

# **The jurisdiction and the applicable law to maintenance obligations in the light of Regulation 4/2009.**

## **Introduction**

The EU has a limited role in family law matters. Each individual member state has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters. The role of the EU is mainly concerned with ensuring that decisions made in one country can be implemented in another. It also has a role in trying to establish which country has jurisdiction to hear a particular case.

Expression referring to the previous speakers I would like to discuss issues related to maintenance obligations with particular emphasis on jurisdiction and applicable law.

I will discuss **council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.**

The free movement of families within the European Union has brought the need for ways of enforcing maintenance payments across international borders sharply into focus. The EU aims to provide an efficient system for enforcement of maintenance obligations in all 27 member states by providing that they are *directly enforceable* in Family Proceedings Courts through the introduction of Maintenance Regulation 4/2009.

The Regulation covers cross-border maintenance applications arising from family relationships, removes the requirement that although one party was habitually resident in a Member State. It establishes common rules for the entire European Union (EU) aiming to ensure recovery of maintenance claims even where the debtor or creditor is in another country.

# I. Subjective and objective scope of Regulation

The Regulation applies to:

## 1) individuals (art.2):

- **creditors** to whom maintenance is owed or who are in maintenance claims
- **debtors** who have maintenance obligations or in respect of which put forward the claim to be owed;

## 2) public institutions (ust.14 Preamble, Art. 64) as creditors;

The Regulation applies to maintenance obligations arising from a family relationship:

- parentage,
- marriage or
- affinity.

But it does not explain what is meant by the term "**maintenance obligation**". This concept, according to the Preamble, is to be interpreted in an independent manner by the national courts, but to cover all maintenance obligations arising from any family relationship and to ensure equal treatment of all creditors.

## **II. Territorial scope of Regulation.**

Regulation as a whole is applicable in relations between **the Member States of the European Union except the UK and Denmark**, in relation to which the partial.

United Kingdom has adopted the use of the Regulation as a whole beyond the provision of Article 15 of Chapter III, which forms on the Law Applicable to Maintenance Obligations and the law applicable to maintenance obligations in the UK will continue to be determined on the basis of national law rules.

Denmark adopted a regulation insofar as it amends Regulation No 44/2001, thus excluding the adjustment chapters III - on the application of the Hague Protocol of 2007 and distribution VII.

# III. Temporal scope of Regulation.

The Regulation shall apply ( art.75 and 76):

- in full to **proceedings instituted, court settlements** approved or concluded before a court and **official documents** drawn up - **from 18 June 2011** (including this day);
- to judgments given in proceedings instituted before the date of application - for the purposes of recognition and enforcement of judgments, in cases where an application for recognition and enforcement commencing on 18 June 2011;

## **Jurisdiction in matters relating to maintenance:**

1. General,
2. Resulting from the agreement between the parties,
3. Resulting from defending on the dispute,
4. Additional,
5. Forum necessitatis;

# GENERAL JURISDICTION

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graph TD; A[GENERAL JURISDICTION] --> B[1. the habitual residence of the defendant]; A --> C[2. the habitual residence of the creditor]; A --> D[3. state court proceeding for the status of a person excluding jurisdiction derived only from citizenship]; A --> E[4. state court proceedings for parental responsibility excluding jurisdiction derived only from citizenship];
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1. the habitual residence of the defendant

2. the habitual residence of the creditor

3. state court proceeding for the status of a person excluding jurisdiction derived only from citizenship

4. state court proceedings for parental responsibility excluding jurisdiction derived only from citizenship

**Jurisdiction resulting from the prorogation agreement**(art.4)- if the parties so decide:

<p>1. The court of habitual residence of the party</p>	<p>2. The court of citizenship of the party</p>	<p>3. The matters between ex-spouses:</p> <ul style="list-style-type: none"><li>a) the court having jurisdiction as to the <u>matrimonial disputes</u></li><li>b) court <u>last common habitual residence of the spouses</u> for at least one year</li></ul>
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NOTE: The contract is excluded in relation to children under 18 years of age!!!!

