Brussels IIa, habitual residence and forum necessitatis

Even after Brussels IIb's coming into force (that we reported on last week), the Court of Justice of the EU issued its judgment in case C-501/20. The case remains relevant, also under the new Regulation. The Court had the opportunity to not only add to its case law on habitual residence, but also to clarify three other matters: first, the Regulation's and the Maintenance Regulation's relation to the Vienna Convention on the Law of Treaties, specifically with regard to diplomatic immunity; second, the Brussels IIa's relation to domestic bases of jurisdiction; and third (and related to the second point), the *forum necessitatis.*

The case concerned the divorce and related disputes between a Spanish national and a Portuguese national. The couple had two children, who had dual Spanish-Portuguese nationality. The family lived first in Guinea-Bissau and later in Togo. The parents were posted at these places as EU delegates of the European Commission. They separated factually while still living in Togo. The mother then brought divorce proceedings, including the issues of parental responsibility and maintenance, in Spain. This court had to decide on its jurisdiction, which raised various issues.

Concerning the **habitual residence**, which is the first stop to determine jurisdiction (Art. 3 and 8 of Brussels IIa and Art. 3 of the Maintenance Regulation), the Court reiterated the two main factors to determine the habitual residence of adults: "first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, second, a presence which is sufficiently stable in the Member State concerned" (para 44, referring to its case C-289/20 interpreting the Rome III Regulation on the law applicable to divorce proceedings). The Court added that the definition of habitual residence in the Brussels IIa and Maintenance Regulations should be "guided by the same principles and characterised by the same elements" (para 53). (The Court here did not refer to Rome III, but the same is true as we know from previous case law.) Both factors of habitual residence were absent in this case. First, there was no intention to move back to Spain. Second, the parents were physically absent from Spain for this period (except for the birth of the children and periods of leave). Therefore, they could not have been habitually resident in

this Member State.

Concerning the habitual residence of the children, the Court referred to the factors in its previous case law, including the duration, regularity, conditions and reasons for the child's stay, the child's nationality, school and family and social relationships (para 73). To establish a habitual residence, it is essential that the child is physically present in this Member State (para 75). The mother's nationality and the pace where she lived prior to her marriage (and prior to the child's birth) are not relevant (para 76). The child's nationality and the place where they are born, are relevant but not decisive (para 77).

Any **diplomatic immunity** cannot change this conclusion, as the Spanish court does not have jurisdiction (paras 61 and following). Even though Recital 14 states that "[t]his Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities," this refers to a situation where a court in a EU Member State would have jurisdiction but cannot exercise it due to diplomatic immunity. In short, the existence of diplomatic immunity cannot grant jurisdiction.

The **residual jurisdiction** under Arts 6 and 7 of Brussels IIa, and specifically the situation that factual scenario that arose in this case, have long caused confusion. The legislator attempted to rectify this in Brussels IIb (Art. 6). The problem was that Art. 6 stated that if a spouse who is habitually resident in or a national of a Member State, may only be sued on the bases of jurisdiction in the Regulation, while Art. 7 referred to domestic bases of jurisdiction where no court in an EU Member State has jurisdiction. So, what is to be done where a spouse is a national of an EU Member State (Portugal in this instance) but there are no available bases of jurisdiction in the Regulation (as neither of the spouses are habitually resident in the EU and they do not have a common EU nationality)? Which provision should prevail? The Court found that Art. 7, and thus domestic bases of jurisdiction, cannot be used in this case; only the residual bases of jurisdiction of the Member State of the defendant's nationality can come into play (Portugal in this instance). See also the Opinion of Advocate-General Szpunar.

The same contradiction does not exist in the case of jurisdiction over children: Art. 14 simply states that where no court in a Member State has jurisdiction on the basis of the Regulation, domestic jurisdiction rules apply. Thus, Spanish residual bases of jurisdiction could be used concerning the parental

responsibility.

The Maintenance Regulation does not have such reference to domestic bases of jurisdiction, but contains a complete harmonisation of jurisdiction, for all situations. It is in this context that there is also a ***forum necessitatis***: if no court in a Member State has jurisdiction and it would be impossible or cannot reasonably expected of the parties to bring the proceedings in the third State to which the dispute is connected, a court in a Member State may, on an exceptional basis, hear the case (Art. 7). The Court explained that this can only come into play if no court in a Member State has jurisdiction, also not on the basis of the link of the case to the status or parental responsibility, and also not on the basis of the choice of the parties (para 101 and following). If this is the case, it is not required that the parties first attempt to institute proceedings in the third State, but the court "cannot rely solely on general circumstances relating to deficiencies in the judicial system of the third State, without analysing the consequences that those circumstances might have for the individual case" (para 112).