

TOPIC: CROSS-BORDER DIVORCE

Hans-Heinrich Vogel

Case study

A German couple marries in Munich with a marriage contract. The husband has just obtained a job at the European Central Bank and the couple moves to Frankfurt. Following a promotion, the husband is transferred to Stockholm to the National Bank of Sweden. Unfortunately, the couple's relationship is not running smoothly and they divorce.

- 1) In which country will the divorce be declared?
- 2) Which law is applicable to the divorce?
- 3) What will happen regarding liquidation of the matrimonial property regime?

EU-Regulations

Regulation Brussels I

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Regulation Brussels II*bis*

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

Swedish Statutes

Act of 1904

Act on some International Marriage and Guardianship Relationships (SFS 1904:26 s. 1)

Act of 1990

Act on International Questions concerning Property Relations between Spouses (SFS 1990:272)

Case Law

EC Court of Justice, Judgment 29.11.2007, C-68/07 Sundelind Lopez

Swedish Literature

Michael Bogdan (ed.): Swedish Law in the New Millennium. Stockholm 2000.

– : Concise Introduction to EU Private International Law. Groningen 2006.

– : Svensk internationell privat- och processrätt. 7th ed. Stockholm 2008.

Karnov – Svensk lagsamling med kommentarer. 2008/09. Vol. 1–3, Stockholm 2008.

1 WITHOUT MARRIAGE CONTRACT

1.1 *International jurisdiction*

1.1.1 Divorce proceedings

Regulation Brussels IIa) is applicable

According to
Article 3 Paragraph (1) point a)

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State
(a) in whose territory:

second indent:

– the spouses are last habitually resident

German courts have jurisdiction (if the wife moved to Sweden together with the husband, the result will be the same according to Article 3 Paragraph (1) point b))

or

Article 3 Paragraph (1) point a) third, fourth or fifth indent

– the respondent is habitually resident, or
– in the event of a joint application, either of the spouses is habitually resident, or
– the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made,

Swedish courts have jurisdiction

(concerning the fifth indent: if the wife remained in Germany, Swedish jurisdiction can be dependent on the position of the party as applicant or respondent and/or the length of time the husband has resided in Sweden)

(National Swedish provisions on jurisdiction in Chapter 3 Paragraph 2 of the Act of 1904 are not applicable; cf. EC Court of Justice, Judgment 29.11.2007, C-68/07 Sundelind Lopez.)

1.1.2 Litigation concerning matrimonial property

There are no provisions on this matter in *EU Regulations* Brussels I or Brussels IIbis.

In *Swedish* law there are provisions in the Act of 1990.

Swedish courts have jurisdiction according to

Paragraph 2 if

- No. 1: the matter is ancillary to divorce proceedings in Sweden,
- No. 2: respondent has residence in Sweden,
- No. 3: applicant has residence in Sweden and Swedish law is applicable according to Paragraphs 3 or 4 concerning property relations between the spouses,
- No. 4: the matter concerns property in Sweden, or
- No. 5: respondent in ongoing proceedings has accepted that the court deals with the substance of the matter or the respondent has entered a defence without objecting to the court's jurisdiction.

Eventually, remarks concerning

1.1.3 Versorgungsausgleich

Unknown in Swedish law. Therefore lack of provisions and general uncertainty.

1.1.4 Maintenance

The provisions of Regulation Brussels I on jurisdiction are applicable.

Noteworthy are Articles 2 and 5 Paragraph (2).

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. ...
2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

1.1.5 Custody

The provisions of Regulation Brussels II*bis* on jurisdiction are applicable.

Noteworthy are Articles 8 and 12 of Section 2 on *Parental responsibility*

Article 8

General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 12

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

...

1.2 Applicable law

1.2.1 Decision on divorce

Chapter 3 Paragraph 4 of the Act of 1904

Section 1

Generally Swedish law.

Sections 2 and 3

There are two exceptions, if both spouses are foreigners and where the defendant spouse is not amenable to divorce.

Firstly, foreign law will be considered when neither of the spouses has been domiciled in Sweden for at least one year. And no divorce will be granted unless there is a recognised ground for dissolution under the national law of at least one of the spouses.

Secondly, foreign law will be considered even if the one-year domicile requirement is met if there is no ground for dissolution under the national law of the defendant spouse and if the interests of that spouse or of the couple's children provide special reason for refusing divorce.

1.2.2 Matrimonial property

Paragraph 4 of the Act of 1990 provides:

In the absence of a choice of law agreement, the law of the country where the parties established domicile at the time of marriage will apply.

If they had later established domicile in another country, the law of that country will apply if they have resided there for at least two years. The two-year residence requirement will however be dispensed if both parties, at some earlier point in the marriage, had been domiciled in that country or if they are both citizens there. In such cases the law of that country will apply as soon as the spouses have established domicile there.

Eventually: Remarks concerning

1.2.3 Versorgungsausgleich

Unknown in Swedish law. Therefore lack of provisions and general uncertainty.

as well as – with regard to Chapter 3 Paragraph 6 of the Act of 1904 – according to the discretion of the court

1.2.4 Maintenance

In principle *lex domicilii* of the maintenance creditor

1.2.5 Custody

In principle *lex domicilii* of the child

Noteworthy involvement (jurisdiction) of the Swedish Social Insurance Agency and the Social Welfare Committee of the municipality.

2 WITH MARRIAGE CONTRACT

2.1. International jurisdiction

2.1.1 Divorce proceedings

Regulation Brussels II*bis* is applicable.

No prorogation is possible.

2.1.2 Litigation concerning matrimonial property

Neither EU Regulations nor the Swedish Act of 1990 permit prorogation. The provisions on international jurisdiction in Paragraph 2 of the Act of 1990 remain applicable.

2.2 Applicable law

2.2.1 Divorce

There is no possibility to choose the law.

2.2.2 Matrimonial property

Paragraph 3 of the Swedish Act of 1990 provides that spouses have a statutory right to contract on the law of the country that is to govern their property relations, provided they choose the law of a country in which at least one of them was domiciled or a citizen at the time of contract.

If there is no choice of any applicable law by agreement of the spouses, Paragraph 4 Section 1 of the Act of 1990 provides that the law of the state is applicable, in which the spouses established their domicile at the time of their marriage.

Finally, Paragraph 5 of the same Act, provides that property agreements between spouses will be valid, if concluded according to the law that applied to the spouses' property relations at the time of such agreement.

Eventually: Remarks concerning

2.2.3 Versorgungsausgleich

Unknown in Swedish law. Potential problems under EU law.

2.2.4 Maintenance

Agreement on the choice of law probably impossible, if parties to proceedings are not in agreement with regard to the substance of the maintenance matter.

2.2.5 Custody

Agreement on the choice of law impossible.

Noteworthy involvement (jurisdiction) of the Swedish Social Insurance Agency and the Social Welfare Committee of the municipality.

ANSWERS – FROM THE SWEDISH POINT OF VIEW

1) In which country will the divorce be declared?

The divorce can be declared in Sweden

- if the wife unilaterally applies for divorce and Sweden is the country where the husband/respondent is habitually resident, or
- in the event of a joint application of the spouses, and Sweden is the country in which one of the spouses (the husband) is habitually resident, or
- if the husband unilaterally applies for divorce and Sweden is the country where he is habitually resident and where he resided for at least a year immediately before the application was made,

2) Which law is applicable to the divorce?

Swedish law is applicable. A choice of the law to be applied to the divorce is not possible; i.e. neither international jurisdiction nor the applicable law can be chosen.

3) What will happen regarding liquidation of the matrimonial property regime?

Any agreement concerning matrimonial property by the spouses by means of German matrimonial contract (Ehevertrag) will in principle be recognised in Sweden as valid. This includes any agreement to apply German law. Even if there is no such agreement, however, German law would be applicable as the law of the state in which the spouses established their domicile at the time of their marriage.

It is not possible to make a choice concerning international jurisdiction.