Brussels IIbis: Jurisdiction in divorce matters

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Introduction

- Brussels II *bis*
- Regulation 2201/2003, replacing 1347/2000
- A big step, but no leap
Introduction to jurisdiction rules

- Broad; many alternatives
- No ‘formal’ choice
- Rationale
  - Time of distress
  - People and families moving
  - (Absence of unified rules on applicable law?)
Geographical scope of application

- EU Member States,
  - but not Denmark
  - Including United Kingdom and Ireland
Material scope of application

• Divorce
  – Judicial and administrative
  – Dutch *flitsscheiding*?

• Annulment of marriages

• **NOT:**
  – Marriages
  – Civil status

• (Parental responsibility)
Personal scope of application

• The headache of Articles 6 & 7

  – Article 6:
    A spouse habitually resident in or a national of an EU State (domicile for Ireland & UK) → ONLY arts 3-5

  – Article 7:
    If no EU court jurisdiction according to arts 3-5 → domestic rules on jurisdiction

  – C-68/07, *Sundekind Lopez v Lopez Lizazo*
    Regulation applies also if defendant habitually resident outside EU and no EU national
Personal scope of application (2)

- Four step analysis:
  - Does the forum have jurisdiction under Brussels IIbis?
  - If not, does a court in another EU Member State have jurisdiction under Brussels IIbis?
  - If not, defendant’s nationality and hab res?
  - Residual rules: national law
Jurisdiction rules: Art 3

1. Habitual residence of the spouses
2. Last habitual residence if one of spouses still lives there
3. Habitual residence of the defendant
4. If joint application: habitual residence of either of spouses
5. Habitual residence of plaintiff if he/she resided there for a year prior to application
Jurisdiction rules: Art 3 (2)

6. Habitual residence of plaintiff if he/she resided there for 6 months prior to application AND had nationality or domicile (Ireland and UK)

7. Common nationality or domicile (Ireland and UK)
Jurisdiction rules: Arts 4 & 5

• **Article 4:**
  – If court has jurisdiction according to Art 3, also to hear counter-claim

• **Article 5:**
  – Converting of legal separation into divorce
Provisional measures

• Article 20:
  – In urgent cases
  – Regulation *does not prevent* provisional (& protective) measures available under national law, even if courts of another EU Member State has jurisdiction on substance
  – Cease to apply when Member State court with jurisdiction takes measures
  – Case C-523/07, A
Lis pendens

- Straight-forward and simple:
  - First come, first served
- Also if actions not identical
  - eg divorce and legal separation
  - but not maintenance (→ Brussels I !)
- What if same day?
  - French Cass. 11 June 2008
Amendments that were not enacted

• Brussels IIter or Rome III?
  – Rules on applicable law
  – Jurisdiction rules amended:
    • Limited choice of court
    • Deletion of Article 6
    • Deletion of reference to residual national rules; but enactment of one residual rule

• Not for the moment
Unregulated… and problematic

- The nationality issue
  - and dual nationality: C-168/08, Hadadi, pending
- Definition of marriage
- Same-sex couples
- Registered partners
- Civil status