First Seminar on EU Family Law
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LITIGATION UNDER BRUXELLES II BIS REGULATION

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Outline of the lecture

European civil procedure (in cross border) family matters
  • Setting the scene

Regulation 2201/2003 (Brussels II bis)
  • Architecture of BIIbis
  • Scope of application
    • Autonomous interpretation

• Jurisdiction in matrimonial matters
• Jurisdiction in parental responsibility matters
• Lis pendens and related proceedings
JURISDICTION TO MATRIMONIAL ISSUES
• Jurisdictional ground count even if the case is not between MS
• Jurisdictional rules are strict, inflexible, mandatory, no discretion is left for a judge
• no *forum non conveniens* doctrine
• relevant point of time as to which the facts establishing jurisdiction are ascertained is when the application is made
• if facts change after jurisdiction is taken by the court, *perpetuatio fori* applies
• if initially fact gave no jurisdiction to a court, lack of jurisdiction can be cured until time the court last assesses the facts
• Jurisdictional grounds are not in hierarchical order and are all equal
• Open *forum shopping* though rules on *lis pendens* exist for correction
• Jurisdictional rules are elective - when applying for divorce a person/couple may take a matrimonial action in the courts of the MS
  • where one or both of them are or were habitually resident, or
  • the MS of their common nationality or common domicile.
• it may be possible to take the action in a number of states!
• Considerations for the future
  • ? Could in the future party autonomy serve to prevent rush to the courts
  • ? Should hierarchical order be introduced
General jurisdiction to divorce, art.3

- Two categories of criteria (habitual residence / nationality)
- Seven alternatives are provided for, to serve favor divortii

- Borrás report states such criteria “are designed to meet objective requirements, are in line with the interests of the parties, involve flexible rules to deal with mobility and are intended to meet individuals’ needs without sacrificing legal certainty”
<table>
<thead>
<tr>
<th>Art. 3(1) a</th>
<th>Elective jurisdictional criteria</th>
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<tr>
<td>• habitual residence of the spouses</td>
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<td>• last habitual residence of the spouses, insofar as one of them still resides there;</td>
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<td>- habitual residence of the respondent</td>
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<td>- habitual residence of any of the spouses in the event of a joint application;</td>
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<td>- habitual residence of the applicant, if he/she resided there for at least a year immediately before the application was made;</td>
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<td>- habitual residence of the applicant, if he/she resided there for at least six months immediately before the application was made and he/she is a national of the Member State in question (in the case of UK „domicile”);</td>
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<td>Art. 3(1)b</td>
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<td>• nationality of both spouses or, in the case of the UK „domicile”</td>
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How do we interpret and find habitual residence?

- seen that the principal connecting factor
- nowhere defined in the instrument - not easy to define
- question of fact

- HR means residence which is being enjoyed for the time being and with the settled intention that it should continue for some.
- Habitual residence is a centre of private and social activities of a person
• It has to be permanent and stable
• Constitutive elements of habitual residence are:
  • **Objective** – factual element of being at certain place
  • **Subjective** – *animus residendi*, volition element

• Held by minor as well - person does not have to be mature to hold one!
Habitual residence

- term “habitual residence” has an autonomous meaning for the purposes of the Brussels II bis Regulation

„Place where person is established, on a fixed basis, his permanent habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence” C-13/73

C- 42/75, Delvaux v. Commission, 17.2.1976. NO Warner: „If we want to determine if a person at a particular time in a particular place habitual residence, we need to know the extent to which the same was present there, and only then, should examine the reasons for its presence. „
Case C-90/97, 1999, Swaddling v. Adjudicatory Officer

- Britain has used the freedom of movement and residence in France
- He returned to Britain, where he intended to find a job
- He immediately called for support for the unemployed guaranteed by Regulation 1408/71.
- The request was denied because the English law does not meet the qualifications of a common residence in the requested certain lapse of time travel in its territory.
• „ECJ: The fact of the existence of intended stay is crucial (it is confirmed through business and family situation, the reasons for movement), while the length of stay is only one aspect of the overall situation, not necessarily required for the acquisition of habitual residence”

• EU Court of Justice states:
  • „adopted .... understanding of the concept of habitual residence has a broader meaning of Community law ..."

BUT

• The judgment was made in the framework of the social policy acquis is not best suited to decide the procedures for the welfare of the children!
Nationality as a criterion

- both nationalities are relevant
- no examination, which one is the „effective nationality”

The courts must „take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.” C-168/08 (Hadadi)
Mr Hadadi and Ms Mesko, both of Hungarian nationality, married in Hungary in 1979.

