Training course "Provisions and practical application of the Rome III Regulation"
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Provisions of jurisdiction and recognition in EU International Family Law

A. Rules on jurisdiction and recognition in matrimonial and maintenance matters

Rules on jurisdiction and recognition in matrimonial and maintenance matters are found in the Brussels II*bis*[1] and in the Maintenance Obligations Regulations[2]. The rules on whether a court in the EU has jurisdiction over divorce or maintenance obligations are almost uniform throughout. The only difference is that for the UK jurisdictions and Ireland, "domicile" instead of nationality is the deciding factor in the category where this is relevant.

B. Brussels II*bis* Regulation

I. Introduction

The Brussels II*bis* Regulation contains rules on jurisdiction and recognition in civil matters relating to divorce, legal separation and marriage annulment. Parental responsibility is included.

II. Scope of application

The Regulation applies to civil proceedings relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility (Art. 1 para. 1). The scope of the Brussels II*bis* Regulation is confined to the dissolution of the matrimonial ties and it does not apply to any ancillary issues. Therefore, many issues are outside the scope of the Regulation, such as maintenance obligations (Art. 1 para. 3 lit. e), which are covered by the Maintenance Obligations Regulation. The property consequences of a marriage are also excluded.
Parental responsibility refers to the full set of rights and obligations in relation to a child's person or property. In order to ensure equality for all children, the Regulation covers all matters of parental responsibility, including measures to protect the child, independently of any matrimonial proceedings.
The Brussels II*bis* Regulation on matrimonial matters and parental responsibility came into effect in March 2005. The UK and Ireland are taking part in the application of the Brussels II*bis* Regulation. Denmark did not take part in the adoption of the Regulation and is therefore not bound by it.

III. Jurisdiction

[1] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338/1.– See Practice Guide for the application of the new Brussels II Regulation - October 2005, http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_en.htm

[2] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1.

1. Grounds of jurisdiction

One of the main issues concerning the Brussels IIbis Regulation is the determination of the Member State whose courts have jurisdiction. The jurisdiction rule in Art. 3 sets out a complete system of grounds of jurisdiction for determining in which Member State the courts are competent. The Regulation determines the Member State whose courts have jurisdiction, but not the specific court which is competent within that Member State. This question is left to domestic procedural law.

2. Several alternative grounds of jurisdiction in matrimonial matters

There is no general jurisdiction rule in matrimonial matters. Instead, Art. 3 offers a broad series of jurisdictional grounds. The grounds are alternative, implying that that there is no hierarchy between them. The variety of jurisdictional bases encourages forum shopping to a certain extent.

Art. 3 of the Brussels II*bis* Regulation enumerates seven alternative grounds of jurisdiction in matters of divorce, legal separation and marriage annulment. The grounds do not take precedence over each other and the spouses may file a petition with the courts of the respective Member State.

a) Habitual residence of the spouses

The spouses may file a petition with the courts of the Member State of their habitual residence (Art. 3 para. 1 lit. a first indent).

To establish habitual residence, case law prescribes that someone must be physically present in that country on a voluntary basis, for a settled purpose, and with a settled intention to remain there for a significant period of time. EU law on this point demonstrates that one must focus on a person's permanent and usual centre of interest. For the purposes of Brussels II*bis*, a person can have only one habitual residence.

> Example "Working abroad"
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> Husband and wife still maintain a common home in Latvia. However, the husband is employed in Munich (Germany) and the wife in Brussels (Belgium). They regularly visit their home country. Their children live with the grandparents. After a deterioration of their marriage the spouses want to get divorced.

b) Last habitual residence if one of the spouses still resides there

The spouses may file a petition with the courts of the Member State of their last habitual residence if one of them still resides there (Art. 3 para. 1 lit. a second indent).

