Recent ECJ Judgment and References on Brussels I and Brussels II bis

I. Judgment on Brussels II *bis*

On 23 December 2009, the ECJ delivered its judgment in case C-403/09 PPU (Jasna Deticek v Maurizio Squeglia).

The case, which was decided under the urgent preliminary ruling procedure, concerns the interpretation of Art. 20 Brussels II *bis* Regulation.

The referring Slovenian court asked the ECJ whether a court of a Member State has jurisdiction under Art. 20 Brussels II *bis* to take protective measures if a court of another Member State having jurisdiction as to the substance on the basis of the Regulation has already taken a protective measure which has been declared enforceable in the first Member State.

Further, the referring court asked whether – in case of an affirmative answer regarding the first question – protective measures can be taken under Art. 20 Brussels II *bis* pursuant to national law amending or rendering inoperative a final and enforceable protective measure taken by a Member State court having jurisdiction as to the substance.

In its reasoning, the Court referred in particular to the three cumulative conditions which have to be satisfied to take provisional or protective measures under Art. 20 Brussels II *bis*: The measures concerned have to be urgent, must be taken in respect of persons or assests in the Member State where the courts are situated and must be provisional (para. 39 of the judgment).

According to the Court, already the first requirement, urgency, is not fulfilled since the change of circumstances resulted from the child's integration into a new environment. The Court held in this respect (para. 47): "If a change of circumstances resulting from a gradual process such as the child's integration into a new environment were enough, under Article 20 (1) of Regulation No 2201/2003, to entitle a court not having jurisdiction as to the substance to adopt a

provisional measure amending the measures in matters of parental responsibility taken by the court with jurisdiction as to the substance, any delay in the enforcement procedure in the requested Member State would contribute to creating the conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. Such an interpretation would undermine the very principles on which that regulation is based."

As a further argument, the Court emphasised *inter alia* that the change in the child's circumstances resulted from a wrongful removal. According to the court, "the recognition of a situation of urgency in a case such as the present one would run counter to the aim of Regulation No. 2201/2003 to deter the wrongful removal or retention of children between Member States […]." (para. 49)

Thus, the Court held:

> *Article 20 [Brussels II bis] must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment had been declared enforceable in the territory of the former Member State.*

II. References

1. Reference on Art. 1 Brussels I Regulation (C-406/09; *Realchemie Nederland BV v. Bayer CropScience AG*)

There is a new reference for a preliminary ruling on the interpretation of the term "civil and commercial matters" which has been referred to the ECJ by the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) asking *inter alia* the following question:

> *Is the phrase 'civil and commercial matters' in Article 1 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in*

civil and commercial matters to be interpreted in such a way that this regulation applies also to the recognition and enforcement of an order for payment of 'Ordnungsgeld' (an administrative fine) pursuant to Paragraph 890 of the German Code of Civil Procedure (Zivilprozessordnung)?

"Ordnungsgeld"-decisions are contempt fines issued by German courts on the basis of § 890 ZPO. The State is responsible for enforcing these decisions: it collects the fine ex officio through its own public authorities, the fine is to be paid to the State ('Gerichtskasse'). Therefore the question whether these decisions can be enforced under the Brussels Convention/Regulation is controversial: The Higher Regional Court of Munich has refused to confirm a contempt fine as a European Enforcement Order in a recent decision based on the argument that the judgment creditor had no legitimate interest to apply for this confirmation since under German law the responsibility for the enforcement was attributed exclusively to the State (OLG München, 3 December 2008 – 6 W 1956/08 (the case is now pending before the Bundesgerichtshof (I ZB 116/08); see with regard to this case Giebel in IPRax 2009, p. 324 et seq.).

Many thanks to Sierd J. Schaafsma (The Hague).

2. Reference on Art. 5 No. 3 Brussels I and Art. 3 e-commerce-Directive

The German Federal Court of Justice (Bundesgerichtshof) referred with decision of 10 November (VI ZR 217/08) questions on the interpretation of Art. 5 No. 3 Brussels I Regulation as well as Art. 3 e-commerce-Directive to the ECJ for a preliminary ruling.

The case concerns an action for an injunction brought in Germany based on an impending threat of violation of personal rights due to publications on a website. The defendant, the operator of the website in question, is established in Austria. Thus, the question arose whether German courts are competent to hear the case under the Brussels I Regulation and therefore how the term "place where the harmful event may occur" in Art. 5 No. 3 Brussels I has to be interpreted.

Since the Bundesgerichtshof had doubts which requirements have to be satisfied for establishing jurisdiction on the basis of Art. 5 No. 3 Brussels I under the circumstances of the present case and – should German courts be competent to

hear the case – whether German law is applicable, the Bundesgerichtshof referred the **following questions** to the ECJ for a preliminary ruling:

1. Is the phrase "place where the harmful event may occur" in Art. 5 No.3 Brussels I in case of (impending) violations of personal rights due to the content of an internet website to be interpreted as meaning

that the person concerned can bring an action for an injunction against the operator of the website before the courts of every Member State where the website can be accessed regardless of the Member State the operator is established

or

does the jurisdiction of the courts of a Member State where the operator of the website is not established require a particular connecting link either between the forum and the content in question or the website itself which goes beyond the mere technical accessibility of the website?

2. In case such a particular connecting link to the forum is required:

Which criteria are decisive for establishing this link?

Is it decisive whether the website is directed – according to the operator's purpose – (also) at the internet users in the forum or is it sufficient if the accessible information shows a connection to the forum in this sense that, according to the circumstances of the specific case, a conflict of interests – namely the claimant's interest in the respect of his personal rights and the operator's interest in the design of his website as well as in reporting – could actually have arisen or may actually arise in the forum state?

Is it decisive for the determination of the connecting link to the forum how often the website has been accessed in this Member State?

3. In case a particular connecting link to the forum is not necessary for establishing jurisdiction or in case it is sufficient for establishing this link that the information in question shows a connection to the forum in this sense that a conflict of interests could actually have arisen or may arise in the forum state according to the circumstances of the specific case in particular due to the content of the website and the assumption of a link to the forum does not require

the ascertainment that the website has been accessed in the forum in a minimum number of cases:

Are Art. 3 (1) and (2) Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) to be interpreted as meaning

that these rules have the character of choice of law rules in this sense that they declare also with regard to civil law – by overriding national choice of law rules – the law of the country of origin to be exclusively applicable

or

do these rules constitute a corrective at the level of substantive law modifying the substantive result of the law applicable according to national choice of law rules and reducing this result to the requirements of the country of origin?

In case Art. 3 (1) and (2) Directive on electronic commerce have to be interpreted as choice of law rules:

Do the mentioned rules declare only the substantive law rules of the country of origin to be applicable or do they also refer to the private international law rules of the country of origin leading to the result that a renvoi to the law of the country of destination is possible?

(Own approximate translation from the German referring decision.)

The case is pending at the ECJ under C-509/09; the (German) text of the referring decision can be found at the website of the Bundesgerichtshof.