

# **Regulation No 4/2009 and jurisdiction over maintenance obligations**

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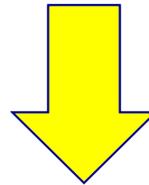
# 1) The scope of application of Reg. 4/2009

## General overview:

- complete PIL legal instrument
- applicable since 18 June 2011
- all EU MS, except **Denmark** (which has nonetheless implemented the contents of this Reg. to the extent that it amends Reg. 44/2001)
- interplay with the **2007 Hague Protocol** with regard to the applicable law (Art. 15 Maint. Reg.)
- partial harmonisation of **enforcement** procedures (abolition of *exequatur* for those MS bound by the Hague Protocol)

## Objective scope

- “maintenance obligations”: no definition in the Reg.
- **Art. 1:** maintenance obligations arising from a family relationship, parentage, marriage or affinity (irrespective of a possible family breakdown)

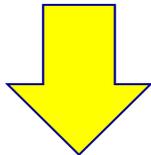


Recital 11: autonomous interpretation, in order to ensure equal treatment to all creditors

# Subjective scope

## i. **individuals** within the meaning of **Art. 2**

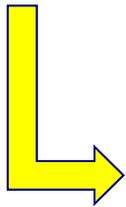
- “**creditor**”: the person to whom maintenance **is owed or alleged to be owed**
- “**debtor**”: the person who **owes or is alleged to owe** maintenance



does it cover **only** persons entitled to maintenance by virtue of a **previous decision**, or **also** those bringing an action for the **first time**?

CJEU, 20.3.1997, C-295/95, *Farrell*

- Art. 5(2) of the 1968 Brussels Conv. did not clarify the notion ('individual')
- the Court: it is a **general term**, without distinction between those already recognised and those not yet recognised as entitled to maintenance



- interpretation codified in the Maint. Reg.
- **not limited** to those who have **already been recognised** as entitled to maintenance rights/duties, but also **those who seek for maintenance**

## ii. **public bodies** within the meaning of Recital 14 and Art. 64

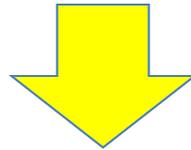
- for the purposes of **recognition and enforcement** of a maintenance decision, they can **serve as “creditors”** if acting in place of an individual to whom maintenance is owed

## 2) The concept of maintenance obligations

- concept of maintenance obligations: no reference to national law for the purposes of determining its meaning and scope
- Thus, in light of CJEU case law: an **autonomous interpretation** must be given, taking into account
  - the **context**, and
  - the **objective**of the relevant provisions

- The **concept** of **maintenance obligations**

- payment of an interim compensation granted to one spouse in a divorce judgment
- payment of a lump sum to one spouse
- transfer of ownership of property between spouses



may be ancillary claims to divorce proceedings, but they are considered civil matters, since they are financial obligations between former spouses determined according to their needs and resources.

*See: CJEU 6.3.1980, 120/79, de Cavel v de Cavel (II),  
CJEU 27.2.1997, C-220/95, van den Boogard v Laumen*

For example, **under Italian law** the EU concept of maintenance obligations is applicable to

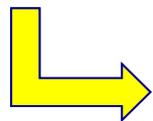
- **maintenance obligations arising out of family relationships**
  - between the spouses (Art. 143 of the Italian Civil Code - ICC)
  - between parents and children (Arts. 147, 315-*bis*, 316-*bis* ICC)
- **alimony**
  - obligation imposed, by operation of law, on next of kin and relatives to provide material assistance to a person in need who is unable to provide for him/herself (Arts. 433-448 ICC)
- **maintenance obligations in the context of the breakdown of family life**
  - between the spouses, in case of separation (Art. 156 ICC) or divorce (Law 898/1970)
  - towards the children (Arts. 337-*ter*, 337-*septies* ICC; Law 898/1970)

