding – necessarily a winding-up proceeding related to those assets -, called 'secondary proceeding' whenever it is commenced after the main proceeding (article 3/ 2 and 3).

As for the subsidiary, considering it forms part of a group of companies headed by the parent company *Construtora Manzanares* but has an autonomous juridical status, since it has an

independent registered office in another Member State (Belgium), the Regulation considers the parent and the subsidiary companies as totally independent ones in what concerns the determination of international jurisdiction for the opening of insolvency procedures, since it doesn't contemplate the specific case of groups of companies.[7]

No information is given on the location of the COMI of the subsidiary, but we have the legal presumption of article 3/ 1, *in fine*, according to which in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. Assuming that the subsidiary is registered in Brussels, this is presumably the location of its COMI.

Therefore, in the absence of any elements to rebut the said presumption, the insolvency of the subsidiary must be commenced in Belgian courts. However, in this case, Rosa cannot claim her credit in Belgium, since it exists only against the Spanish company, whose insolvency proceedings take place in Madrid. She can only claim her credit in this latter procedure.

[7] This has been the orientation of the European Court of Justice, as can be seen in the paradigmatic case *Eurofood* (from 2 May 2006, case C-341/04, available in <http://curia.europa.eu>.), although it has been very criticized, on the allegation that this formal separation of companies compromises the group reorganization or causes a considerable loss of value to the group's assets.