

Seven ways to survive divorce in Europe

As suggested by the Netherlands 1: Laurien, Boudewijn and Barbara



Although of good will, Franz and Rosa get lost into the European jungle of matrimonial rules, regulations and ways of execution. An international lifestyle, with job hopping, nomad living, globalisation of property & finance, marriage & kids cannot be regulated properly within the context of diverse European matrimonial laws.

In 17 answers and 7 statements we try to TomTom our way through the labyrinth. Feel free to join the ride

1.

The Regulation 2201/2003 (hereinafter Brussels II bis) does not set out one general rule for jurisdiction in matrimonial matters. Article 3 of Brussels II bis provides that when applying for divorce a person or a couple may take a matrimonial action in the courts of the Member State where one or both of them are or were habitually resident, or the Member State of their common nationality or common domicile. This means, of course, that it may be possible to take the action in a number of states. The jurisdiction competent in our case is Belgium, because this was the common country residence of the spouses, and one of the spouses still resides there (Rosa). Another possible jurisdiction in our case is Germany, because this is the residence of Franz at the moment of the divorce.

2.

Council Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and enforcement of judgments in civil and commercial matters (hereinafter Brussels I) lays down rules on special jurisdiction for the courts concerning maintenance payments. Because the divorce was pronounced in 2007 the applicable law is Brussels I. According to this convention the following courts have jurisdiction:

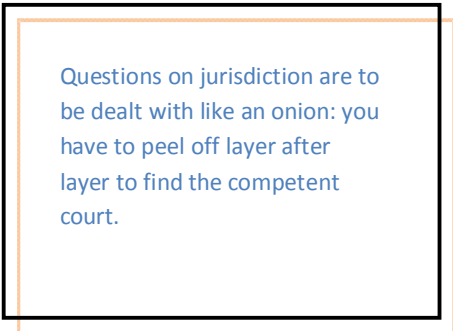
- The Member State where the maintenance creditor is domiciled (article 5 §1), in this case Belgium and/or
- If it is a subsidiary claim brought in the divorce procedure the law of court that has jurisdiction over this procedure is applicable. In answer 1 we have stated that this could be a German or a Belgian court.

Brussels II bis does not apply because of article 1 § 1 sub e. We assume that the divorce proceedings took place before 2009, so the 2009 Regulation on maintenance does not apply because it did not exist. In the case of mediation as a basis for the agreement, the agreement by mediation is nothing more than a (civil) agreement between spouses. In this case Brussels I is also applicable.

The EU Mediation Directive (2008/52/EC), issued in 2008 is not applicable, because the by mediation reached agreement dates before this regulation.

3.

Brussels II bis article 8 states that the court of the member state where the child has its habitual residence has jurisdiction regarding parental responsibility. In this case that is Belgium. Article 12 § 1 states that the court that has jurisdiction according to article 3 (the court that has jurisdiction over the divorce) also has jurisdiction over the parental responsibility. This in our case, as written



Questions on jurisdiction are to be dealt with like an onion: you have to peel off layer after layer to find the competent court.

earlier, is either Belgium or Germany. Provided that the provisions under article 12 § 1 under a and b are fulfilled, which is the case.

(If Germany was chosen as a jurisdiction for the divorce and subsequently the divorce procedure has come to an end, the jurisdiction of Germany ends, § 2).

4.

In Brussels I matrimonial property law is excluded in art 1 §2 sub a. At this moment there is no specific EU law on the subject of matrimonial property law, nor are there any applicable International Conventions on the subject (except for the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, but only The Netherlands and Luxemburg have ratified this Convention) are applicable. The court with jurisdiction under Brussels II bis currently is the court that also deals with the matrimonial property in the event of divorce. For questions regarding matrimonial property law, one has to look at the national legal system. In our case this must be the Belgian or the German system, depending on where the divorce was pronounced.

This legal vacuum is eliminated by a new set of EU rules in the 2010 regulation on divorce and legal separation.¹

5.

At the time of the divorce in this case it was not determined what law applied when an application for divorce is being considered. So, a German person living in Germany wanted to divorce a Dutch spouse who is living in Belgium, which national law applies? At that moment, the different Member States had different rules for answering this (article 5). So once again this means that national law is applicable in our particular case. If a similar case would arise today, the Regulation 1259/2010 on divorce and legal separation would point to the applicable law regarding the divorce. So after the entry into force of the Regulation, this would be the law of Belgium according to art 8 sub b. Because Belgium is the last place of habitual residence of both spouses (provided that in our case the former spouses have not chosen an applicable law).

6.

Article 8 of Brussels II bis states that the applicable law is that of the court of habitual residence of the child. Furthermore there are two international conventions that state law on custody and visitation. These are the Hague 1961² Convention and the 1996 Convention³. On the basis of both conventions the competent court would have to apply its national law. In our case, this would then have to be Belgian law.