## What is the nature of maintenance obligations?

CJEU 6.3.1980, 120/79, *de Cavel v de Cavel (II)*

- The case concerned the **payment of an interim compensation** granted to one of the parties (wife) **in a French divorce judgment**
- the relevant instrument in force at that time (**1968 Brussels Conv.**) **excluded** from its scope the status of natural persons, as well as rights in property arising out of a matrimonial relationship

- can the Brussels Conv. **apply** to an ancillary order concerning maintenance, even though the main dispute (divorce proceedings) falls out of its scope? **YES**



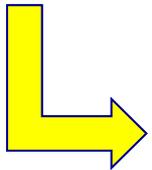
- the nature of the maintenance ancillary claim was found in the **financial obligations between former spouses** after divorce, fixed **on the basis of their respective needs and resources**
- as such, it was considered a **civil matter** within the meaning of the 1968 Brussels Conv.

## Does the form of payment or a possible transfer of ownership of property matter? NO

CJEU 27.2.1997, C-220/95, *van den Boogard v Laumen*

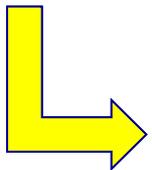
- The case concerned the **payment of a lump sum** and **transfer of ownership of property** by one party to his former spouse in the context of **divorce proceedings**
- again, the nature of maintenance was found in its objective to **enable one spouse to provide for himself/herself**, and in the determination of its **amount** according to **needs and resources of both spouses**

- to establish the nature of maintenance, the **method of payment** (lump sum or periodic instalments) is **not relevant**



even a lump sum may be designed to ensure a predetermined level of income

- likewise, the **transfer of ownership of property** between the former spouses **does not alter** the nature of maintenance

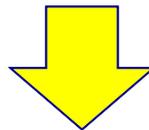


it still is a capital sum for the maintenance of one of the former spouses

## 3) Jurisdiction over maintenance obligations

**Overview** of the jurisdictional regime in the Maint. Reg.

- general grounds
- choice of court
- submission to jurisdiction
- subsidiary jurisdiction
- necessary jurisdiction (*forum necessitatis*)



### **Recital 15**

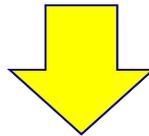
- regardless of whether the defendant has his/her habitual residence in a MS or not
  - no room for application of national law

## General grounds (Art. 3)

- **Autonomous maintenance claims:**

jurisdiction lies with the **court for the place** where

- a) the **defendant** has his/her **habitual residence**, or
- b) the **creditor** has his/her **habitual residence**

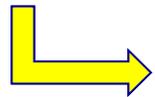


- rules determining both international and territorial jurisdiction (“for the place”)
- pro-claimant provisions, designed to protect the maintenance creditor (i.e. the weaker party)
- proximity between the forum and the creditor also for evaluating the creditor’s needs

## Case law on letter *b* and the concentration of jurisdiction in a MS

CJ, 18.12.2014, C-400 and 408/13, *Sanders and Huber*

Under German law, in case a party is not habitually resident in Germany, it is provided that jurisdiction to rule on cross-border maintenance obligations is concentrated on the local court (*Amtsgericht*) having jurisdiction for the district of the higher regional court (*Oberlandesgericht*) where the defendant or creditor has his/her habitual residence



a **centralisation of jurisdiction** is **precluded** by the Maint. Reg., **UNLESS**

- the objective of **proper administration of justice** is achieved
- the **interests of maintenance creditors** are protected

- **Ancillary maintenance claims (Art. 3):**

jurisdiction lies with the court which

- c) has **jurisdiction** to hear proceedings concerning the **status of a person** (i.e. divorce, separation, nullity or annulment of marriage), **or**
- d) has **jurisdiction** to hear proceedings concerning **parental responsibility**

**UNLESS**, in both cases, jurisdiction is **based solely on the nationality** (or domicile for Ireland and the UK) **of one of the parties**

On which provisions can the **jurisdiction based solely on nationality** be grounded?