They emigrated to France, where they became naturalised French citizens, although did not lose their Hungarian nationality.

In 2002, Mr Hadadi instituted divorce proceedings before Pest Court; divorce granted by judgment of May 2004.

In the course of these proceedings, Ms Mesko made an equivalent application to the French courts.

Paris Court of Appeal held that the judgment of the Hungarian Court could not be recognized in France, on the ground that the jurisdiction of this court was very flimsy, whereas the jurisdiction of the French court, where the marital home is situated, was particularly clear

Mr Hadadi appealed on a point of law against this decision.
• **ECJ rules:** in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another MS, the court seised must take into account the fact that the spouses also hold the nationality of the MS of origin and that the courts of the latter could have had jurisdiction in accordance with the Regulation.

• autonomous and uniform interpretation – no privilege to national rules!

• grounds set out in Article 3 are alternatives, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.

• spouses may seise the courts of either of the Member States of which they both hold the nationality, as they choose!
Are we entitled to apply national jurisdictional rules?

- Conditions to apply national rules, as prescribed by the Regulation
  - on the side of plaintiff: that he holds citizenship of some MS and he has habitual residence on the territory of some Member State;
  - on the side of respondent that he has habitual residence in NON MS, and that he is not a national of some MS or has domicile in UK / Ireland
- Regulation applies even if spouses are citizens of non MS – if they have habitual residence in EU!
Sundelind Lopez v Lopez Lizazo C-68/07

• second judgment on the Brussels II bis Regulation
• the respondent in a case concerning divorce is neither resident in a MS nor a citizen of a MS
• may the case be heard by a court in a MS which does not have jurisdiction under Article 3 [of the Brussels II Regulation], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?
case concerned the commencement of divorce proceedings in Stockholm by the female petitioner Swedish national

respondent is her husband - a Cuban national

couple lived together in France, but at the date of commencement of proceedings, the petitioner continued to reside in France, whereas her husband, by then, was resident in Cuba.

The Swedish court dismissed the petition on the ground that under Article 3(1) of Brussels II bis only the French courts had jurisdiction
Swedish Supreme Court received an appeal where the petitioner submitted that Article 6 of Brussels II bis implies that the courts of Member States do not have exclusive jurisdiction where the respondent neither has his habitual residence in, nor is a national of, a Member State.

Swedish Supreme Court referred the question to the ECJ for a preliminary ruling

The respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State. May the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of Brussels II bis], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?
ECJ held:

- „Articles 6 and 7 of Regulation No 2201/2003 ...... are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a MS and is not a national of a MS, the courts of a MS cannot base their jurisdiction to hear the petition on their national law, if the courts of another MS have jurisdiction under Article 3 of that regulation.”
• EJC held that according to Article 7(1) it is only where no court of a Member State has jurisdiction pursuant to Articles 3 to 5 of the Regulation that jurisdiction is to be governed, in each MS, by the laws of that state.

• Pursuant to Article 17, where a court of one MS is seised of a case over which it has no jurisdiction under the Regulation, and a court of another MS has jurisdiction pursuant to the Regulation, the former is to declare of its own motion that it has no jurisdiction.

• Consequence of Sundelind Lopez v Lopez Lizazo was that:
  • Swedish courts could not base their jurisdiction to hear that petition upon rules of national law, pursuant to Article 7 (1)
  • Swedish courts were required to declare of their own motion that they had no jurisdiction, pursuant to Article 17, since the French courts had jurisdiction to hear the divorce petition based on Article 3(l)(a)
Article 6 Exclusive nature of jurisdiction under Articles 3, 4 and 5

- A spouse who:
  - (a) is habitually resident in the territory of a Member State; or
  - (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her ‘domicile' in the territory of one of the latter Member States, may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7 Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.
Do I have jurisdiction pursuant to Articles 3-5?

YES

Does a court of another Member State have jurisdiction under the Regulation (Art. 17)?

YES

NO

Court should declare of its own motion that it has no jurisdiction (art. 17)

regulation, national

Where no court is competent under the regulation, court can establish jurisdiction based on law “residual jurisdiction”, Art. 7
The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation, art. 4.

The counterclaim must be included within the scope of application of the Regulation.

Ezg. maintenance between the spouses

- Jurisdiction rules of Regulation 4/2009 apply to such claim
Conversion of legal separation into divorce

- Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

- In several German rulings regarding Italian nationals, German court gave a false interpretation as there is no conversion in Italian law!