

THOMAS · MORE · CHAMBERS

**“SUING CASANOVA –  
THE PERILS OF TRANS-  
BORDER ROMANCE”  
EU FAMILY LAW:  
MONEY & CHILDREN**

**Thursday 19<sup>th</sup> June 2008  
6.30pm to 7.30pm**

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## INTRODUCTION

1. 5 million foreign EU nationals live in another EU state and the EU has a comparatively high divorce rate. There are around 2.2 million marriages in the EU every year. The Commission estimates that around 350,000 of these involve an international couple. Of the 875,000 divorces in Member States, it is estimated that therefore 16% are international.
2. If the proportion is similar in England and Wales, around 24,000 of our 150,000 divorces annually involve international couples who need to be aware of the difficulties they may face navigating the wide variation in divorce law across European jurisdictions.
3. All cases with a “foreign” element involve two separate issues as a matter of law:
  - (a) jurisdiction – which court should hear the case;
  - (b) choice of law – which law should be applied by that court.

## JURISDICTION

4. There are two main relevant EU regulations dealing with jurisdiction which might affect family cases:

Brussels I – Regulation 4/2001 – expressly excludes rights in property arising out of a matrimonial relationship but includes maintenance [excludes Denmark!]

Brussels II bis “BIIR” – Regulation 2201/2003 - regulates jurisdiction for “matrimonial matters and matters of parental responsibility” ie excluding maintenance in relation to ancillary relief. The court first seised has jurisdiction.

See also the Practice Guide for the Application of BIIR, produced by the European Commission.

5. The ECJ is therefore the ultimate court in relation to many issues on family jurisdiction – see [www.curia.europa.eu](http://www.curia.europa.eu) for upto date information on ECJ caselaw.
6. There have only been 2 references on BIIR so far –

**Re C** (Case C C-35/06) [2008] 1 FLR 490 – reference from Finnish Court as to whether public law proceedings come within Brussels II R - yes

**Sundelind Lopez v Lopez Lizano** (Case C-68/07) [2008] 1 FLR 582 – reference from Swedish Court as to whether Brussels II R applies in a case involving a non-member state national from Cuba – yes [see below]

## CHOICE OF LAW

7. Once it has been decided which court will hear the case, there remains an issue of which law the court will apply.

8. The European Commission’s proposal to standardise the applicable law in family cases “Rome III” was not adopted by the UK, Ireland or Malta when it was first suggested. It

seems that the remaining countries which were in favour of this change are also however far from agreed as to choice of law rules. Experts seem to be agreed that to all intents and purposes the Rome III proposals are therefore dead – British Institute for International and Comparative Law Seminar 16<sup>th</sup> June 2008.

9. However, in July 2006 the European Commission also produced a Green Paper “On Conflict of Laws in Matters concerning matrimonial property regimes, including the Question of Jurisdiction and Mutual Recognition” (SEC (2006) 952). This was part of a package of European measures designed to harmonise conflicts rules in the area of family law. This is a wide ranging consultation which goes in many ways goes further and wider than the Rome III proposals.

10. The UK’s response to this Green Paper has been pretty unenthusiastic so far, perhaps not surprising given that in family cases the UK generally applies UK law.

11. However, it should be remembered that various member states including Spain, Austria, Estonia, France, Germany, the Netherlands, Greece, Italy, Portugal and Poland already apply the divorce laws of other states in some circumstances. This is pursuant to their own domestic law. Spain as an example has applied foreign law to divorce cases since 1981 pursuant to Article 107 of the Spanish Civil Code which is based in part upon habitual residence.

12. The UK, save in cases of nullity, only ever applies its own laws to family cases. See though case of **Otobo v Otobo** [2003] 1FLR 192 in which the English Courts took into account in deciding the ancillary relief the likely awards which the parties would have received had they not litigated in England – weight should be attached to the foreign cultural factors.

*“English law chooses no substantive law other than its own for the despatch of applications for ancillary relief following divorce, even though belatedly it is beginning to recognise the need, in a case with foreign connections for a sideways look at foreign law as part of the discretionary analysis required”* **C v C** [2004] 2 FLR 1

13. See also **A v T (ancillary relief:cultural factors)** [2004] EWHC 471 in which the same approach was followed re Iran and **Sabbagh v Sabbagh** [1985] FLR 29 in which account was taken of Brazilian proceedings.