Example: The husband left Latvia to work abroad. His wife stayed at home. Latvian courts have jurisdiction.

c) Habitual residence of either spouse in case of a joint application

Married couples may file a joint application for divorce. They may file their petition with the courts of the Member State of the habitual residence of either spouse (Art. 3 para. 1 lit. a third indent).

d) Habitual residence of the respondent

A spouse may apply for a divorce at the place of habitual residence of the respondent (Art. 3 para. 1 lit. a fourth indent).

e) Habitual residence of the applicant provided that he or she has resided there for at least one year before making the application

A spouse may file a petition with the courts of the Member State of the habitual residence of the applicant provided that he or she has resided there for at least one year before making the application (Art. 3 para. 1 lit. a fifth indent)

> Example "Returning to Latvia"

The Polish applicant left Latvia in 2008 and then went to England where she married an Englishman. After the breakdown of the marriage she returned to Latvia in September 2011, where she stayed and filed for divorce in November 2012. Latvian courts have jurisdiction.

f) Habitual residence of the applicant provided that he or she has resided there for at least six months before making the application and he or she is a national of that Member State

A spouse may file a petition with the courts of the Member State of the habitual residence of the applicant provided that he or she has resided there for at least six months before making the application and he or she is a national of that Member State (Art. 3 para. 1 lit. a sixth indent).

Example "Returning from Italy"

The Latvian applicant left Latvia in 2009 and then went to Ireland where she married an Irishman. After the breakdown of the marriage she returned to Latvia in December 2011 where she stayed and filed for divorce in November 2012. Latvian courts have jurisdiction.

g) Common nationality (common "domicile" in the case of UK and Ireland)

The spouses may file a petition with the courts of the Member State of their common nationality (common "domicile" in the case of the UK and Ireland) (Art. 3 para. 1 lit. b).

Example "Dual nationality" (Hadadi case)

Mr Hadadi and Ms Mesko, both of Hungarian nationality, married in Hungary in 1979. They then emigrated to France, where they became naturalised French citizens, although did not lose their Hungarian nationality. In 2002 (before Hungary's accession to the EU), Mr Hadadi instituted divorce proceedings before Pest Court (Hungary), with the divorce granted by a judgment of May 2004. In the course of these proceedings, Ms Mesko made an equivalent application to the French courts. The Paris Court of Appeal held that the Hungarian judgment could not be recognised 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 then appealed against this decision on a point of law.

According to the European Court of Justice, both nationalities are to be taken into account, so that the courts of those two Member States will have jurisdiction on that basis, at the choice of the persons concerned[3]. The Court establishes that, on account of the fact that the grounds set out in Art. 3 are alternatives, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them. It observes that, through its wording, Art. 3 only refers to nationality, a link that is unambiguous and easy to apply, without providing for any other criterion relating to nationality, such as how effective it is.

3. Exclusive jurisdiction

The grounds are exclusive in the sense that a spouse who is habitually resident in a Member State or who is a national of a Member State (or who has his or her "domicile" in the United Kingdom or Ireland) may only be sued in another Member State on the basis of the Regulation (Art. 6).

[3] European Court of Justice 16 July 2009, Case C-168/08 - Hadadi ./. Mesko, ECR. 2009, I-6871.

Example:"The Franco-German couple"
The husband who is a national of Germany is married to a woman who is a national of France. The couple reside habitually in Latvia. After a few years, their marriage deteriorates and the wife wants to divorce. The couple can only apply for divorce before the courts of Latvia pursuant to Art. 3 para. 1 lit. a (first indent) on the basis that they have their habitual residence there. The wife cannot seise the French courts on the basis that she is a national of this State, since Art. 3 para. 1 lit. b requires the common nationality of the spouses.

