

# **Law applicable in maintenance obligations cases**

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# The law applicable to maintenance obligations

**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 (Maintenance Regulation)

# The law applicable to maintenance obligations

## Article 15

«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 law applicable to maintenance obligations**

**Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (2007 Hague Protocol)**

# 2007 Hague Protocol and its scope of application

- Material scope: (Article 1, Section 1)
- Spatial Scope: (Article 2)
- Coordination other international instruments (Articles 18 and 19)

# General rule

## Article 3:

«(1) Maintenance obligations shall be governed by the law of the State of the **habitual residence** of the **creditor**, save where this Protocol provides otherwise.

(2) In the case of a **change** in the habitual residence of the creditor, the law of the State of the **new habitual residence** shall apply as from the moment when the change occurs».

# Special rules

- A – **Article 4** - Special rules favouring certain creditors.
  
- B – **Article 5** - Special rule with respect to spouses and ex-spouses
  
- C – **Article 6** - Special rule on defence

## Article 4

«(1) The following provisions shall **apply** in the case of maintenance obligations of -

**a) parents towards their children;**

**b) persons, other than parents, towards persons who have **not** attained the age of **21** years, except for obligations arising out of the relationships referred to in Article 5; and**

**c) children towards their parents.**

## Article 4

(2) If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the **law of the forum** shall apply.

(3) Notwithstanding Article 3, if the creditor has seised the competent authority of the State where the debtor has his habitual residence, the **law of the forum shall apply**. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the **law of the State of the habitual residence of the creditor** shall apply.

(4) If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3 of this Article, to obtain maintenance from the debtor, the **law of the State of their common nationality**, if there is one, shall apply».

## Article 5

*(ex-spouses)*

«In the case of a maintenance obligation between **spouses, ex-spouses** or parties to a marriage which has been annulled, Article 3 shall not apply if **one of the parties objects** and the law of **another State**, in particular the State of their last common habitual residence, has a **closer connection** with the marriage. In such a case the law of that other State shall apply».

## Article 6

«In the case of maintenance obligations other than those arising from a parent-child relationship **towards a child** and those referred to in **Article 5**, the debtor may contest a claim from the creditor on the ground that there is no such obligation under both the law of the State of the habitual residence of the debtor and the law of the State of the common nationality of the parties, if there is one».

# Party autonomy

- **Article 7** - Designation of the law applicable for the purpose of a particular proceeding
- **Article 8** - Designation of the applicable law

# Party autonomy – Article 7

«(1) Notwithstanding Articles 3 to 6, the maintenance **creditor and debtor** for the purpose only of a particular proceeding in a given State **may expressly designate** the law of that State as applicable to a maintenance obligation.

(2) A designation made before the institution of such proceedings shall be in an **agreement, signed** by both parties, **in writing** or **recorded** in any medium, the information contained in which is accessible so as to be usable for subsequent reference».

# Party autonomy – Article 8

- (1) Notwithstanding Articles 3 to 6, the maintenance **creditor and debtor** may **at any time designate one of the following laws** as applicable to a maintenance obligation -
- a) the law of any State of which either party is a national at the time of the designation;
  - b) the law of the State of the habitual residence of either party at the time of designation;
  - c) the law designated by the parties as applicable, or the law in fact applied, to their property regime;
  - d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

## Party autonomy – Article 8

- (2) Such **agreement** shall be **in writing** or **recorded** in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.
- (3) Paragraph 1 shall **not** apply to 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.

## Party autonomy – Article 8

- (4) Notwithstanding the law designated by the parties in accordance with paragraph 1, the question of whether the **creditor can renounce** his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation.
- (5) Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall **not apply** where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

# Scope of the applicable law

## Article 11

The law applicable to the maintenance obligation **shall determine** *inter alia* -

- a) whether, to what extent and from whom the creditor may claim maintenance;
- b) the extent to which the creditor may claim retroactive maintenance;
- c) the basis for calculation of the amount of maintenance, and indexation;
- d) who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation in the proceedings;
- e) prescription or limitation periods;
- f) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in place of maintenance.

# Public policy

## Article 13

«The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum».

## Other provisions

### Article 10 - Public bodies

«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».

## Other provisions

### **Article 14 - Determining the amount of maintenance**

«Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance».

## Other provisions

### Article 12 - Exclusion of *renvoi*

«In the Protocol, the term "law" means the law in force in a State other than its choice of law rules».

## Summarising conclusions

- Habitual residence, closer connection vs (limited) party autonomy

- CJEU relevant case-law

7.06.2018, C-83/17, *KP c. LO*

20.09.2018, C-214/17, *Mölk*

## Law applicable in maintenance obligations cases

### Case study

#### FACTS

Beatriz, a Portuguese woman, and Davide, an Italian man, met in Lisbon, where both are resident and where they married in March 2010. Beatriz works as a licencing specialist in company seated in Porto, and Davide is a sports freelance reporter working for several European broadcasting companies.

In April 2015, Beatriz received an incredible job offer from a multinational company having its headquarters in Milan and they agreed to move to Italy, Davide's home country where he was able to find further useful contacts for his activity.

Married life went on happily in Milan and on 1<sup>st</sup> September 2015 Beatriz gave birth to a beautiful baby girl, Amelia.

In January 2016 Davide accepted a job offer from Eurosport to cover and report the most important cycling tour all over the world. As a consequence, he started travelling regularly all over Europe and outside the continent for longer periods, usually 2-to-4-week-periods each month from February to November.

Due to Davide's continued absence, the spouses' relation begins to deteriorate. In June 2017, tired of the situation, Beatriz asks Davide to spend separate holydays so to think over their relation and to decide next steps. On 1 July 2018, with Davide's consent, Beatriz flies to Portugal with Amelia, to spent some weeks near Porto at her parents' house. Beatriz and Davide agree to reunite the family again in their home in Milan at the end of August.

By the end of August, Beatriz informs Davide that she needs more time to understand if their relationship has come to an end. Davide agrees that she and Amelia can remain in Porto some more time, provided that such situation is intended to be only temporary and that meanwhile he can visit her daughter any time he is free. And so he does, visiting Amelia in Porto for a couple of days once a month until January 2019.

On 1 February 2019, Beatriz brings a lawsuit against Davide before the Porto court seeking for:

- divorce from his husband Davide,
- full custody over Amelia, on the ground that Davide is always travelling all over the world and cannot take daily care of their daughter,
- a periodic maintenance payment for her and
- a periodic maintenance payment for her child.

Surprised by such an action, Davide immediately seeks for legal advice from his best friend, Marco, who is a lawyer in Milan. In particular, Davide asks Marco to:

- contest the jurisdiction of the Porto court in relation to all claims (divorce, parental responsibility, maintenance obligations towards his wife and maintenance in favour of his daughter);

- start proceedings in Milan for legal separation from Beatriz and joint custody over Amelia;
- have the Italian court establish that Amelia should live alternatively one month with him, in their family home, and one month with the mother in a house of her choice in Milan, and set her maintenance accordingly, as equally shared among parents;
- contest Beatriz's entitlement to any maintenance due to fact that she earns more than him from her job.

### Related questions

- 1) How would you contest the jurisdiction of Portuguese courts over Beatriz's claims for:
  - a. divorce?
  - b. parental responsibility?
  - c. maintenance towards the spouse?
  - d. maintenance in favour of the child?
- 2) Have Italian courts jurisdiction over:
  - a. legal separation?
  - b. parental responsibility?
  - c. possible maintenance counterclaims made by Beatriz when entering her defence?
- 3) What's the relation between the proceedings possibly initiated by Davide before the Italian competent court and the ones already commenced in Portugal? In particular, what about Beatriz's claims for maintenance?
- 4) Which is the law applicable to spousal maintenance obligations?
- 5) Which is the law applicable to child maintenance obligations?

### VARIATION No. 1

Suppose that Beatriz and Davide, in 2015, immediately after Amelia's birth, drew up an agreement (made in writing and signed by both of them) providing that, in case of marriage dissolution, Italian courts should have jurisdiction to hear any claim concerning parental responsibility and maintenance issues stemming therefrom and that those courts were to apply Italian law.

Davide uses such deed in its first defence before the Portuguese court seised by Beatriz to object to its jurisdiction, and also before the Italian court he himself has seised to support his application.

### Related questions

- 6) Is the spouses agreement valid as to:
  - a. parental responsibility?

b. maintenance towards the child?

- 7) Does the agreement cover maintenance claims in favour of both the child and the spouse?
- 8) Does such agreement affect the answer given to questions No 1.b), 1.c) and 1.d)? How? Which is the court competent to hear parental responsibility, child's maintenance claim and spouse's maintenance claim?
- 9) Does such agreement affect the answer given to questions No 4 and 5? How? Which is the law applicable to child's maintenance claim and spouse's maintenance claim?

<b>LEGAL INSTRUMENT(S) TO BE APPLIED</b>
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Regulation No 4/2009

2007 Hague Protocol

## Questions with guidelines

### 1) How would you contest the jurisdiction of Portuguese courts over Beatriz's claims for:

#### a. divorce?

Art. 3, lit. a, 6<sup>th</sup> indent, Brussels IIa provides for the jurisdiction, *inter alia*, of the courts of the applicant's habitual residence if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there: Portuguese courts would have jurisdiction.

#### Possible issues to be discussed:

Change of habitual residence of the wife-applicant: is a 7-month period (1 July 2017- 1 February 2018) sufficient for her to acquire a new habitual residence? Yes, to Art. 3, lit. a, 6<sup>th</sup> indent, when the wife has the nationality of the Member State.

- does Davide's understanding that his wife and daughter's stay in Porto is only temporary prevent the establishment of Beatriz's new habitual residence in such place? No.

- Beatriz could have asked for an additional period in Porto only to make Art. 3, lit. a, 6<sup>th</sup> indent applicable to her claim → is it possible to qualify such situation as an abuse of law? In the positive, can such abuse affect the applicability of Art. 3, lit. a, 6<sup>th</sup> indent? It could be understood as an abuse of law, but that is not relevant in the applicability of Article 3.

#### b. parental responsibility?

Art. 8 Brussels IIa provides for the jurisdiction of the courts of the child's habitual residence → Italy is the State of Amelia's habitual residence (stay in Italy Sept. 2015 - June 2017 v stay in Portugal 1 July 2017 -1 February 2018): Portuguese courts do not have jurisdiction, which in turn lies with Italian courts only.

#### Possible issues to be discussed:

- Change of the child's habitual residence → is a 7-month period sufficient for a 2-year-old child to acquire a new habitual residence? Does her parents' intention to move on a stable basis (maybe her mother) / only temporary (her father) in another country play any role? fragmentation of EU PIL rules in family matters leading to fragmentation of proceedings. The displacement of the child to Portugal was made on the assumption that it would be temporary, with agreement of both parents – there was not a change of the habitual residence of the child.
- Fragmentation of EU PIL rules → separation of family proceedings on different claims

- Does Art 12 on prorogation of jurisdiction apply to the case at stake? No, art. 12 demands that 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, which does not seem to be the case.
- Is Art 15 on transfer of case to better placed court applicable in the case at stake? It could be possible, filled the requirement of the particular connection of the child to Portugal and if it is considered to be the best interests of the child

### **c. maintenance towards the spouse?**

Art. 3 lit. *c* reg. 4/09 provides that as jurisdiction the court which has jurisdiction to entertain proceedings concerning the status of a person (divorce) if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties: Portuguese courts would have jurisdiction.

#### Possible issues to be discussed:

- coordination with B2a: in matrimonial matters jurisdiction based solely in jurisdiction are grounded on art. 3 (b) of Brussels IIa.
- coordination between grounds for autonomous and ancillary maintenance claims under Art 3 reg. 4/09. They are alternative (there is no hierarchy). However, the two ancillary provisions are mutually exclusive (*c* and *d*).
- notion of ancillary claim under Art 3 lit. *c* reg. 4/09. Actions that are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; best position of the court; best interest of the creditor.

### **d. maintenance in favour of the child?**

Art. 3 lit. *d* reg. 4/09 provides that as jurisdiction the court the court which has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties: Italian courts (Portuguese courts would not have jurisdiction).

#### Possible issues to be discussed:

- coordination between grounds for autonomous and ancillary maintenance claims under Art 3 reg. 4/09. In parental responsibility jurisdiction based solely in jurisdiction are grounded on art. 3 b) + art. 12 section 1 Brussels IIa; and 12 section 3 Brussels IIa.
- notion of ancillary claim under Art 3 lit. and *d* reg. 4/09. Actions that are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; best position of the court; best interest of the creditor.

- fragmentation of EU PIL rules in family matters leading to fragmentation of proceedings. Art. 13 requires that the action is related, and where it is it gives some form of discretion to the court second seized do decide where to stay proceedings or not.

## 2) Have Italian courts jurisdiction over:

### a. legal separation?

Art. 3, lit. a, 2<sup>th</sup> indent, Brussels IIa could provide jurisdiction to the Italian courts (the spouses were last habitually resident, insofar as one of them still resides there), however Beatriz already brought a lawsuit in Portugal seeking the divorce. See answer (3).

#### Possible issues to be discussed:

- no hierarchy among grounds of jurisdiction provided for by Art. 3 Brussels IIa. No hierarchy, but there is a *lis pendens* rule.
- possible *forum shopping* under Art 3 Brussels IIa → time/party's promptness to act becomes crucial! That's the reason why Art. 3 is accused of encouraging the rush to the courts – *qui prior est in tempore potior est iure*.

### b. parental responsibility?

Beatriz already brought a lawsuit in Portugal regarding the parental responsibilities, but the Portuguese court shall decline jurisdiction.

Art. 8 Brussels IIa provides for the jurisdiction of the courts of the child's habitual residence → Italy is the State of Amelia's habitual residence (stay in Italy Sept. 2015 - June 2017 v stay in Portugal 1 July 2017 -1 February 2018): Portuguese courts do not have jurisdiction, which in turn lies with Italian courts only.

#### Possible issues to be discussed:

Habitual residence of the child. Is in Italy

### c. possible maintenance counterclaims made by Beatriz when entering her defence?

Art. 5<sup>o</sup>: a court of a Member State before which a defendant enters an appearance shall have jurisdiction, unless where appearance was entered to contest the jurisdiction - consent-based jurisdiction. If the appearance had the objective of contesting the jurisdiction, art. 5 is not relevant. If the appearance did not had the objective of contesting the jurisdiction – acceptance of the jurisdiction is inferred from the submission. Italian courts have jurisdiction (art. 10).

Possible issues to be discussed:

Is a counterclaim sufficient to transfer jurisdiction to the Italian court under Art 5 reg. 4/09 (jurisdiction based on the defendant's appearance)? Only if it does not contest jurisdiction.

**3) What's the relation between the proceedings possibly initiated by Davide before the Italian competent court and the ones already commenced in Portugal? In particular, what about Beatriz's claims for maintenance?**

Article 19(1) Brussels IIa covers two situations: a. Proceedings relating to the same subject-matter and cause of action are brought before courts of different Member States and b. Proceedings which do not relate to the same cause of action, but which are "dependent actions" are brought before courts of different Member States.

If a legal separation claim is brought to the Italian courts, Italian courts shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the Portuguese court is established, the Italian court shall decline jurisdiction in favour of that court (Article 19).

Possible issues to be discussed:

- *Lis pendens*: Proceedings relating to the same subject-matter and cause of action are brought before courts of different Member States.
- False *lis pendens* between proceedings for divorce and separation. An action for separation and an action for divorce might be seen as not to have the same object since only the latter but not the former might lead to the dissolution of the marriage. Article 11 (2) Brussels II: «Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established».

**4) Which is the law applicable to spousal maintenance obligations?**

Art. 15 Reg. 4/09 – 2007 Hague Protocol.

Art. 3 Hague Protocol: law of the State of the habitual residence of the creditor – Portuguese law.

Art. 5 Hague Protocol: Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply. The husband can request the application of the Italian law, claiming that it is closer with the marriage. In that case, Italian law shall apply.

Possible issues to be discussed:

- law applicable absent a choice: the rationale of closest connection vs favor creditoris
- habitual residence of the wife: is a 7-month period stay in Portugal sufficient to establish her new habitual residence in Portugal? → effects of a change of residence on the law applicable to maintenance obligations. Habitual residence, implies a measure of stability (mere residence of a temporary nature is not sufficient to determine the law applicable to the maintenance obligation).
- relation between Art 3 (general rule) and Art 5 (special rule with respect to spouses) 2007 Hague Protocol → in particular possible objection by the husband to the application of Portuguese law (as law of the creditor's habitual residence) in favour of Italian law, law of the spouses' last common habitual residence having a closer connection with marriage and family life

### 5) Which is the law applicable to child maintenance obligations?

Special Rule: art. 4<sup>o</sup>, Section 1 (a): parents towards their children.

1<sup>st</sup> cascade: The law applicable is that of the habitual residence of the creditor (art. 3) – Italian law; should the creditor is unable to obtain maintenance, the law applicable is that of the forum (art. 4<sup>o</sup>, Section 2) - Italian law; should the creditor is unable to obtain maintenance under this law, the law applicable is that of the common nationality, if there is one (art. 4<sup>o</sup>, Section 4).

2<sup>nd</sup> cascade: Should the creditor seize the court of the State of the habitual residence of the debtor: the law primarily applicable to the child maintenance claim is the lex fori, Article 4 (3); should the creditor be unable to obtain maintenance, the law of the habitual residence of the creditor applies, Article 4 (3); and finally should the creditor be unable to obtain maintenance under that law, the law applicable is that of the common nationality of the debtor and the creditor if there is one, Article 4(4).

#### Possible issues to be discussed:

relation between Art 3 (general rule) and Art 4 (special rule with respect to spouses) 2007 Hague Protocol → creditor's impossibility to obtain maintenance and

### 6) Is the spouses agreement valid as to:

#### a. parental responsibility?

Is not possible a choice-of-court agreement over parental responsibility (Brussels II a).

#### Possible issues to be discussed:

- Is it possible a choice-of-court agreement over parental responsibility matters? No.
- Do either Art 12 on prorogation of jurisdiction or Art 15 on transfer of case to better placed court apply to the case at stake? Art. 12 and 15 are not choice-of-court agreement rules.

### **b. maintenance towards the child?**

The EU Maintenance Regulation expressly bars the choice-of-court for child maintenance, Article 4 (3) of the 4/09 Regulation.

The couple would also be unable to include a binding choice of law applicable to child maintenance in their agreement, Article 8 (3) Hague Protocol.

#### **Possible issues to be discussed:**

- Party autonomy as to jurisdiction over child's maintenance under Art 4 reg. 4/09 → are Italian courts a valid option for the parties?
- Party autonomy as to choice of law: formal and substantive requirements (is Italian law a valid option?) under Art 8 Hague Protocol

### **7) Does the agreement cover maintenance claims in favour of both the child and the spouse?**

The EU Maintenance Regulation allows the spouses to agree that the court or courts of a certain EU Member State should have jurisdiction in matters of spousal/ex-spousal maintenance, Article 4 (c) 4/09 Regulation: courts of the Member State where the spouses has their last common habitual residence, provided that the residence has lasted at least for an year – conditions to be met at the time the agreement is concluded or the court is seised – Italy.

Article 8 of the Protocol allows creditor and debtor to choose a law applicable to a maintenance obligation: b) the law of the State of the habitual residence of either party at the time of designation – Italy.

#### **Possible issues to be discussed:**

Scope of the agreement

### **8) Does such agreement affect the answer given to questions No 1.b), 1.c) and 1.d)? How? Which is the court competent to hear parental responsibility, child's maintenance claim and spouse's maintenance claim?**

**1.b),** parental responsibility: no.

**1.c)** spouse's maintenance claim: yes, the jurisdiction conferred by the agreement is exclusive, which mean that only the Italian court can decide the case. The Portuguese court shall declare of its own motion that it has no jurisdiction (art. 10).

**1.d)** child's maintenance claim: no.

Possible issues to be discussed:

Coincidence *forum* and *ius*

**9) Does such agreement affect the answer given to questions No 4 and 5?  
How? Which is the law applicable to child's maintenance claim and  
spouse's maintenance claim?**

No 4 spouse's maintenance claim: Italian law applies.

No 5 child's maintenance claim: no.

Possible issues to be discussed:

Coincidence *forum* and *ius*