14. However, two earlier Court of Appeal decisions would seem to suggest otherwise – **Dart v Dart** [1996] 2 FLR 286 – no consideration given to USA divorce law in Michigan, **Thyssen-Bornemiswza v Thyssen-Bornemiswza** [1985] FLR 1069 – no consideration given to Swiss divorce law.

## Which types of dispute are covered by which Regulation?

### Brussels I

15. Maintenance – see also the EU Commission’s proposals for a separate regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – see COM (2005) 649. NB BIIR also makes it clear in its 11<sup>th</sup> recital that maintenance not covered.

16. See also the new Hague Convention on the International Recovery of Child Support and other forms of Family Maintenance which the EU signed in November 2007 but which is yet to come into force and the UK has not yet ratified.

17. See the ECJ case of **Van der Boogard v Laumen** [1997] 2 FLR 399 and the Court of Appeal case of **Moore v Moore** [2007] EWCA Civ 361 which define the scope of maintenance for the purpose of this Regulation.

18. In **Moore** the Court of Appeal held that H’s application to the Spanish court was an application for the division of the wealth or assets to which the former married couple had a claim and was not related to maintenance within the meaning of Brussels I.

19. The appellant husband (H) appealed against a decision giving his former wife (W) leave to apply for orders for financial relief pursuant to the **Matrimonial and Family Proceedings Act 1984** Part III. H and W had separated after being married for the last five years of a relationship lasting over 15 years. They had three children. They had emigrated to Spain for tax reasons. H had filed for divorce in Spain. He had offered to pay W £6 million in addition to such properties as were registered in her name. W issued a divorce petition in England, which was stayed in accordance with the provisions of **Council Regulation 1347/2000**. H then applied for the Spanish court to deal with the financial aspects of the divorce but on the basis that English law applied.

20. The Spanish court declined to deal with the financial claims and H appealed against that decision. Meanwhile W had obtained leave under s.13 of the 1984 Act to apply for financial relief after an overseas divorce. H applied to set aside that leave. The judge confirmed the leave obtained by W, holding that H’s application in respect of finances in Spain was not a claim for maintenance within Brussels I Art.5(2) and that there was a close connection with England, which made England the appropriate venue.

21. H submitted to the Court of Appeal that (1) the judge had been wrong to hold that his application to the Spanish court was not to be characterised as relating to maintenance within Regulation 44/2001 Art.5(2); (2) the judge should have stayed the English proceedings as related proceedings under Brussels I Art.27 or Art.28 on the basis that H’s Spanish proceedings remained on foot; (3) leave should not have been granted under s.13 of the Act.

22. The Court of Appeal (Thorpe LJ, Lawrence Collins LJ, Munby J) held that:

- Whether an application was to be regarded as a matter relating to maintenance depended not on Spanish law, nor on English law, but on the autonomous concept of Community law derived from the judgments of the European Court of Justice, **De**

**Cavel v De Cavel** (143/78) (1979) ECR 1055, **De Cavel v De Cavel** (120/79) (1980) ECR 731 and **Van den Boogaard v Laumen** (C220/95) (1997) QB 759 applied. On that basis H's application in Spain was plainly not related to maintenance, but was an application for the division of the wealth or assets to which the couple had a claim. The essential object of H's application was to achieve sharing of the property on his terms rather than an order based on financial needs, **Miller v Miller** (2006) UKHL 24, (2006) 2 AC 618 considered. Consequently the application was not a matter relating to maintenance for the purposes of Brussels I;

- Since H's application was not a matter relating to maintenance within Brussels I Article 5(2), there was no basis for the application of Art.27 or 28 even if those proceedings were still pending, and it was not necessary to decide whether Art.27 applied where the court first seised had declared that it was without jurisdiction but an appeal was pending.
- The High Court judge had been entitled to find that the connection with England was overwhelming for the purposes of s.13 and s.16 of the 1984 Act and that W had established a substantial ground for making her application under DMPA.

23. In the case of **Prazic v Prazic** [2006] 2FLR 1128 there were properties in France and England, H petitioned first in France and W in those proceedings founded her claim upon the value of the English properties. W then issued TOLATA proceedings in respect of the same two English properties. The Court of Appeal decided that pursuant to Article 28 Brussels I that the TOLATA action was "a related action" to the French ancillary relief proceedings and hence stayed proceedings due to the risk of irreconcilable judgments and multiplicity of proceedings.

24. See also the case of **J v P** [2007] EWHC 704 (Fam) where a father was a resident of Italy and the unmarried mother lived in England. The father issued proceedings in Italy seeking a decision as to maintenance against himself. When the mother applied under Schedule I of the Children Act, the High Court on the basis of Article 27 Brussels I had no choice but to stay her proceedings, despite expressing regret.

## **Brussels II**

25. Divorce, legal separation and marriage annulment – yes

26. Civil partnership dissolution – unknown as UK legislation clear that it was not a "gay marriage"! NB in Spain no problem as domestic law treats what is defined in the UK as a civil partnership as a marriage.

27. Property adjustment orders - see recital 8 to BIIR. The Regulation does "*not deal with issues such as the grounds for divorce, property consequences of the marriage or any ancillary measures*". See also **Prazic** above as to TOLATA proceedings.

28. BIIR applies whatever the nature of the court or tribunal in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility: Article 1(1)(b).

29. This includes particular rights of custody and rights of access; guardianship; curatorship; the designation and functions of any person or body having charge of the child's person or

property; representing or assisting the child; the placement of the child in a foster family or institutional care; measures for the protection of the child relating to the administration, conservation or disposal of the child's property: Article 1(2)

30. However BIIR does not apply to the establishment or contesting of a parent-child relationship; decision on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child; emancipation; maintenance obligations; trusts of succession; or measures taken as a result of criminal offences committed by children: Article 1(3) – see though **Re C** (Case C C-35/06) [2008] 1 FLR 490 re care proceedings

31. With regard to issues of parental responsibility, the member state where the child is habitually resident will generally have jurisdiction: Article 8.

32. However there are a number of exceptions to this general rule:

- where a child has moved lawfully to England from another member state and has acquired a new habitual residence there, the Courts of former member state in which the child was lawfully resident will retain jurisdiction for 3 months for the purpose of modifying access rights under an existing order: Article 9(1)

- where a child has been abducted, the courts of the former member state where the child was habitually resident immediately before the abduction will retain jurisdiction until the child has attained habitual residence in another member state: Article 10

- pursuant to Article 12(1) or Article 12(3)

### **Article 12 - Prorogation**

33. Article 12 provides two ways in which children proceedings can “move” from their Article 8 habitat ie:

34. Article 12(1):

- a. at least one of the spouses has parental responsibility in relation to the child and
- b. the jurisdiction of the English courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility and
- c. is in the superior interests of the child

35. Article 12(3):

- a. the child has a substantial connection with another Member State eg is a national or one of holders of PR is habitually resident there
- b. the jurisdiction of that Member State has been accepted expressly and in an unequivocal manner by all of the parties
- c. it is the best interests of the child

36. The jurisdiction under Article 12 ends when the judgment on the matrimonial proceedings (ie. granting/refusing the divorce/legal separation/marriage annulment) has become final – Article 12(2).

37. Where an appeal is pending in a member state, the proceedings will not be regarded as final: **A v A (Jurisdiction: Brussels II)** [2002] 1 FLR 1042

38. Where a child's habitual residence cannot be established and jurisdiction cannot be established in accordance with Article 12 then the courts of the member states where the child is physically present will have jurisdiction: Article 13

39. The "best interests" of a child has only been considered so far in **Re S (Brussels II: Recognition: Best Interests of Child) No 1** [2004] 1 FLR 571 albeit under Articles 21 and 22 which do not refer to this phrase explicitly.

40. Belgian H had a child with W while they lived in Belgium. The child, M, was 11 months when the parents separated. The following year W left Belgium with M to live in her family home in England. H issued proceedings in an Antwerp court demanding contact with M. M was represented in the Antwerp court. The Antwerp court ruled that M should spend periods of up to a fortnight with H in Belgium and that these periods should be spread out over the course of the year.

41. H went to High Court in order get the Antwerp court order recognised pursuant to Article 21 and enforced in UK. W resisted and the Holman J. had no choice but to recognise it. The only exception he could identify was Article 22 of BII R which provides:

*"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"*

42. However, the Judge was unconvinced that the Antwerp court order was in the best interests of M. The question arose as to whether this amounted to a breach of Article 22(a). He stated at paras 32-33 (NB reference is to Article 15(2)(a) ie unrevised convention)

*"[32] It seems to me that, in applying Art 15(2)(a), I have to give proper weight and effect to the language that is used. The Article does not refer simply to recognition being contrary to the best interests of the child. It refers, rather, to recognition being contrary to public policy, taking into account the best interests of the child. Merely to reconsider the best interests of the child would be to review the Belgian judgment (which is clearly welfare based) as to its substance, which is forbidden by Art 19. I have to take into account the best interests of M, but ultimately to consider whether recognition is manifestly contrary to English public policy. To say that something is contrary to public policy is a high hurdle, to which the Article adds the word 'manifestly'. This is an international convention and I must apply it purposively, giving appropriate weight to the word manifestly. Indeed, the judgment of the European Court in the case of Krombach v Bamberski [2001] 3 WLR 488, given on 28 March 2000, although given in a very different context, affords some guidance. At para [21] the court said in relation to a similar provision of a similar convention, although not employing the added qualification of 'manifestly': '... the court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention ... With regard, more specifically, to recourse to the public policy clause ... the court has made it clear that such recourse is to be had only in exceptional cases ...'*

[33] I accept the submission of Mr Overall that it is possible to contemplate a situation in which an order of a foreign court is so strongly contrary to the welfare of the child concerned that it would be possible to conclude that its recognition was manifestly contrary to the public policy of our State. But, in my judgment, this order in relation to M falls far short of that. I have frankly said that in my view it is not an order which was in his best interests, but I am quite unable to conclude that it is so contrary to his best interests that it would be actually contrary, let alone manifestly contrary, to some English principle of public policy to enforce it. Accordingly, in my view, no defence or exception to recognition and registration of this judgment has been established and I am bound by the mandatory terms of Art 14(1) to recognise it.

43. However, Holman J made clear that the court does have a discretion to “phase in” the foreign order. However this cannot be done to review the merits: **Re S (Brussels II: Recognition: Best Interests of Child) (No. 2)** [2003] EWHC 2974 (Fam).

44. In **C v C** [2006] EWHC 3247 (Fam), H and W had separated in 2002 with the 2 children remained with W. Contact litigation ensued in England and W argued that H had sexually abused the children. In June 2005 a County Court order was made giving W permission to relocate to Spain with children and provision for contact with the H with a direction that W to come back to the UK if ordered. Litigation over contact continued. In Nov 2005 W issued divorce petition in County court and decree absolute was made in July 2006.

45. H sought to return his contact application to the County Court. W in the meantime obtained an injunction from a Spanish court and wrote to the County court stating that she would not attend County court hearing on contact. H sought declaration that UK had jurisdiction from the High Court and an order remitting the case back to the County court. W sought declaration that Spanish court had jurisdiction and the UK courts should stay proceedings in respect of parental responsibility.

46. Hedley J. held [para 17]:

*“In my judgment the fundamental approach to this should be objective; what inference should be drawn from the mother's litigation conduct? The answer to that is clear: complete acceptance. Then one should ask whether a failure to address the question of challenge vitiates what otherwise appears to be an unequivocal acceptance. I do not think it does. This case demonstrates a clear acceptance of the Northampton county court's jurisdiction at least until late July 2006 by which time on any basis the court must be seised of the matter. Accordingly it is then too late to object. In my judgment the evidence demonstrates an unequivocal participation in the proceedings and thus an acceptance of the jurisdiction. I do not think that the absence (as I am prepared to accept it was) of advice on her right to object should vitiate the unequivocal acceptance otherwise established. I am glad to reach that view in this case as questions of jurisdiction should be resolved at the outset of a case and not on the eve of a final hearing. That point of policy also fortifies my view that the court should be looking at what the parties have actually done rather than the reasons (or lack of them) for doing it, absent, of course, fraud or misrepresentation.”*

This would appear to be a case where arguably the court was seised both under 12(1) and 12(3).

47. In **L v L** [2006] EWHC 2385 (Fam), H and W separated in 2004. In 2005 W was given leave to relocate permanently with the children to Austria. The High Court Order was

made by consent and recorded and express agreement under Article 12 vesting jurisdiction with the High Court to determine (1) the H's contact application and (2) the M's undertaking to return the children if called upon to do so.

48. Upon W trying to withdraw from the agreement, Mostyn J. stated at para 3:

*“That agreement is manifestly a full and effective prorogation of jurisdiction over the substance of the matter in favour of this court, provided that I am satisfied that it is in the "superior interests" of the children, which I unequivocally am. It overrides the normal rule expressed in Article 9 which is that absent a prorogation agreement this court would lose jurisdiction three months after the change of habitual residence.”*

49. Pursuant to Article 9, Austria would have had jurisdiction to deal with parental responsibility unless there had been a valid prorogation under Article 12(3). That prorogation was made plain by the agreement between H and W.

### **Article 3 BIIR - Jurisdiction in divorce**

50. The rules are now found in Article 3 of BIIR. The same rules apply to actions relating to "legal separation" and "marriage annulment". A court in a member state has jurisdiction to entertain an action for divorce, separation, or nullity where:

- Both spouses are habitually resident there;
- Both spouses were last habitually resident, and one still resides there;
- The petitioner is habitually resident there;
- The respondent is habitually resident, and either has resided there for at least a year preceding the application or is domiciled (or a national) there and has resided there for at least six months preceding the application;
- Both spouses are domiciled (or nationals).

51. The recent ECJ case of **Sundelind Lopez v Lopez Lizano** (Case C-68/07) [2008] IFLR 582 involves a Swedish W living in France who was married to a Cuban. W tried to bring divorce proceedings in Sweden arguing that Article 3 did not apply and that therefore Swedish domestic law applied to the proceedings. The ECJ made it clear that a case cannot be heard in a member state which does not have Article 3 jurisdiction when there is another member state which does have Article 3 jurisdiction – see Articles 6 and 7. This means that in order for the residual jurisdiction under s5(2)(b) of the Domicile and Matrimonial Proceedings Act 1973 to be exercised, there has to be no court of a member state capable of having jurisdiction under BIIR, even where the Respondent is neither a national nor habitually resident in an member state.

### **Habitual Residence and Domicile**

52. BIIR provides at Article 3(1) *inter alia* that:

*“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 or in the case of the UK, has his or her “domicile” there”*

Much of the caselaw in the UK on BIIIR has centred on this issue of habitual residence/domicile.

53. Domicile of origin is attributed at birth and will persist unless replaced by a subsequent domicile of dependence – this will only happen if it can be shown that the person has the intention to live in a different jurisdiction indefinitely. A glance at caselaw, both old and new, shows just how difficult it is to prove such an intention – see **Winians v AG** [1904] AC 287 and **Cyganik v Agulian** [2006] EWCA Civ 129 – both being cases where people had spent the majority of their lives away from their domicile of origin but were not found to have replaced their domicile.

54. See also **Re N (Jurisdiction)** [2007] 2 FLR 1196 in which Hedley J dealt with both issues of domicile [held that W had not changed her domicile of birth] and seisin in relation to French proceedings.

55. In relation to habitual residence, this is a very different concept and one which is capable of change much more easily. See **LK v K(no 2)** [2006] EWHC 3280 and also the recent decision of **Marinos v Marinos** [2007] 2 FLR 1018.

56. **Marinos** involved a Greek H and English W living in Greece. W was an air hostess based in UK but worked 4 weeks out of 8, studied part time in the UK and had properties in the UK although they were let out to tenants. W issued divorce petition the day after her return to the UK with the children. She had arrangements in place in the UK to take up school places and to resume living in one of properties the parties owned in London.

57. The High Court held that English Court had jurisdiction under Article 3(1) as W had been habitually resident over previous 28 months. Munby J held that under BIIIR, pursuant to the autonomous ECJ definition [rather than the domestic definition], a person could only be habitually resident in one location – see **Swaddling v Adjudication Officer** (Case C-90/97) [1999] 2 FLR 184. This contrasts with domestic law where a person can be habitually resident in more than one jurisdiction **Ikimi v Ikimi** [2001] 2FLR 1288.

58. The Judge went further to say:

*“one can be habitually resident in one country at the same time as one is also resident (though not habitually resident) in another.”* [para 48]

*“It is of course trite learning under our domestic law that although habitual residence can be lost in a day it cannot be gained in a day. However, .....the approach is quite different as a matter of ECJ law ....so far as concerns Brussels II R, one can in appropriate circumstances establish habitual residence very quickly.”* [para 87-88]

### **Article 19 – when are proceedings seised?**

59. Article 19 of BIIIR provides:

*“1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different member states, 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.*

3. *Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court...*"

60. The time of seisure depends on whether the first step in an action is to lodge a document instituting proceedings in court, or to serve the document. If the document requires to be lodged first, then the time of lodging is the moment the court is seised, provided the document is then served.

61. If service comes first, then service represents the seizure of the court, provided the document is then lodged (article 16). The effect of Brussels II has not been altogether helpful. It means that in EU cases, there may be a rush to commence proceedings, in order to secure the application of what are perceived to be the most helpful rules on divorce or ancillary matters.

62. **BC v AC (Chorley v Chorley)** [2005] EWCA Civ 68 is an important case as the Court of Appeal made it clear that where there was a dispute as to which court is first seised, judges should refer the issue to the court of the Member State where the disputed proceedings were allegedly issued. In a case where there was a dispute about which document commenced proceedings in France, a DJ in the PRFD should have referred the matter to the French court for a declaration and stayed the proceedings in the meantime.

63. Oddly enough, in **Re N (Jurisdiction)** [2007] 2 FLR 1196 Hedley J decided to follow the view given by the French Appeal Court in the matter of **Chorley** regardless of the fact that the French court clerk in **N** had given a different date for the commencement of the proceedings .....!

64. In **LK v K** (Brussels II Revised: maintenance pending suit) [2006] EWHC 153 (Fam), another case involving France, W issued divorce proceedings in London on the same day that the H issued proceedings in France. The W claimed that the UK courts had jurisdiction. However she had failed to supply a marriage certificate with her petition contrary to rule 2.6(2) of the Family Proceedings Rules 1991. A judge in France ruled that the English court was first seised (the petition was issued earlier on the same day in the UK) and the French proceedings were stayed. That decision was to be appealed in the French courts by H. H argued that the English judge should predict the outcome of the French appeal and hold that the appeal would succeed (ie the jurisdiction would return to France).

65. Singer J held that he could not rule on the H's appeal point as it was a speculation too far. Maintenance pending suit was granted (to pay for legal costs) as the balance of unfairness would fall more heavily on the wife if no order was made. The fact that the wife failed to issue a marriage certificate was a minor procedural irregularity which did not strike at the root of the validity of all the steps taken thereafter.

66. In fact the French Appeal court dismissed H's appeal in any event, although H later indicated that he intended to pursue it further. It appears that H may have had a point as one of the issues was the prohibition on H's French lawyer giving evidence as to the timing of the "requete" being lodged....

67. The marriage certificate issue was revisited in **L-K v K (No 3)** [2006] EWHC 3281 (Fam). Singer J held that there was no sanction for failure to comply with rule 2.6(2) and in accordance with common practice at the Principal Registry, the W's solicitor had provided

an undertaking to file the required documents prior to applying for directions ie W had validly commenced proceedings in the UK.

68. He also found that for the purposes of Article 16, the word “lodge” for had an autonomous interpretation which was to adopt a procedure accepted by the court which led to the initiation of proceedings by the court.

69. The first **LK v K** High Court decision eventually reached the Court of Appeal **LK v K** [2008] IFLR 692. The Court of Appeal made it clear that to the extent that H’s further appeal was upheld by the French courts, that this merely made orders of the English courts of no effect – including the Decree Nisi.... The Court of Appeal was not prepared to stay the proceedings based upon possible further appeals in other jurisdictions.

70. The 2005 Practice Guide for the application of the new Brussels II Regulation issued by the Commission states at p.49:

*“Once a court has been seised pursuant to Article 3 of the Regulation and declared itself competent, courts of other Member States are no longer competent and must dismiss any subsequent application. The aim of the “lis pendens” rule is to ensure legal certainty, avoid parallel actions and the possibility of irreconcilable judgments.”*

71. Perhaps it might be simpler if each State could provide a clear rule as to seisin in their country .....

72. Importantly, once it has been decided that BIR applies to a particular case, the principle of lis pendens, or 'first come, first served' applies automatically to actions raised in two different member states. This provision does not relate to actions brought in different parts of the same state. There is no discretion. The rule is absolute. The courts in the place second seised must decline jurisdiction. Arguments as to *forum non conveniens* are irrelevant.

