Article 24 Brussels I, abuse of proceedings and Article 6 ECHR

In an interesting case concerning jurisdiction in a maintenance case, the Dutch Supreme Court – clearly doing justice in the individual case – ruled that jurisdiction may be based on Article 24 Brussels I in spite of the respondent contesting jurisdiction (LJN BL3651, Hoge Raad, 09/01115, 7 May 2010, *NJ* 2010, 556 note Th.M. de Boer). It considered that in this particular case contesting jurisdiction constituted abuse of proceedings. It upheld the decision by the Court of Appeal that considered that declining jurisdiction would constitute a violation of the right of access to justice guaranteed by Article 6 ECHR since it would make it impossible for the claimant to have the case examined on the substance.

The facts that led to this ruling are as follows. Parties, ex spouses, both have the Dutch nationality but are domiciled in Belgium. In 2001 they obtained a divorce in the Netherlands. The District court also awarded maintenance for the (ex-) wife and their three children, but in appeal this decision was reversed due to lack of resources of the husband. In 2003, the woman turns to the Justice of the Peace in Zelzate, Belgium, again requesting maintenance (€ 1000 per child and € 3.500 for herself per month). The man argues that not the Belgian, but the Dutch court has jurisdiction. The Justice of the Peace accepts jurisdiction, but does not award the maintenance. The woman lodges an appeal at the Court of First Instance (District Court) in Ghent, Belgium. The man again contests jurisdiction of the Belgian court, this time successfully. The court in Ghent declines jurisdiction, considering that Article 6 of the Belgian-Dutch Enforcement Convention of 1925 (!) confers jurisdiction upon the Dutch court since the maintenance is connected to a divorce obtained in the Netherlands. It refers the case to the District Court in The Hague, Netherlands.

In The Hague court – meanwhile we are in 2006 – again the man invokes the exception of jurisdiction, now arguing that it is *not* the Dutch court, but the *Belgian* court that has jurisdiction pursuant to the Brussels I Regulation. The District court, however, accepts jurisdiction (incorrectly) considering that the Belgian judgment regarding jurisdiction is to be recognized, and awards part of the maintenance considering that the man does have sufficient resources after all (€ 193,31 per child and € 1.691,43 for the ex-spouse per month). The man lodges

an appeal, once again contesting jurisdiction of the Dutch court. The Court of Appeal correctly concludes that the Brussels I Regulation applies (and not the Belgian-Dutch Enforcement Convention, see Art. 69). It considers that the Dutch court does not have jurisdiction pursuant to Art. 2 or 5(2) Brussels I (the ex-spouses are domiciled in Belgium and it concerns an independent maintenance claim), and that only Art. 24 on tacit submission can serve as a basis for jurisdiction.

It is under these circumstances that the Court of Appeal considers that the man contested jurisdiction of the Belgian court, arguing that the Dutch court had jurisdiction, but when the case was transferred to the Netherlands, changed his position without a valid reason, contesting jurisdiction of the Dutch court. This constitutes abuse of proceedings under Dutch law. Where the Dutch court would decline jurisdiction, the wife would not have access to court to have her claim decided on the merits. As mentioned above, the Supreme Court ruled that the Court of Appeal under these circumstances rightfully based its jurisdiction on Art. 24 Brussels I.

Though there may be a little tension (?) with the generally rigid approach of the ECJ in relation to the Brussels I Regulation, denying arguments based on abuse of proceedings (such as in the Gasser case), I believe this Dutch judgment to be the only just solution in this case.