The conditions of contract:

1. written form or perpetuated by electronic means;
2. acceptable indication of a non-EU court but this country has to be a party of the Lugano II Convention, resulting in the use of its;
3. conditions must be met at the time of conclusion of the contract,

**Jurisdiction resulting from defending on the dispute**(art.5)

Any court except when defending on the dispute concerns the complaint of lack of jurisdiction.

Jurisdiction based on the defendant in defending on the dispute, as provided for in Article 5 of this Regulation, is - in the opinion of the Court of Justice of the EU's implicit conclusion of a jurisdiction.

**Additional Jurisdiction**(art.6):

If none of courts of Member State or the Lugano Convention has jurisdiction –



THE COURT OF COMMON CITIZENSHIP OF THE PARTIES.

**Necessary jurisdiction**(art.7) *forum necessitatis* :

If none of courts of Member State has jurisdiction and it can't be initiated or performed or it's impossible proceedings in third country



The court of the Member State

with which the dispute has **a sufficient connection**

## Jurisdiction in cases of change in the judgment of the debtor's petition (art.8)



As a rule the court of the Member State or Hague Convention of 2007 which has jurisdiction until creditor has habitual residence there.

# APPLICABLE LAW

According to art.15, chapter III of this Regulation, **the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007** on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument.

The Hague Conference on Private International Law on 23 November 2007 adopted both ***the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the “2007 Convention”)***, and the ***Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (the “Protocol”)***. The Protocol is an autonomous instrument and it is open to ratification and accession by any State, including States not party to the 2007 Convention.<sup>7</sup>

The primary purpose of the Protocol is to introduce uniform international rules for the determination of the law applicable to maintenance obligations. It was decided that making applicable law rules a part of the 2007 Convention was unrealistic due to key differences in national legal systems.

## **General rule on applicable law (art.3)**

The main applicable law rule employed by the Protocol is  
**the law of the creditor's habitual residence.**

# Special rules favouring certain creditors(art.4)

## Special rules favouring certain creditors(art.4)

The Protocol provides certain “cascading” subsidiary applicable law rules, designed to favour certain maintenance creditors. These special rules are designed to ensure that the creditor has the greatest possibility of obtaining maintenance.

The types of creditors who will benefit from these additional rules include:

1. **children** who are owed maintenance by their parents (regardless of the age of the child),
2. **any person** who has **not** attained **the age of 21 years** who is owed maintenance by persons other than parents (with the exception of maintenance obligations arising between spouses, ex-spouses and parties to a marriage which has been annulled),
3. and **parents** owed maintenance by their children;

Connecting factors:

1. the debtor habitual residence,(if the creditor has seised the competent authority of the State where the debtor has his habitual residence);
2. the debtor and creditor's common nationality;

### **Special rule with respect to spouses and ex-spouses(art.5)**

The Protocol provides a special rule for maintenance obligations between spouses, ex-spouses, and parties to a marriage which has been annulled.

Connecting factor - the court which has a closer connection with marriage than that of the creditor's habitual residence (for example, *inter alia* the spouses' habitual residence or domicile during the marriage, their nationalities...)

APPLICABLE LAW

the law of the creditor's habitual residence (in accordance with the general rule laid down in art.3)



if one of the parties objects



the last common habitual residence of the spouses (if the court has closer connection with marriage)

## **Choice of the applicable law by the parties(art.7-8)**

The Protocol includes novel features that enshrine the possibility for the parties, with some restrictions, to choose the applicable law to maintenance obligations.

1. Firstly, parties are permitted to make agreements designating the law applicable to maintenance obligation at any time
2. Secondly, parties are only permitted to designate the law of any State of :
  - which either party is **a national**,
  - **the habitual residence** of either party, or
  - **the law** previously chosen or actually applied to their **property regime** or to their **divorce or legal separation**

Choice of law agreements covering maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties is not in a position to protect his or her interest, are prohibited.

The Protocol also requires that parties to an agreement on applicable law must be “fully informed and aware” of the consequences of their designation. Otherwise a court or authority seized may set aside the application.

## **Public bodies**

The Protocol provides that the right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject.

## CONCLUSION

**Thanking you** for your attention I would like to emphasize that I am very happy that I had the pleasure to lead this lecture, and that our work together will be a part of building an area of freedom, security and justice with particular emphasis on facilitating access to justice.