However, Belgium is not a party to these Conventions, so this leaves the question of the applicable law up to the national authorities to decide. We would like to add that article 8 of The European Convention on Human Rights provides Franz with the right to family life and to visit his children. This is should be provided for in any case, under every national jurisdiction.

¹ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

² The Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants.

³ The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

7.

Rosa and Franz were married in The Netherlands and therefore we should first look at the Dutch law in this context. According to Dutch law, marriages formalized in 2004 fall under the 1978 Hague Matrimonial Property Convention.⁴ This convention permits a choice of law, within certain limits. In our case Rosa and Franz did not make a choice so the law of the country in which the parties establish their first place of habitual residence after the marriage (Italy) applies concerning the use of the apartment.

Concerning the maintenance obligations the new Regulation on Maintenance⁵ contains provisions on the applicable law referring to the 2007 Hague protocol⁶, this Regulation however has not yet entered into force entirely.

For our case we have to go back to the Hague Conventions of 1956⁷ and 1973^{8,9}, according to which, the law of habitual residence of the child in question or of maintenance creditors in general (or the law of the country of new habitual residence in the case of a change in habitual residence) is applicable. The children in this case reside in Belgium, so Belgian law is applicable.

Watch out! In a divorce procedure applicable law can differ from topic to topic. There are big differences between topics concerning children, financial arrangements and property.

8.

She can file a lawsuit to obtain a payment order from a court, or to obtain an execution title ó which can later be used to seize the property of Franz.

Council Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and enforcement of judgments in civil and commercial matters (hereinafter: *Brussels I*) contains jurisdiction rules concerning maintenance payments. As a general rule Franz can be summoned before a court in Germany, on the basis of article 2, § 1. But according to article 5, § 2, the maintenance creditor can also chose to bring a case, to the court of the Member State where the creditor has his domicile or habitual residence. So, also the Belgian courts offers a viable forum to Rosa.

⁴ The Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes.

⁵ 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.

⁶ The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

⁷ The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.

⁸ The Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

⁹ Belgium is not a contracting party to this Convention.

If Franz is sued in Germany, the payment order/seizing order can be executed in accordance with German national law. If she obtains such a court decision in Belgium however, this decision will be recognised in Germany (article 33 Brussels I). However she will have to file for a separate declaration of enforceability in Germany, to be able to execute her Belgian decision in Germany (article 38). This declaration encompasses the power to proceed with protective measures in Germany (article 47, § 2).

Already before she obtains the indicated German declaration of enforceability through the exequatur procedure, she can seek provisional measures from a German court (article 47, § 1).

By means of these measures she could attach the bank account of Franz, for example.

Besides the abovementioned payment/seizure orders, Brussels I provides also for the recognition and enforcement of interim measures, in accordance with article 31. In this particular case, both Belgium and German courts have original jurisdiction, so there is no direct need to address courts in another Member State. However ó if needed ó she could demand interim measures from a court of any Member State, safe that there is a real link between the purpose of the measure and the territorial jurisdiction of the court applied to in the Member State. In the case of Rosa, that could be the Netherlands, for instance.

Besides the aforementioned procedures, Rosa might consider demanding a European Enforcement Order if Franz does not contest her claim, on the basis of Regulation (EC) No 805/2004. With such an order, she would be able to take the Belgian decision directly to a German bailiff.

Finally, it is important to realise that the New York Convention of 1956 provides a system of cooperating national institutions that work in the field of recovering maintenance fees. The Belgian authority is called 'Dienst voor alimentatievorderingen' (DAVO) and can assist Rosa in obtaining payment from Franz in Germany.

9.

Article 8, § 1, of the Brussels II bis makes the Belgian courts the primary competent authority to rule over matters of parental responsibility. Franz will have to address a Belgian court to obtain enforcement measures ensuring his right to see his children, for instance to set a penalty payment on not giving access to his children. As long as Rosa is not taking the children across the border, this procedure will not be governed by EU law ó and can further

be considered as an internal situation. Relevant of course is the right to family life under article 8 of the ECHR, but we assume that Belgian law is in accordance with that. Brussels II bis plays a more important role, if Rosa takes the children to live with her in France. We assume that this is *not* in itself yet a violation of the parental responsibility arrangements. The habitual place of residence has therefore legally changed from Belgium to France. In this case, the Belgian court retains competence over matters of parental responsibility for a duration of three months (article 9, § 1). So, within this period Franz may still address the Belgian court to seek enforcement of his right to see his children.

Changes in personal circumstances during the marriage and divorce should be taken into account on forehand.