### **WHATEVER HAPPENS TO CASSANOVA’S CHILDREN?**

The first issues to consider are whether the children are in the UK lawfully or unlawfully, and whether or not there have been court orders already concerning the children abroad.

#### **Lawful relocation?**

##### **UK/Wales:**

The law governing relocation from the UK to Europe is straightforward, and the case of Payne v Payne [2001] IFLR 1052 still applies:

## **Europe:**

Most European countries are civil law jurisdictions and both parents, regardless of marriage status, have joint parental authority over their children; thus if a parent desires to relocate with a child, they must obtain the consent of the other parent or permission of the court for the relocation to be lawful.

## **Spain:**

In determining any application for permission to relocate, a court will consider the best interests of the child. The court will also consider the circumstances of the proposed relocation, that is, the proposed plans of the parent wishing to relocate. A child whose parent wishes to relocate with them will have their interests separately represented and the court will hear them if they are aged 12 years or older.

The general trend in Spain is that the court will give permission to a parent seeking to relocate where a reasonable proposal has been by the requesting parent and there will be generous contact between the child and non-relocating parent.

## **Sweden**

When determining a request for permission to relocate, the child's best interests will be the court's paramount consideration. Joint residence arrangements that divide the child's time equally between the parents, whereby 7 days the child lives with one parent and 7 days with the other, are widely used. Thus, it is difficult for a parent to obtain permission to relocate and parent requesting permission must satisfy the court that it would be better for the child to relocate as opposed to continuing to live in their current environment.

Two major obstacles to satisfying the court of the improvement to the child's life if they were to relocate are the loss of contact between the child and non-relocating parent and the loss itself of the child's current, and most likely, stable environment. The existence of these obstacles usually results in permission to relocate applications being successfully defended. Another

result has been the transfers of residence from a faultless mother to the father where the mother has clearly made her intentions known to relocate regardless of the court's decision.

## **France**

When determining an application for permission to relocate the courts will consider as its paramount concern the best interests of the child.

According to case law (in which the majority of reported cases involved a mother as the primary carer seeking to relocate) when a court is considering an application to relocate it will take into account several factors that include:

- Whether the mother has had a residence order in her favour for at least 2-3 years before requesting permission to relocate and
- Has the mother as primary care giver always recognised the father's role and place in child's life
- Has the mother as primary care giver shown willingness to agree to decreased maintenance to enable father to visit
- Has the carer demonstrated an intention to maintain child in a French, or at-least a bi-lingual environment, and generally provide a good standard of education
- Is the father incapable of providing daily care because of work commitments or other reasons.

It has been suggested that the emerging trend in relocation cases in France is that permission will be granted generally where:

- The mother has a residence order in her favour
- The child is less than 10 yrs old
- The mother has satisfied the court she can provide a more secure and stable environment for child,
- The mother has allowed an adequate transition period between the time of divorce and the desired date of relocation.

Permission to relocate is likely to be refused if the mother has already changed her place of residence or 'relocated' without seeking permission or agreement with the other parent.

## **Belgium**

Decisions concerning a child must be taken jointly by both parents.

This principle is applicable to all parents whether they be married, unmarried or divorced. The best interests of the child standard is to be applied for all the decisions taken concerning a child. Relocation cases are handled in the same manner as any other case concerning parental authority. No specific rules exist concerning relocation and little case law has developed around that issue. A parent who wants to move with a child should obtain the consent of the other parent. Each parent is bound by a court order that has specifically determined the residence of a child. If a parent disobeys a residence order by moving the child elsewhere, such as another country, that parent could be subjected to Belgium's laws concerning abduction. The parent could ask for a modification of the court order to permit a relocation. In that situation, the best interests of the child, as in any case involving the child, will be the only criterion that guides the court.

## **Germany**

A request for permission to relocate is called a 'request to obtain the right to determine the place of abode' of the child. These requests are generally made by the mother. In determining a request to determine the place of abode, the court's first and paramount consideration is the welfare of the child. Requests to determine the place of abode are determined on a case-by-case basis. Consideration of these requests will depend on whether a change of residence is deemed to be for the benefit of the child. It has been observed that there is no general rule on whether such requests are usually granted.

## **Where the child is lawfully relocated :**

Issues of contact and enforcement of contact orders will be relevant assuming that the child was relocated by court order.

