PÉCSI TUDOMÁNYEGYETEM

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Hungary-Croatia
IPA Cross-border Co-operation Programme

SUNICOP

INTERNATIONAL AND EUROPEAN CIVIL PROCEDURE

Pécs, 4-6 April 2012

Civil procedure in (cross border) family matters

Special part

- Regulation 2201/2003 (Brussels II bis)
- Regulation 4/2009 (Maintenance Regulation)

SCOPE OF APPLICATION - REGULATION 2201/2003

- Temporal: applies as of 1 March 2005
- Geographical: applies in all MS of the EU, except Denmark
- The Regulation is directly applicable in the MS and prevails over national law.
- Material: divorce, legal separation and marriage annulment, parental responsibility

- The first reference for a preliminary ruling on Brussels II *bis* comes from the Finnish *Korkein hallinto-oikeus* in **case C-435/06**

- referred the following questions to the ECJ **:**
  - (a) Does Regulation No 2201/2003 apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety?

ECJ held:

- „Article 1(1) of Regulation No 2201/2003..... is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term ‘civil matters’ for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.”

Which decisions are covered by the Regulation?

- not confined to court judgments (art. 2/1,2/4)
- applies to any decision pronounced by an authority having jurisdiction in matters falling under the Regulation (e.g. social authorities)
- applies to “authentic instruments” (art. 46)
- applies to agreements between parties (art. 46)

- 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!

DIVORCE ISSUE

- Article 3 General jurisdiction
  - the spouses are habitually resident, or
  - the spouses were last habitually resident, insofar as one of them still resides there, or
  - the respondent is habitually resident, or
  - in the event of a joint application, either of the spouses is habitually resident, or
  - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question

- (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the ‘domicile' of both spouses.

DIVORCE ISSUE

- In maginary case of Alek and Nina

- possible competent courts for a divorce:

  - Germany - because this was the country of common residence of the spouses (Alek and Nina) and one of the spouses still resides there (Nina).

  - Hungary - because this is the residence of Alek at the moment of the divorce.

C-68/07, Sundelind Lopez- 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?

- **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.

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.”

- Do I have jurisdiction pursuant to Articles 3-5?

YES

NO

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

YES

NO

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

Where no court is competent under the Regulation, court can establish jurisdiction based on national law "residual jurisdiction", Art. 7

- **C-168/08 Laszlo Hadadi v Csilla Marta Mesko**
- 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, 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 privedge 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!

MAINTENANCE ISSUE

- Regulation No. 2201/2001 excludes it from material scope
- Regulation No 4/2009 applies, with scope of application
- Temporal: proceedings issued after 18 june 2011
- Geographical: all EU MS except Denmark, UK
- Material: maintenance obligations arising from a family relationship, parentage, marriage or affinity

General jurisdiction, art. 3.

- (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.

Prorogation of a competent court art. 4.

Llimited to:

- (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 MS of the spouses' last common habitual residence for a period of at least one year.

  - Child maintenance (under 18) – prorogation excluded!

Jurisdiction based on the appearance of the defendant, art. 5

- Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction.
- The rule shall not apply where appearance was entered to contest the jurisdiction.

Subsidiary jurisdiction, art. 6

- Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 and no court of a State party to the Lugano Convention which is not a MS has jurisdiction pursuant to the provisions of that Convention, the courts of the MS of the common nationality of the parties shall have jurisdiction.

Forum *necessitatis,* art. 7

- exceptionaly allows a court of a MS to hear a case which is closely connected with a third State.
- Justification:
  - proceedings prove impossible in the third State, egz. because of civil war;
  - dispute has a sufficient connection with the MS of the court seised, egz. nationality of one of the parties.

PARENTAL RESPONSIBILITY ISSUE

- Regulation No. 2201/2003 applies
- Possible competent courts
  - courts of the MS where the child has its habitual residence (art. 8)
    - In our case it is Germany where Ferenc resides
  - court that has jurisdiction according to art. 3 (jurisdiction over divorce) also has jurisdiction over the parental responsibility isue (art. 12)
    - In our case either Germany or Hungary

Continuing jurisdiction of the child's former habitual residence, art. 9

- Exception to the general rule – change of residence implies change of jurisdiction
- Applies under strict conditions:
  - the courts of the Member State of origin must have issued a decision on access rights
  - applies only to "lawful" moves
  - applies only during the three-month period following the child's move
  - child must have acquired habitual residence in the new MS during the three-month period
  - holder of access rights must still have habitual residence in the MS of origin

- **Case C 497/10 PPU Mercredi v. Chaffe**
- Concept of 'habitual residence' of an infant ?
- Recalling Case C 523/07 Court noted that:
  - habitual residence corresponded to the place which reflects some degree of integration by the child in a social and family environment
  - reference must be made to the conditions and reasons for the child's stay, as well as to his nationality.
  - in addition to physical presence other factors must make it clear that the child's presence is not in any way temporary or intermittent, and in this the intention of the person with parental responsibility to settle permanently with the child in another MS may constitute an indicator of the transfer of habitual residence.
  - child's social and family environment is fundamental!

