AG Campos Sánchez-Bordona on multiple places of (habitual) residence under the Brussels II bis Regulation in the case IB, C-289/20

This Thursday AG Campos Sánchez-Bordona delivered his Opinion in the case IB, C-289/20. It is another request for a preliminary ruling addressing the issue of multiple places of residence. The recent take on this issue concerned the framework established by the Succession Regulation. In its judgment in the case E.E., C-80/19, the Court of Justice held the last habitual residence of the deceased, within the meaning of that regulation, must be established by the authority dealing with the succession in only one of the Member States.

In the case IB, C-289/20, the Court is invited to interpret the Brussels II bis Regulation in the context of a request for a preliminary ruling originating from the proceedings for a divorce.

The preliminary question reads as follows:

> *Where, as in the present case, it is apparent from the factual circumstances that one of the spouses divides his time between two Member States, is it permissible to conclude, in accordance with and for the purposes of the application of Article 3 of [the Brussels II bis Regulation] that he or she is habitually resident in two Member States, such that, if the conditions listed in that article are met in two Member States, the courts of those two States have equal jurisdiction to rule on the divorce?*

In his Opinion, AG proposes to the Court to consider that under the Brussels II bis Regulation a spouse may have only one place of habitual residence (points 83 et 90). If, in fact, as the preliminary question presupposes, a spouse divides his life between two Member States, it has to be considered that he or she does not have

a place of habitual residence within the meaning of Article 3 of the Regulation (point 98). If that leads ultimately to the situation where no forum within the EU can hear the case for a divorce, in order to remedy situations of denial of justice, the jurisdiction might be exceptionally attributed to the courts of one of the Member State where the spouse resides (points 100 and 101).

Instead of providing a summary of the elaborate analysis offered by the Opinion, it seems more meaningful to highlight some of its points.

At the outset, AG observes that the entry into force of the Regulation 2019/1111 will not affect the rules on jurisdiction of relevance for a divorce already provided for in the Brussels II bis Regulation (point 27).

He also seems to reject the idea that notion of 'habitual residence' should necessarily receive the same meaning among the EU private international law instruments that elevate the place of habitual residence to the role of a connecting factor (point 39). Scepticism regarding this idea is expressed on several occasions (see, for instance, point 50).

The subjective factor that corresponds to the intention of a spouse might come into play when identifying the place of habitual residence. According to AG, the criteria that normally characterize "habitual residence" may be supplemented – or even replaced – by the intentions of a spouse (point 66).

Under the Brussels II bis Regulation a spouse may have only one place of habitual residence and multiple places of "non-habitual" residence which are, however, irrelevant for the purposes of Article 3 (points 83 et 90).

Ultimately, where no court has jurisdiction pursuant to the Brussels II bis Regulation, including the national rules of jurisdiction that may be of relevance under Article 7 of the Regulation (residual jurisdiction), the courts of one of the Member States where the spouse (non-habitually) resides may exercise jurisdiction in order to remedy situations of denial of justice (points 100 and 101). This consideration seems to draw inspiration from the doctrine of the forum of necessity, even though this notion itself does not appear in the Opinion. Besides, at least to a certain extent the terms employed here seem to echo the wording of Recital 16 of the Maintenance Regulation and Recital 31 of the Succession Regulation, which contrary to the Brussels II bis Regulation explicitly provide for a forum of necessity. In a similar vein, the reference to the "deprivation of the

judicial protection within the Union" at point 99 ("ne priverait pas nécessairement les parties de la protection juridictionnelle au sein de l'Union") may make one think of Article 47 of the Charter.

The Opinion can be consulted here (no English version yet).