The Council Regulation preamble states that this regulation covers all decisions on parental responsibility, and this is further defined in Article 1 as the rights of custody and access; (further defined in Article 2)

Article 41 deals with rights of access and Article 55 deals with co operation on cases involving parental responsibility.

An issue to be determined will be which court now has jurisdiction?

Article 9 gives the original country jurisdiction for 3 months after removal to modify judgments on access rights;

However, NB: Article 12 of the Council Regulation: The court of the country dealing with the divorce, separation or annulment shall have jurisdiction in parental responsibility, where it has been accepted expressly or otherwise.

See Re ML and AL (Children) [2006] EWHC 2385:

Re C (Costs: Enforcement of Foreign Contact order) [2007] EWHC 1993 (Fam)

AD v CD and AD [2007] EWCA Civ 1277

### **Where the child is unlawfully relocated:**

Pursuant to the preamble (17) the Hague Convention of 1980 still applies as complemented by Article 11; However, even if a country refuses to return the child, such a decision can be replaced by a subsequent decision of the original country prior to removal requiring the child's return: The child would then have to be returned in any event.

Article 10 deals with jurisdiction: The original country prior to removal retains jurisdiction until the child acquires habitual residence or has settled in the country for a year without a request for return by the other parent with knowledge of where he is etc;

The court has strict time limits regarding an application for return of the child and by Article 12 (3) are to give judgment no later than 6 weeks after the application is lodged.

The old defence to such a request of 13 b Hague Convention is now effectively lost ie there is a grave risk that the child would be exposed to physical or psychological harm a child on this basis if it is established that adequate arrangements have been made to secure the protection of the child after his or her return:

Such arrangements can include for example supervision, protection by police etc; a swift court hearing with separate representation.

Article 11 (8) means that any order in the UK for non return can be circumvented:

Notwithstanding a judgment of non return any subsequent judgment for such a return from the original country is enforceable anyway.

M (A child) [2006] EWCA Civ 630:

Practical guidance to lawyers to avoid such delays at paragraphs 44 to 47.

Further practical guidance regarding Article 11 cases is set out in the case of Re A; HA v MB [2007] EWHC 2016 (Fam) per curiam:

JPC v SMW and another [2007] EWHC 1349:

### **Differences in European courts:**

#### **The voice of the child:**

The main difference in approach between Europe and the UK is that there is in Europe much more concern that the child's wishes and feelings are heard directly by the judge; In the UK, except from conciliation appointments where the children are to be taken to speak to Cafcass if over the age of 8 years (introduced around the time Brussels II was drafted), the court historically has disapproved of parents who take their children to court or involve them in court proceedings at all. Such an approach, however, is apparent from the Brussels II revised document itself which is peppered with clauses demanding that the child is heard: In the preamble paragraph (19): The hearing of the child plays an important role in the application of this Regulation..."

Article 11 (2) states that in relation to application of the Hague Convention criteria "it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his age or her age or degree of maturity".

Similarly, Article 41 (2) (c) and Article 42 (2) (a) also state that certificates shall only be issued only "if the child was given an opportunity to be heard unless a hearing was considered inappropriate having regard to his or her age or degree of maturity."

In the past, the children's views were canvassed by Cafcass ie indirectly;

The UK courts are now moving towards the Judge hearing from the child directly (see above case) and see W (Children) [2008] EWCA Civ 538:

The Family Justice Council has created a sub committee the "Voice of the Child" to advise government as to a way forward.

**Defence/Ground of Appeal/ Refusal re certificate:**

It is unclear whether failure to hear directly from the child, untainted by Cafcass opinions in any event, may affect the enforceability of judgments under Brussels II: In Article 23, for example, a judgment relating to parental responsibility shall not be recognised (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard...”

SARAH LUCY COOPER  
FREYA ROWE

Thomas More Chambers  
19<sup>th</sup> June 2008

## **ARTICLES**

The new Hague Maintenance Convention - Daniel Eames April 2008 Family Law

Intervening in litigated contact –ideas from other jurisdictions – Family Policy Briefing 4 September 2005

Habitual Residence and Brussels II R – Ruth Lamont October 2007 Journal of Private International Law

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International Child Relocation Research Project, Thomas Foley, Civil Appeals Office

## **BOOKS**

Dicey & Morris - The Conflict of Laws 14th Edition

Rayden on Divorce

Thomas More Chambers

19<sup>th</sup> June 2008