- in matrimonial matters
  - Art. 3(b) of Brussels IIa Reg.
- in parental responsibility matters
  - Art. 12(1) + Art. 3(b) of Brussels IIa Reg.

- **Relationship** between the general grounds of jurisdiction (letters *a*, *b*, *c* and *d*)
- considered **together**, they are **alternative** (i.e. there is no hierarchy, and claimant can choose to sue on the basis of each one of them)
  - the **two ancillary provisions** (letters **c** and **d**), however, are **mutually exclusive**, with the consequence that claims regarding child maintenance could only be ancillary to parental responsibility proceedings, and not to those on the status of a person (for example, the parents)

# Case law on the relationship between Art. 3, letters c and d

CJ, 16.7.2015, C-184/14, A v B

The relationship of **mutual exclusivity** has a number of **reasons**

- an application involving maintenance in respect of minor children is **not necessarily linked** to divorce or separation proceedings
- the court with jurisdiction to hear proceedings on parental responsibility is **in the best position** to evaluate *in concreto* the issues involved in the application relating to child maintenance
- the **best interests of maintenance creditors** (i.e. the children) are guaranteed

## Case law on the relationship between Art. 3, letters *a* and *d* and Art. 5

CJ, 5.09.2019, C-468/18, *R v P*

where there is an action before a court of a MS on the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child,

- the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, **nevertheless has jurisdiction** to rule on the claim concerning the **maintenance obligation with regard to that child** where
  - it is also the court for the place where the defendant is habitually resident or
  - the court before which the defendant has entered an appearance, without contesting the jurisdiction of that court.

## Case law on Art. 3(d)

CJ, 12.11.2014, C-656/13, *L. v M.*

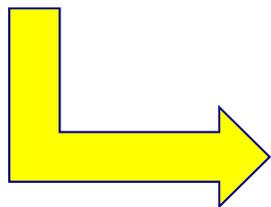
- The jurisdiction of the Czech court in parental responsibility matters is grounded on Art. 12(3) of BIIa Reg. (prorogation).
- Is it also competent on the ancillary maintenance claims?

**YES**

The court which has jurisdiction under Art. 12(3) of BIIa will, in principle, also have jurisdiction to hear an application for maintenance which is ancillary to the parental responsibility proceedings pending before it (unless that jurisdiction is based solely on the nationality of one of the parties)

## CJEU, 15.2.2017, C-499/15, W, V v Z

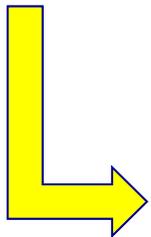
- the courts of the Member State which made a decision that has become final concerning parental responsibility and maintenance obligations with regard to a minor child, **no longer have jurisdiction** to decide on an application for **variation** of the provisions ordered in that decision, inasmuch as the habitual residence of the child is in another Member State.



as a consequence of the ancillary relationship (= change of HR, change of jurisdiction)

## CJEU, 16.1.2018, C-604/17, *PM. v AH.*

- Art. 3(d) of the Maint. Reg. cannot apply whenever the courts of a given MS lack jurisdiction to rule on parental responsibility matters



again, as a consequence of the ancillary relationship

## CJEU, 10.4.2018, C-85/18 PPU, *CV v DU*

- The Romanian court, being the MS of refuge in a case of wrongful removal, lacked jurisdiction in custody matters as the conditions laid down in Art. 10 of BIIa Reg. were not met.
- Is it competent on the ancillary maintenance claims?

**NO**

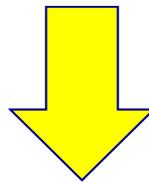
The courts of the **MS of refuge do not have jurisdiction** to rule on an application relating to custody or the determination of a maintenance allowance with respect to that child, in the absence of any indication that the other parent consented to his removal or did not bring an application for the return of that child.