Example: "Sundelind Lopez v Lopez Lizazo"
Mrs Sundelind Lopez, a Swedish national, was married to Mr Lopez Lizazo, a Cuban national. When living together, they were resident in France. Later, Mrs Sundelind Lopez was still resident in France but her husband was resident in Cuba. Acting on the basis of the Swedish legislation, Mrs Sundelind Lopez petitioned the District Court, Stockholm (Sweden) for divorce.
European Court of Justice: The respondent was neither resident in a Member State nor a citizen of a Member State. However, Art. 6 and 7 Brussels II*bis* Regulation are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of such a Member State cannot base their jurisdiction to hear the petition on their own national law, if the courts of another Member State (France) have jurisdiction under Art. 3[4].

The parties may not choose a court other than those listed. Choice-of-court agreements are not recognised.

4. Residual jurisdiction

It is only where neither spouse can start a divorce anywhere in the EU (except Denmark) that the applicant can fall back on any other rules that a Member State may have. Residual jurisdiction exists where no court of a Member State has jurisdiction pursuant to Arts. 3, 4 and 5 (Art. 7 para. 1). In such cases jurisdiction is to be determined, in each Member State, by the laws of that State.

Example: A Latvian wife and her US husband have their habitual residence in California (USA). Since there is no jurisdictional basis under Art. 3 *et seq.* Latvian jurisdictional rules have to determine if there is a competent forum in Latvia.

5. Parental responsibility

There are also special rules on parental responsibility. "Parental responsibility" includes rights of custody and rights of access, guardianship, the placement of a child in a foster family or in institutional care (Art. 2 No. 7). Typical examples are provided by decisions on custody after divorce or decisions in the context of divorce proceedings.
The general rule is that the court which has jurisdiction in matters of parental responsibility is the court of the State where the child is habitually resident (Art. 8). Arts. 9 to 15 contain special rules. The court in the Member State of the child's habitual residence before an abduction retains jurisdiction to deal with the case except in certain limited circumstances, for example, where all concerned have acquiesced to the abduction (Art. 10).

[4] European Court of Justice Case C-68/07, Sundelind Lopez v Lopez Lizazo, [2007] ECR I-1 1321.

Once the matter is before the courts in one country, the court of the child's former residence continues to have jurisdiction even if the child has lawfully changed his country of residence (Art. 9).
The rule on jurisdiction in Art. 12 stipulates that a court which is seised of divorce proceedings under the Regulation also has jurisdiction in matters of parental responsibility connected with the divorce if certain conditions are met. The parents may agree to have the question of parental responsibility decided in the court which has jurisdiction on the matrimonial matter or may agree to have the case heard by the court of a country with which the child has a close connection (for example, nationality).
If the child's habitual residence cannot be established, then the Member State in which the child is present has jurisdiction (Art. 13).
Under certain circumstances, the court which has jurisdiction may transfer the proceedings to another court if that other court is better situated to hear the case and this would be in the best interests of the child (Art. 15; doctrine of *forum non conveniens*). This could arise, for example, if the child's habitual residence has changed. There are time limits on this procedure. If a child's habitual residence changes as a result of a wrongful removal or retention, jurisdiction may shift only under very strict conditions (Art. 10).

IV. Lis pendens

In many cases it is possible that each spouse could initiate a divorce in more than one country. The existence of several *fora* gives opportunities for one spouse to engage in a "rush to court" or "forum shopping". Therefore, there is also a provision on lis pendens (Art. 19). A competent court in a Member State seised first will have jurisdiction over the divorce proceeding. For example, if the husband has applied for a divorce in an Austrian court, a Latvian court may not subsequently accept a divorce application of the wife.
In a series of judgments the European Court of Justice has developed a genuinely European notion of a "cause of action" primarily characterised by its broad scope[5]. As a consequence, two proceedings will necessarily involve the same cause of action when the same subject-matter lies "at the heart of the two actions". The procedural position of the parties as plaintiff or respondent is irrelevant. It is regularly the case that no difficulties arise in matrimonial matters.

V. Recognition and enforcement of matrimonial judgments

1. Applicable rules

The rules on recognition and enforcement are those laid down on this matter by the Brussels II*bis* Regulation (Arts. 21 – 52). The recognition rules of the Regulation apply irrespective of the nationality and domicile of the parties; only the origin of the judgment counts. Given space limitations, it only can be mentioned here that in cases of contact with children and child abduction some special provisions apply (Art. 40 ff.).