If, subsequently, the Belgian court decides that the children should be heard (this is obligatory in order to issue a certificate to France, article 41, § 2, sub c), this is facilitated by the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. The regulation contains the procedure for the Belgian court to request hearing a witness in France (article 4, § 1, sub e). Article 11 allows representatives of the Belgian court and the parties to be present at the performance of the judicial act by the French court. If this is not possible, modern communications technology, and in particular, videoconferencing, may be used to facilitate their participation. The regulation also provides for the possibility for the Belgian court to hear the minors by themselves in France (article 17).

The Regulation lays down precise criteria regarding the form and content of the request (article 4). The request must be made using a specific form, and must contain certain details, such as the name and address of the parties to the proceedings, the nature and subject matter of the case, a description of the taking of evidence to be performed, etc. The language of the request (article 5) and available time for execution (article 10) are regulated.

The Belgian court can use the online EJM Atlas to identify the competent court in France and draft the request, and may subsequently use the EJM contact points to communicate with the French court. The EJM has as of January 2011 a legal basis in Decision 568/2009/EC and Council Decision 2001/470/EC.

10.

She can request an order to return the child, on the basis of article 12 of the 1980 Hague Convention on Child Abduction. This can be done in a Belgian court, but she may also address directly the German competent authorities (article 29 of the Convention).

Regulation 2201/2003 facilitates efficient and speedy procedures of the Hague Convention in particular by:

- setting time limits for the court to decide on a request to return a child (article 11, § 3, Brussels II bis);
- establishing uniform rules for the certificates (article 42, § 1, Brussels II bis);
- providing for direct communication between the courts and/or Central Authorities (article 11, § 6, Brussels II bis);
- limiting the grounds for refusal, when the home country takes protective measures (article 11, § 4, Brussels II bis).

11.

Concerning Franz's desires in relation to parental responsibility, the competent court will be a Belgian court (assuming that the children still have their habitual place of residence in that country). This on the basis of article 8, § 1 of Brussels II bis. No longer

a German court has competence to decide on these matters on the basis of prorogation (article 12), because the possibility for prorogation has ended with the end of the divorce case (§ 2, sub a).

Concerning Franz's claim for a change of the maintenance arrangements, the Council Regulation 4/2009 applies. Article 3, sub d, prescribes that when the maintenance procedure is ancillary to a procedure of parental responsibility, the maintenance procedure follows parental responsibility. That is the case here, because Franz primarily aims to change the parental responsibility; the change of maintenance payments is indeed ancillary to that claim. The Belgian courts are therefore also competent to decide on his request to change the maintenance provisions.

The execution of financial arrangements and custody of children can be organized within a European framework, for instance by participating in a European maintenance authority

12.

In case Franz initiates a procedure to change measures after the divorce, as specified in question 11, and requests the hearing of his parents who live in Munich, he can rely on the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (hereinafter 'Regulation on evidence'). According to article 4 of the Regulation on evidence, the competent court, *in casu* the Belgian court, can lodge a request for the hearing of witnesses with the German central authority assigned to judge upon the requests, by filling in the form 1 or the form A annexed to the Regulation on evidence. The Belgian court has to mention all the information summed up in article 4 of the Regulation on evidence. Following the request, the German court is bound to execute the request swiftly, respecting the guarantees provided by the abovementioned Regulation.

If Franz' parents move to Switzerland, however, the abovementioned Regulation cannot be relied upon. The Hague Convention of 18 March 1970 on the Taking of evidence Abroad in Civil or Commercial Matters neither is applicable, because Belgium has not signed this convention. Therefore, the appropriate legal instrument in this particular case is the Hague Convention on civil procedure of 1954. Article 8 of that Convention states that ða judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, apply, by means of a Letter of Request, to the competent authority of another Contracting State to request it, within its jurisdiction, to obtain evidence, or to perform some other judicial act. Letters of request are transmitted by the consul of the requesting State to the competent authority designated by the State of execution.

If the Belgian court decides to hear the witnesses directly, it can let them know the time and the date of the hearing via the competent German receiving authority, by virtue of article 2 of the Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (hereinafter Regulation on documents). The Belgian transmitting authority, designed by virtue of article 2 of the aforementioned Regulation on documents, has to file a request according of the standards given by article 4 of the Regulation on documents, accompanied by the request form in the annex. If Franz' parents move to Switzerland, this Regulation on documents is not applicable. The competent court can use as a legal basis the Hague Convention of 1965¹⁰. By virtue of article 2 of that Convention, each Contracting Party shall design a competent

¹⁰ The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

authority to transmit and receive judicial documents. The Belgian transmitting authority can, by virtue of article 3 of the aforementioned Convention of 1965, send a request conforming the model annexed to the Convention.