## Choice of court (Art. 4)

- **Limited choice** to confer jurisdiction to a court of a MS to settle disputes (actual or future) in matters concerning maintenance obligations
- **NOT applicable** to maintenance proceedings concerning **children under the age of 18**
- the jurisdiction conferred by agreement is **exclusive** (only the chosen court has the power to adjudicate the case)

## Possible choices, generally applicable (**Art. 4**):

- a) the court(s) of the MS where **one of the parties** has his/her **habitual residence**,
- b) the court(s) of the MS of which **one of the parties** is a **national** (or is domiciled in the case of Ireland and the UK)

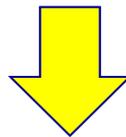


these conditions have to be met  
at the time the agreement is concluded, or  
the court is seised

**Possible choices**, applicable **only** to maintenance obligations **between spouses or former spouses**

**(Art. 4, c):**

- i) the **court** which has jurisdiction to hear their **matrimonial disputes**
- ii) the court(s) of the MS where they had their **last common habitual residence**, provided that the residence has lasted for **at least one year**

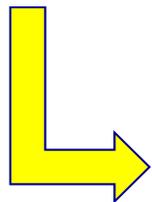


these conditions have to be met  
at the time the agreement is concluded, or  
the court is seised

**Art. 4(2): formal requirements** of the agreement (similar to RIII Reg.)

- **in writing**
  - not necessarily an agreement signed by both parties, but also a choice expressed in the parties' court documents
- any **communication by electronic means** that provides a **durable record** of the agreement is equivalent to writing

**Art. 4(4):** in case the parties agreed to confer jurisdiction to court(s) of a **State party to the 2007 Lugano Convention that is not a MS** (i.e., currently, Iceland, Norway, Switzerland)



the Reg. **gives way to the Convention**, which shall apply **except** in relation to a dispute relating to maintenance obligations towards **children under the age of 18**

## Submission to jurisdiction (Art. 5)

A court of a MS **acquires jurisdiction** – even though it is not competent pursuant to the general and special grounds/no agreement – in case **the defendant enters an appearance** before this court **without contesting** its jurisdiction

- it is meant to **prevent delays** in the proceedings
- it is a form of **consent-based** jurisdiction, insofar as a “procedural” acceptance of jurisdiction is inferred from the submission

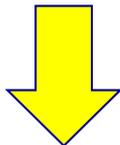
## !! For lawyers

- it is advisable to raise a **timely exception of lack of jurisdiction** of the court seised, not only to contest the claimant's application on the merits
- otherwise the court, when examining its jurisdiction pursuant to Art. 10, shall retain it by virtue of the defendant's acceptance/appearance without contestation (even though it is not competent on the basis of the general or special grounds)

## Subsidiary jurisdiction (Art. 6)

The meaning of “subsidiary”:

- when **neither the defendant nor the creditor are habitually resident in a MS**
- when **no choice of court** has been made by the parties
- when the **defendant has not submitted** (accepted/not contested) to the jurisdiction of the court seised
- when **no court of a non-EU State party to the Lugano Conv.** has jurisdiction



the court seised can have **jurisdiction if** it is **in the MS of common nationality of the parties**

## Art. 6: example

A couple of Italian nationals moves to Croatia, where they habitually reside,

marriage breakdown, followed by a separation by mutual consent approved by the Croatian court,

the wife relocates to Sweden for employment purposes, and regularly spends several months in Asia for business,

the husband relocates to Tunisia with other relatives, and shortly after files for maintenance before the Italian court,

the wife enters an appearance before the court and contests its jurisdiction.

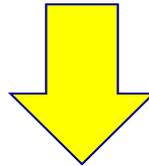
➤ has the Italian court (MS of common nationality) jurisdiction to hear the maintenance proceedings?

**YES**

- neither the defendant (wife) nor the creditor (husband) have their habitual residence in a MS (the husband lives in Tunisia, while the wife spends several months in Asia),
- the parties did not make any choice of court,
- the Italian court has not acquired jurisdiction by virtue of the defendant's (wife) submission (she has entered an appearance and contested the jurisdiction),
- the courts in (Iceland, Norway or) Switzerland have no jurisdiction on the basis of the Lugano Conv. (Art. 5(2), similar to Maint.Reg., but no HR/domicile defendant).

## **Necessary jurisdiction/*Forum necessitatis* (Art. 7)**

- When **no court of a MS** has **jurisdiction** pursuant to **Arts. 3, 4, 5 and 6** and
- if proceedings **cannot reasonably be brought** or would be **impossible** in a **third State** with which the dispute is **closely connected**



**a court of a MS can hear the case**

- on an **exceptional basis**,
- and
- if it has a **sufficient connection** with the dispute

The meaning of “**exceptional basis**”:

examples given in **Recital 16** of the Maint. Reg.

- the proceedings would be impossible in the third State due to **civil war**  
(extremely unlikely possibility, and rarely applicable)
- when the applicant **cannot be reasonably expected** to initiate or conduct proceedings in the third State  
(likely possibility)

The meaning of “**sufficient connection**” between the MS and the dispute:

- example given in **Recital 16** of the Maint. Reg.
  - one of the parties is a **national of that MS** (or has his/her domicile in case of Ireland and the UK)
- other situations
  - the **debtor’s goods/properties** are located **in that MS**
  - the **creditor is present in that MS**

## Art. 7: example

A French man and a woman of African origin got married and habitually reside in Bulgaria, marriage breakdown, and divorce declared by the Bulgarian court,  
after the divorce, the man, who retains properties in Bulgaria, has no fixed home and lives between Italy and Asia,  
the woman relocates to her State of origin,

two years since the divorce, she intends to bring maintenance proceedings against the former husband, but

- in her State of origin, local traditions prevent a woman from suing her husband (otherwise she would be prosecuted and possibly imprisoned)
- in Bulgaria, the former husband appears before the court seised with maintenance proceedings and contests its jurisdiction

➤ can the Bulgarian court retain its jurisdiction as *forum necessitatis*?

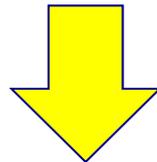
**YES**

- the applicant (former wife) cannot reasonably initiate proceedings in the third State of her habitual residence,
- it is impossible to determine the habitual residence of the defendant/debtor (former husband),
- no choice-of-court agreement has been concluded,
- the Bulgarian court has not acquired jurisdiction by virtue of the defendant's submission,
- the parties have no common nationality of a MS,
- the Bulgarian court has a sufficient connection with the dispute, being the MS where the debtor's properties are located.

## Limit on proceedings (Art. 8)

What if a **maintenance decision** given in a **MS** or a **Contracting State** of the **2007 Hague Conv.** needs to be **modified or replaced** by a new decision?

As long as the **maintenance creditor** was and continues to be **habitually resident** in that **MS/Contracting State**, changes in the existing decision can **only** be issued **by the courts of that State**



**continuing jurisdiction**  
of the **creditor's habitual residence**

## **Exceptions** to the rule of continuing jurisdiction:

- choice-of-court agreement between the parties to confer jurisdiction to the courts of another MS (Art. 4),
- creditor's submission to the jurisdiction of the courts of another MS (Art. 5),
- it is impossible to obtain changes to the original decision or a new decision from the competent authority in the 2007 HC Contracting State (the court cannot, or refuses to, exercise jurisdiction),
- the decision given in the 2007 HC Contracting State cannot be recognised or declared enforceable in the MS where the proceedings for modification are contemplated.