Presence of a child, art. 13

- If it proves impossible to determine the habitual residence of the child and Article 12 does not apply, judge of a MS can decide on matters of parental responsibility with regard to children who are ***present*** in that MS

- **Residual jurisdiction, art. 14**
- If no court has jurisdiction under art. 8 - 13, the court may found its jurisdiction on the basis of its own national rules
- Such decisions are to be recognised and declared enforceable in other Ms pursuant to the Regulation no. 2201/2003

- Do I have jurisdiction pursuant to the general rule (Art. 8)?

YES

NO

Do I have jurisdiction pursuant to Art. 9-10,12 or 13?

YES

NO

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

YES

NO

Court must declare of it's own motion that it has no jurisdiction, art. 17.

Where no court of a MS is competent under Regulation, court can excercise any jurisdiction available under national law ("residual jurisdiction") Art. 14

- **Transfer to a better placed court, art. 15**
- Possible under some conditions:
  - child must have a “particular connection” with the other MS
  - (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
  - (b) is the former habitual residence of the child; or
  - (c) is the place of the child's nationality; or
  - (d) is the habitual residence of a holder of parental responsibility; or
  - (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

MATRIMONIAL PROPERTY ISSUE

- No EU rules at the moment, proposal is pending

- In most MS the court with jurisdiction on divorce under Brussels II bis is the court that deals with the matrimonial property in the event of divorce as well, but basicly, national rules applies!

APPLICABLE LAW

- DIVORCE
  - Until 2011. national laws applied
  - Regulation No. 1259/2010 sets common rules:
  - applicable law is last place of habitual residence of both spouses (provided that in our case the former spouses have not chosen an applicable law), art 8 sub b.
  - In our case it is Family law of Germany
- MATRIMONIAL PROPERTY
  - National law applies
  - 1978 Hague Matrimonial Property Convention: country in which the parties establish their first place of habitual residence after the marriage (egz. Austria)

APPLICABLE LAW

PARENTAL RESPONSIBILITY

- Law where the child is habitualy resident (art. 8 of Brussels II bis states)

BUT:

- two international conventions on custody and visitation: Hague 1961, and Hague 1996 conventions
  - competent court has to apply its national law!

MAINTENANCE ISSUE

- From 18th june 2011 - Regulation on Maintenance refers to the 2007 Hague protocol

WHAT HAPPENS IF PROCEEDINGS ARE BROUGHT IN TWO MEMBER STATES?

- Divorce issue – art. 19/1
- Maintenace issue – art. 12
- Parental responsibility – art. 19/2

- *Lis pendens* rule:

„Where proceedings relating to..... between the same parties are brought before courts of different MS, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.”

THE REGULATION DOES NOT PREVENT COURTS FROM TAKING PROVISIONAL, INCLUDING PROTECTIVE, MEASURES IN URGENT CASES.

- A family is travelling from MS A to MS B on summer holiday. In MS B they are victims of a traffic accident: child is only slightly injured, both parents are at coma.
- The authorities of MS B urgently need to take certain provisional measures to protect the child The fact that the courts of MS A have jurisdiction under the Regulation as to the substance does not prevent the courts or competent authorities of MS B from deciding, on a provisional basis, to take measures to protect the child.
- These measures sease to apply once the courts of MS A have taken a decision.

- **Case C 403/09 PPU Detiček v. Sgueglia**
- A child born in September 1997 to a Slovenian mother and an Italian father, who were long term residents in Italy.
- In divorce proceedings, on 25 July 2007, the father was granted provisional custody, but the child was ordered to be placed in care. On the same day the mother removed the child to Slovenia.
- On 22 November 2007 the Italian order was declared enforceable in Slovenia and this was confirmed by the Supreme Court on 2 October 2008. Enforcement proceedings, aimed at securing the return of the child, were then commenced.

- Notwithstanding the latter proceedings, on 28 November 2008 the mother applied for a provisional and protective measure giving her custody of the child on the basis of Art 20, Regulation 2201/2003. This was granted on 9 December on the basis the child was settled, she wished to remain with the mother, and a return would cause her harm.
- Enforcement proceedings were suspended on 2 February 2009.
- The father challenged the granting of the provisional measure. This was rejected. He then appealed to the court of appeal in Maribor, which stayed the proceedings and made an application to the CJEU under the urgent (PPU) mechanism.

- Question:

...whether Art 20 of Regulation No 2201/2003 had to be interpreted as allowing a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who was in the territory of that Member State to one parent, where a court of another Member State, which had jurisdiction, had already delivered a judgment provisionally giving custody to the other parent, and where that judgment had been declared enforceable in the territory of the former Member State.

- The Court recalled the conditions for the application of Article 20: urgency; relate to persons / assets in the Member State seised; provisional in nature
- The circumstances mentioned by the Slovenian court did not suffice to render the case urgent for the purposes of Article 20.
- Were a change in circumstances resulting from a child's integration into a new environment to suffice to activate Art 20(1), then any delay in the enforcement procedure in the requested Member State would contribute to creating the circumstances which would allow a court in the latter State to block the enforcement of the judgment that had been declared enforceable - such interpretation undermines the principle of mutual recognition!