13.

Rosa makes the same request in relation to hearing al witnesses her two sisters, one living in Denmark and the other in Portugal. Firstly, it has to be borne in mind that Denmark opted out of the EU rules on civil cooperation by means of the 22nd protocol to the Lisbon Treaty. Thus the same rules apply as to the request to Switzerland mentioned in question 12, namely the Hague Convention on civil procedure of 1954. By virtue of article 8 of that Convention, a Belgian judicial authority can send a request to the Danish judicial authority to obtain evidence, or to perform some other judicial act. Letters of request are transmitted by the consul of the requesting State to the competent authority designated by the State of execution. For communication of time and serving documents to Denmark, the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (2007) makes it possible to send documents in the same manner as provided in the Regulation on documents.

For the hearing of the witness in Portugal, the Belgian court can proceed the same way as for the hearing of the parents of Franz living in Germany. According to article 4 of the Regulation on evidence, the competent court, *in casu* the Belgian court, can lodge a request for the hearing of witnesses with the Portuguese central authority assigned to judge upon the requests, by filling in the form 1 or the form A annexed to the Regulation on evidence. The Belgian court has to mention all the information summed up in article 4 of the Regulation on evidence. Following the request, the Portuguese court is bound to execute the request swiftly, respecting the guarantees provided by the abovementioned Regulation.

14.

Franz can be entitled to legal aid in case he loses his job and starts procedure to change the measures established after the divorce. On 27 January 2003 the European Council adopted a directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.¹¹ Persons having a legal dispute in another Member States can benefit of appropriate legal aid in order to guarantee their access

¹¹ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

to justice, by virtue of article 3 of the Directive on legal aid. Article 5 of the Directive on legal aid specifies the conditions relating to the applicant's financial resources or the substance of the dispute which may be required by the Member States to award legal aid. The Directive on legal aid applies between all Member States of the European Union with the exception of Denmark.

Moreover, the new Regulation on maintenance¹² ensures a right to legal aid in relation to disputes over maintenance measures. This Regulation applies *ratione temporis* to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established as from its date of application, in January 2009. Under the conditions established by articles 44 to 47 of this Directive, legal aid is provided for disputes on maintenance covering more than one Member State.

15.

Taking into consideration the claim and information from the case, we assume that the agreement between Franz and the SA needs to be classified as a service agreement and *not* as a labour agreement.

In the first place, the Spanish courts are competent on the basis of the domicile of the SA (article 2 of the Brussels I regulation). Article 5, § 1, sub b (second indent), of the Brussels I regulation creates alternative jurisdiction for the country in which the service is provided (or was to be provided). That leads to no other conclusion than that the Spanish courts are competent to decide on this matter.

Even if the agreement must be qualified as a labour agreement, on the basis of article 19, § 2 of Brussels I, Spain will be the jurisdiction where this claim is to be pursued, as the habitual place of the work of the employee (i.e. Franz).

16.

Note that Regulation 592/2008 (Rome I) does not apply to this contract, since article 28 excludes contracts concluded before 17 December 2009 from the scope of the regulation. The 1980 Convention of Rome (80/934/EEC) does apply to this contract, to which both Spain and Belgium are States Parties. The fundamental rule incorporated in that instrument is the free choice of law by the parties. However, in our case, no such choice of law seemed to have been made.

¹² 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.

Article 4, § 2, defines the place with which the contract is most closely connected, as the country in which the -characteristic performerøis having its habitual residence. In our case the -characteristic performerøwas Franz, being the person who rendered the services to the SA. At the time of the performance of the contract, he was living in Italy. That results in Italian law being applicable to the contract.

Since it could be argued the contract was a labour contract, in that case article 6, § 2, indicates that the law of the place where the work is performed applies to the contract. In that case Spanish law would have applied to the contract.

17.

Council regulation 1346/2000 on insolvency proceedings gives in article 3, § 2, the general possibility to open insolvency proceedings against the SA in Belgium. This procedure will be limited as to its effect to the assets of the SA that are located on Belgian soil.

Whether Rosa has indeed the right in Belgium to open insolvency proceedings against the SA, is regulated by Belgian law, to which the Regulation refers in article 29, sub b. If Belgian law allows her to open these proceedings against the SA in Belgian, the Regulation does not restrict that right.

When designing legal matrimonial arrangements, always keep possible disaster in mind. At the end clear enforcement of decisions and smoothness of execution are major subjects for the legal framework of the marriage.

To support efficient and effective divorce we urgently need the following:

- consolidation of the legal framework
- Establishment of legal framework for the cooperation in civil matters within the EFTA area (including Denmark)
- Ratification of the 2007 Hague protocol
- Proposed amendments to the Brussels II bis Regulation

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