2. Recognition

The Regulation provides for automatic recognition of all judgments without any intermediary procedure being required (Art. 21 para. 1). However, any interested party may ask the court in the second Member State to not recognise the decision (Art. 21 para. 3). The Regulation

[5] See particularly ECJ, 12 August 1987, C-144/86, Gubisch Maschinenfabrik KG./.Giulio Palumbo, ECR 1987, 4861,

restricts the grounds on which recognition of judgments relating to matrimonial matters and matters of parental responsibility may be refused.
Recognition and enforcement may be refused, inter alia, if the foreign decision is manifestly contrary to public policy (Art. 22 lit. a). The Member States can define their national public policy. However, public policy has to be interpreted autonomously in accordance with European standards.
The adverb "manifestly" was introduced to qualify the contradiction between the free movement of judgments and public policy. The public policy defence may also be raised in cases of a violation of procedural guarantees (e.g. the right to be heard).
The recognition of default judgments may be refused if there were certain procedural defects. This is the case where the document instituting the proceeding was not served in sufficient time and in such a way as to enable the defendant to arrange for his/her defence (Art. 22 lit. b).
Another ground for non-recognition is that the foreign decision is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought (Art. 22 lit. c). This rule applies even if the foreign judgment is older than the domestic decision.
According to the principle of priority, foreign decisions irreconcilable with an earlier decision given in a Member state or a non-Member State between the same parties will not be recognised (Art. 22 lit. d). Since the recognition of third country judgments is left to national law this means, for instance, that the recognition of a Californian judgment in the Member State of enforcement (for example Latvia) can be contrary to the recognition of a later decision of a court of a Member state (e.g. Germany).
Non-compliance with the rules of jurisdiction in the Regulation is not a reason for denial of recognition. Differences in national law in respect of matrimonial matters cannot be a reason for denial of recognition of the judgment (Art. 25).

3. Enforcement

One has to distinguish between the exequatur proceeding (the declaration of the enforceability of the judgment) and the enforcement of the judgment, the former proceeding according to the rules of the Regulation and the occurring pursuant to the national law.

C. Maintenance obligations

I. Maintenance Regulation

The European Maintenance Regulation provides a series of measures aimed at facilitating the payment of maintenance claims in cross-border situations. Such claims arise from the obligation to help family members in need. For example, they may take the form of maintenance paid to a child or to a former spouse following divorce.
The Regulation applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity (Art. 1 para. 1). Denmark is included here on the basis of a bilateral Agreement of 19 October 2005 between the EC and Denmark.

II. Jurisdiction

1. General rule

In matters relating to maintenance obligations, several courts may have jurisdiction. Jurisdiction will primarily lie with the court of the place where the defendant or the creditor is habitually resident (Art. 3 lit. a, b). However, jurisdiction is vested also in the court which has

jurisdiction to entertain proceedings regarding the status of a person (a divorce for example) if the matter concerning maintenance is related thereto (provided that jurisdiction is not based solely on the nationality of one of the parties) (Art. 3 lit. c). The same is true for cases of parental responsibility (Art. 3 lit. d)

2. Choice-of-court agreements and appearance of the defendant

Unless the dispute relates to a maintenance obligation towards a child under the age of 18, the parties may, subject to certain conditions, agree on the court or courts of a Member State which have jurisdiction to settle it. There is, however, no unrestricted freedom. The Regulation contains a list of courts which may be agreed upon (Art. 4 para. 1). These include:
(a) a court or the courts of a Member State in which one of the parties is habitually resident;
(b) a court or the courts of a Member State of which one of the parties has the nationality;
(c) in the case of maintenance obligations between spouses or former spouses:
(i) the court which has jurisdiction to settle their dispute in matrimonial matters; or
(ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.
The conditions referred to in points (a), (b) or (c) have to be met at the time the choice of court agreement is concluded or at the time the court is seised.
The jurisdiction conferred by agreement will be exclusive unless the parties have agreed otherwise. A choice-of-court agreement must be in writing. Any communication by electronic means which provides a durable record of the agreement will be equivalent to a 'writing' (Art. 4 para. 2).