- given that the circumstances in the present case resulted from an abduction, the Regulation's aim of deterring wrongful removals and retentions would equally be undermined!

- Court pointed to Art 24(3) of the Charter of Fundamental Rights of the EU, on children's right to contact and held that Art 20 could not be interpreted in a manner which disregarded the latter right!

Case C-256/09 Purruckner

- Bianca Purrucker went to live with Guillermo Pérez in Spain; in 2006 she gave birth to their twins prematurely
- parents split and Bianca wanted to go back to Germany
- son left the hospital in Sept. 2006, daughter had to stay in the hospital until March 2007.
- Before leaving Spain, Bianca signed a custody agreement with Guillermo, left with the son to Germany in Febr. 2007.
- Despite the signed agreement, Guillame began custody proceedings in Spain ➡ a provisional order asserting Spanish jurisdiction, granting him full custody of both children, giving him possession of the children's passports.

- Bianca filed for custody in Germany.
- Guillame filed suit in Germany to enforce the Spanish provisional measures.
- Both the court and the appellate court recognized the provisional Spanish orders.

- The Bundesgerichthof however referred the question to the ECJ: whether courts in other MS must recognize these provisional orders, as per Article 21 which requires courts to recognize judgments without requiring any additional special procedures for recognition?

- The ECJ: clarifies that Article 20 only involves orders by courts that do not have substantive jurisdiction over the custody dispute at issue.
- The ECJ examined how to determine the Spanish court's basis for jurisdiction:
  - the Spanish court did not clearly state its basis for jurisdiction in its order
  - court cited domestic and international agreements + Regulation 2201/2003, but ECJ remindes that EU law takes precedence over national and international laws in this case.
  - cases like these assume mutual trust between courts.

- when a court does not clearly state that it is making an Article 20 provisional order, other courts will necessarily have to make the call as to the jurisdictional bases for making the order
- In that case, the court may question whether the order met the requirements under Article 20.
- Article 20 orders must:
  - (1) involve urgent matters;
  - (2) pertain to persons or assets in the Member State; and
  - (3) be provisional

- when determining the nature of a "jurisdictionally ambiguous" order, it falls under Article 20 only if it "falls within the scope of that provision solely where it satisfies the conditions laid down in Article 20."

RECOGNITION AND ENFORCEMENT

- **When is a recognition of a divorce necessary?**

- In accordance with the general principles of constitutional and international law, court judgements and similar sovereign acts only have direct legal effect within the territory of the state in which they were passed or performed.
- Every state is free to determine whether and under which conditions it will recognize foreign sovereign acts, insofar as it is not bound to do so by treaty.

- dissolution of a marriage is basically only valid in the state in which it was dissolved.
- a marriage dissolved in state X abroad continues to be viewed as still in existence -"limping marriage„
- man and wife continue to be listed as such in civil status records and registers of residents of state X until the foreign divorce has been recognized
- they canot enter into a new marriage in state X before the divorce has been recognized (bigamy)
- once the foreign judgement has been recognized may the courts throughout state X consider the marriage truly dissolved

ELECTIVE CRITERIA – IMPLICATIONS ON ENFORCEMENT

- Maintenance claim: one can file a lawsuit to obtain a payment order from a court, or to obtain an execution title which can be later used to seize the property
- If Alek is sued in Hungary the payment order/seizing order can be executed in accordance with national enforcement law
- If Alek is sued in Germany, such a court decision needs to be recognized in Hungary

- Already before Nina obtains the indicated Hungarian declaration of enforceability through the exequatur procedure, she can seek provisional measures from a Hungarian court (art. 14 Regulation No 4/2009).
- With these measures she could reach the bank account of Alek

- If later she wishes to modify the maintance order there are certian **Limit on proceedings (art. 8)**
- 1. Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually

ABOLITION OF EXEQUATUR – MS BOUND BY 2007 HAGUE PROTOCOL

- **Abolition of exequatur – art. 17**
- 1. A decision given in a MS bound by the 2007 Hague Protocol shall be recognised in another MS without any special procedure being required and without any possibility of opposing its recognition.

- 2. A decision given in a MS bound by the 2007 Hague Protocol which is enforceable in that State shall be enforceable in another MS without the need for a declaration of enforceability.

- **Right to apply for a review, art. 19**

- 1. A defendant who did not enter an appearance in the MS of origin shall have the right to apply for a review of the decision before the competent court of that MS where:
  - (a) he was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; or
  - (b) he was prevented from contesting the maintenance claim by reason of force majeure or due to extraordinary circumstances without any fault on his part; unless he failed to challenge the decision when it was possible for him to do so.

MS NOT BOUND BY 2007 HAGUE PROTOCOL

- **Recognition, art. 23**
- 1. A decision given in a MS not bound by the 2007 Hague Protocol shall be recognised in the other Member States without any special procedure being required.

- **Grounds of refusal of recognition, art. 24**
- A decision shall not be recognised:
- (a) if such recognition is manifestly contrary to public policy in the MS 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 or with an equivalent document 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 fulfills the conditions necessary for its recognition in the Member State in which recognition is sought.

Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment

- A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:
- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
- (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

- (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or
- (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought