

Again on Article 20 of Regulation (EC) No 2201/2003

Reference for a preliminary ruling from the Bundesgerichtshof, Germany, in case C- 256/09 was lodged on 10 July 2009 (see V. Gaertner). The ECJ answered a year later; the judgment was published yesterday in OJ, C, 246.

The Facts

The order for reference states that in mid-2005 Ms Purrucker went to Spain to live with Mr Vallés Pérez. She gave premature birth to twins in May 2006. The boy -Merlín- was able to leave hospital in September 2006, whilst the girl -Samira- remained in hospital until March 2007.

Not wanting to be together any more, on 30 January 2007 the parties signed before a notary an agreement concerning inter alia parental responsibility, custody and rights of access to the children. According to Spanish Law the agreement had to be approved by a court in order to be enforceable. In the instant case it was never judicially ratified.

Ms Purrucker returned to Germany with the boy in February 2007; she intended also to bring her daughter to Germany after she left hospital.

Proceedings in Spain. Application for enforcement in Germany

Since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, he brought proceedings in June 2007 to obtain the granting of provisional measures and, in particular, rights of custody of the children before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial. After some discussion, the Court confirmed her jurisdiction to rule on the application for provisional measures, and adopted the following urgent provisional measures:

“1. Joint rights of custody of the two children Samira and Merlín Vallés Purrucker are awarded to the father, Mr Guillermo Vallés Pérez; both parents are to retain parental responsibility.

In implementation of this measure, the mother must return the infant son Merlín to his father who is domiciled in Spain. Appropriate measures must be taken to

allow the mother to travel with the boy and to visit Samira and Merlín whenever she wishes, and, for that purpose, accommodation, which may serve as a family meeting place, must be placed at her disposal or may be placed at her disposal by a family member or by the trusted person who must be present during the visits for the entire time which the mother spends with the children, it being understood that the accommodation concerned may be that of the father if both parties so agree.

2. Prohibition on leaving Spain with the children without the court's prior approval.
3. Delivery of passports of each of the children to the possession of the parent exercising rights of custody.
4. Any change in the residence of the two children is subject to the prior approval of the court.
5. No maintenance obligation is imposed on the mother".

On 11 January 2008 the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial issued a certificate pursuant to Article 39(1) of Regulation No 2201/2003, certifying that its judgment was enforceable and that notice of it had been served. Immediately after, Mr Vallés Pérez brought in Germany, as a precautionary measure, an action for a declaration that the judgment delivered by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial was enforceable. Next, he sought the enforcement of that judgment. Consequently, the Amtsgericht Stuttgart, by a decision of 3 July 2008, and the Oberlandesgericht Stuttgart, by a decision on appeal of 22 September 2008, ordered enforcement of the judgment of the Spanish court and warned the mother that she could be fined if she did not comply with the order.

Ms Purrucker challenged the judgment of the Oberlandesgericht Stuttgart of 22 September 2008 before the Bundesgerichtshof on the ground that, under Article 2(4) of Regulation No 2201/2003, the recognition and enforcement of judgments delivered by the courts of other Member States is not applicable to provisional measures within the meaning of Article 20 of that regulation, because they cannot be classed as judgments relating to parental responsibility.

The preliminary question

The Bundesgerichtshof observes that the question whether the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 are also applicable to provisional measures within the meaning of Article 20 of that regulation or only to judgments on the substance is a matter of debate in academic writing which has not been definitively resolved by the case-law. Therefore, he decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

“Do the provisions of Article 21 et seq. of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 1 (the Brussels IIa Regulation) concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?”

AG's Opinion

Advocate general E. Sharpston delivered a quite long opinion on 20 May 2010. In her view the ECJ should answer as follows:

- Provisional measures adopted by a court of a Member State on the basis of competence derived by that court from the rules on substantive jurisdiction in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility must be recognised and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of that Regulation.
- Provisional measures adopted by a court of a Member State on the basis of national law in the circumstances set out in Article 20 of Regulation No 2201/2003 do not have to be recognised or enforced in other Member States in accordance with Article 21 et seq. of the Regulation. That Regulation does not, however, preclude their recognition or enforcement in accordance with procedures derived from national law, in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.
- A court hearing an application for recognition or non-recognition of a provisional measure, or for a declaration of enforceability, is entitled to ascertain

the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, neither of those means produces a clear and satisfactory result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case of provisional decisions on parental responsibility, the same means of communication may be used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 of Regulation No 2201/2003 is challenged; and, if such communication is unsuccessful, other means of proof may be used, provided that they are adduced in a timely manner.

The judgment

This is the concise ruling of the ECJ:

“The provisions laid down in Article 21 et seq. of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation.”

Some points that deserve consideration

We believe that some points of the ECJ’s reasoning invite to reflection:

.- Concerning the scope of Article 20. In paragraph 64 the ECJ establishes which decisions fall within the scope of article 20. Following the Court, it is not only the nature of the measures which may be adopted by the court - provisional, including protective, measures as opposed to judgments on the substance - which determines whether those measures may fall within the scope of Article 20 of the regulation but rather, in particular, the fact that the measures were adopted by a court whose jurisdiction is not based on another provision of that regulation. Realistically, in paragraph 65, the ECJ acknowledges that “it is not always straightforward, from reading a judgment, to make such a classification of a judgment adopted by a court for the purposes of Article 2(1) of Regulation”.

.- The meaning of the prohibition of reviewing the assessment of jurisdiction made

by a court of a Member State. See paragraph 75, “that prohibition does not preclude the possibility that a court to which a judgment is submitted which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin intended to base its jurisdiction on a provision of Regulation No 2201/2003. As stated by the Advocate General in point 139 of her Opinion, to make such a determination is not to review the jurisdiction of the court of origin but merely to ascertain the basis on which that court considered itself competent.” I find it difficult not to see this as examining the grounds of jurisdiction -although not in order to make a verdict on the recognition of the foreign judgment.

.- With regard to the system of recognition of the measures adopted under Article 20: “(...) it must be held that, as the Advocate General stated in points 172 to 175 of her Opinion, the system of recognition and enforcement provided for by Regulation No 2201/2003 is not applicable to measures which fall within the scope of Article 20 of that regulation.” The ECJ leans on the Borrás Report to the Brussels II Convention, reminding that Article 20(1) of Regulation 2201/2003 has its origins in Article 12 of Regulation No 1347/2000, which is a restatement of Article 12 of the Brussels II convention. The ECJ avoids, however, the differences between both Regulations.

.- On the possibility of recognizing provisional measures taken under Article 20 according to another system of recognition see paragraph 92, “The fact that measures falling within the scope of Article 20 of Regulation No 2201/2003 do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State, as was stated by the Advocate General in point 176 of her Opinion. Other international instruments or other national legislation may be used, in a way that is compatible with the Regulation.” I wish the ECJ had explained this a little bit more.

.- Finally, see the ECJ comments on the domestic system of appeal when used to discuss international jurisdiction. More specifically, the ECJ seems to qualify the Spanish provisions as unsuitable in an international (community) context. To endorse this view the ECJ points out to the primacy of EU law over national law, and reminds the obligation to revise or interpret national law to ensure its conformity. That gives us Spaniards (at least) something to think about.