There is also jurisdiction based on the appearance of the defendant. Where the defendant makes an appearance before a court of a Member State, that court will have jurisdiction, unless the defendant contests the jurisdiction (Art. 5).

3. Subsidiary jurisdiction

In some cases subsidiary jurisdiction exists. If none of the conditions in Arts. 3, 4 and 5 is fulfilled, the dispute may, subject to certain conditions, be brought before the courts of a Member State of which both parties are nationals (Art. 6).

4. *forum necessitatis*

Failing this, if the proceedings cannot be brought in a country outside the EU with which the dispute is closely connected, there is a *forum necessitatis* (Art. 7). The matter may be brought before the court of a Member State with which the case has sufficient connection. Such a sufficient connection may be the nationality or habitual residence of one of the parties.

5. Modification of judgments

As long as the creditor continues to reside in the Member State which rendered the decision on maintenance obligations, the debtor may not, subject to exceptions, bring proceedings to modify the decision in another Member State. The creditor may nevertheless agree that the dispute is to be decided by another court (Art. 8).
Example: There is a Dutch maintenance judgment for a Dutch child and against his Latvian father. Then the father moves to Riga and makes an application for modification. The Riga courts have, in principle, no jurisdiction.

III. *lis pendens*

There is also a provision on lis pendens (Art. 12). If proceedings concerning the same parties and involving the same cause of action are brought before the courts of different Member States, jurisdiction will lie with the court first seised.
Regardless of the court having jurisdiction as to substance, applications for provisional and protective measures may be lodged with any court of any Member State where they are provided for by the law of the State concerned (Art. 14).

IV. Recognition and enforcement of decisions

A decision on maintenance obligations by the courts of one Member State is to be recognised in another Member State without any special procedure. There are differences however in respect of enforcement.

1. Decisions from EU-Member States bound by the Hague Maintenance Protocol of 2007

The vast majority of EU-Member States are bound by the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Within the European Union (with the exception of Denmark and the UK), the rules of the Hague Maintenance Protocol apply provisionally despite the fact that the Protocol itself has not yet entered into force[6].
Where the decision was taken by a court of an EU-Member State bound by the 2007 Hague Protocol, its recognition may not be opposed. If it is enforceable in the Member State in which it was taken, it is enforceable in another Member State without the need for a declaration ("exequatur"; Art. 17 ff.). In certain cases, however, it is still possible to apply for a review of the foreign decision and the refusal or suspension of its enforcement in the State of origin (Art. 19).

2. Decisions from EU-Member States not bound by the Hague Maintenance Protocol of 2007

Where the decision was taken by a court of a Member State not bound by the 2007 Hague Protocol, its recognition may be refused in certain cases (Art. 24). A decision is not to be recognised:
(a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;
(c) if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought;
(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

[6] Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ EU 2009 L 331/17.

A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances is not to be considered an irreconcilable decision within the meaning of Art. 24 lit. c or lit. d.
The foreign maintenance decision may be enforced in another Member State – if it is enforceable in the Member State in which it was taken – on the condition that a declaration of enforceability is obtained from the Member State of enforcement (Art. 26).

3. General rules

In all cases, the foreign judgment must not necessarily be final. The court of origin may also declare a decision as provisionally enforceable (cf. Art. 26). When the decision is to be enforced in the State of recognition, enforcement is governed by the law of that Member State (Art. 41). There is no review as to substance (Art. 42). The decision taken in a Member State cannot be reviewed as to its substance in the Member State in which its recognition, enforceability or enforcement is sought.