German Federal Supreme Court refers questions to the CJEU relating to the concept of “habitual residence” under Art. 8 (a), (b) of the Rome III Regulation

In its decision of 20 December 2023 (Case No. XII ZB 117/23), the German Federal Supreme Court has referred three questions to the CJEU relating to the interpretation of Art. 8 (a), (b) of the Rome III Regulation. The following is a convenience translation of the German press release:

Facts of the Case:

The spouses, German nationals, married in 1989. Initially, they lived together in Berlin since 2006. In June 2017 , the couple deregistered their domicile from the German population register (*Melderegister*) and moved to Stockholm, where the husband was employed at the German embassy. They nonetheless maintained their rented apartment in Berlin so that they could return as soon as the husband’s posting in Sweden was completed. However, when in September 2019 the husband was once again transferred to the embassy in Russia, the parties changed their place of residence from Stockholm straight to Moscow, where the couple lived in a flat on the embassy compound. Both spouses hold diplomatic passports.

In January 2020, the wife travelled to Berlin to undergo medical surgery, but subsequently returned in February. According to the husband, the couple informed their two (adult) children in March 2021 that they had decided to file for divorce. The ensuing separation at the end of May 2021 resulted in the wife returning to the flat in Berlin and the husband continuing to live in the flat on the Moscow embassy premises.

Procedural History:

In July 2021, the husband filed an application for divorce with the German local court (*Amtsgericht Kreuzberg*), which the wife at the time successfully contested on the grounds that the year of separation (*Trennungsjahr*) mandatory under German law had not yet passed, as the separation had taken place in May 2021 at the earliest.

Following the husband's appeal, the Berlin regional court (*Kammergericht*) nethertheless divorced the marriage in accordance with Russian substantive law. In its reasoning, the court stated that (in the absence of a choice of law according to Art. 5) the applicable law was governed by Art. 8 (b) of the Rome III Regulation, because it could be assumed that the last common habitual residence in Moscow did not end until the wife's depature to Germany in May 2021, i.e. less than one year beforce the court was first seised as required under Art. 8 lit. b) of the Rome III Regulation.

Subsequently, the wife lodged an appeal on points of law to the Federal Supreme Court (*Bundesgerichtshof*) seeking a divorce under German substantive law.

Questions:

The German Federal Supreme Court has referred to the CJEU the following three questions: According to which criteria is the habitual residence of the spouses to be determined within the meaning of Art. 8 lit. a) and lit. b) Rome III Regulation, in particular:

1. Does the posting as diplomat affect the assumption of habitual residence in the receiving State or does it even preclude such an assumption?

2. Is it necessary that the physical presence of the spouses in a State must have been of a certain duration before habitual residence can be assumed to be established?

3. Does the establishment of habitual residence require a certain degree of social and family integration in the state concerned?

Implications

In the ideal case, the expected decision of the ECJ will provide for legal certainty for families and people employed in the diplomatic service and similar professions. In addition, the decision could also, more generally, bring about

further insights into the concept of habitual residence in EU secondary law and thus also be of interest with regard to the related European Matrimonial Property Regulation/European Registered Partnership Regulation, Brussels IIter Regulation and possibly also the European Succession Regulation.

The Press Release (available in German only) for the decision can be found here.