## 4) Summarising conclusions

- Jurisdiction:
  - Coordination among general grounds
  - Party autonomy: choice of court
  - Appearance without contesting
  - Subsidiary jurisdiction (common nationality)
  - Forum necessitatis (conditions)

## Regulation No 4/2009 and jurisdiction over maintenance obligations Case study

### FACTS

A couple of Italian nationals, Giovanna and Marco, married in Milan (Italy) in February 2010 and shortly after (in mid-2012) moved to Lisbon (Portugal) due to professional grounds of both spouses. Notably, Giovanna is the executive director of an important fashion brand and Marco works in the restaurant business. They have been habitually resident in Portugal for several years.

In January 2015 they had a child, Tommaso, who was born and grown up in Portugal. Few years later, the husband had some financial problems due to the loss of a business opportunity. As a consequence of the difficult and stressing situation, difficulties arose in the marriage too.

In December 2017 they went back to Italy to spend Christmas holidays with their relatives. During their stay, the spouses decided to relocate in Italy by Spring 2019, hoping that the change would have helped their relationship.

Marco stayed in Italy in order to take care of the renovation of the home in Milan, which was owned by both spouses at 50% each and where they would have wanted to reside. He also started a new commercial activity in Milan.

The wife returned to Portugal with the child and her mother. They were supposed to move in Italy when the renovation was finished.

However, due to continuous arguments mainly related to financial issues, Marco decided to seek divorce. So, on 20 March 2019 he applied before the Tribunal of Milan (Italy) asking for:

- Separation of the couple,
- joint custody of the child,
- placement of the child with the father,
- maintenance for him and the child,
- the award of the home in Milan,

With the introductory claim Marco submits a written agreement signed by both spouses and concluded in Milan in 2010, few days after the marriage, which provided the following clauses for the case of separation or divorce:

- the choice of Portuguese law with regard to the matrimonial disputes (according to which the divorce can be declared after one year of *de facto* separation);
- the choice of Italian courts with regard to both spousal and children maintenance;
- the choice of Italian law on both spousal and children maintenance.

Meanwhile, on 19 April 2019, Giovanna initiated custody proceedings in Portugal asking for the sole custody of Tommaso on the ground that Marco had not been taking

proper care of the child and was often away from home when they lived together in Portugal. She did not file a claim for maintenance as she recalled the signed agreement giving jurisdiction to the Italian court.

The first hearing before the President of the Tribunal of Milan will take place in early July 2019.

Giovanna is asking your legal assistance. She is asking to:

- contest the validity of that agreement;
- enter an appearance before the Italian court and contest the Italian jurisdiction over parental responsibility;
- have the Italian court dismiss the spousal maintenance claims, on the ground that her husband has never provided financial support to the family and she has always paid for family subsistence both in Italy and in Portugal;
- contest the Italian jurisdiction over the child maintenance claim filed by the father;
- She also wants to be able to sell the home in Milan and receive half of the price;
- She wants to know if she can claim damages, in case the husband does not pay the child maintenance;
- Finally, she informs you that she will move to Switzerland by the end of 2019 and wants to know which court has jurisdiction to modify the child maintenance obligation.

### Related questions

- 1) Is the agreement valid? Which are the relevant legal instrument and provision?
- 2) How would you contest the Italian jurisdiction over parental responsibility matters?
- 3) Has the Tribunal of Milan jurisdiction over spousal maintenance claims?
- 4) Has the Tribunal of Milan jurisdiction over child maintenance claims? More generally, could Giovanna file a child maintenance claim against Marco?
- 5) Which is the law applicable to spousal maintenance obligations?
- 6) Which is the law applicable to child maintenance obligations?
- 7) How would you consider the claim concerning the award of the home in Milan? Could it be qualified as the family home? If yes, which are the relevant provisions to determine jurisdiction and applicable law?
- 8) How would you address the claim concerning damages for unpaid child maintenance? Does it relate to family matters?
- 9) When the wife and the child will move to Switzerland, which court will have jurisdiction over the modification of child maintenance obligations?

**LEGAL INSTRUMENT(S) TO BE APPLIED**

Regulation No 4/2009

2007 Hague Protocol

## Questions with guidelines

### 1) Is the agreement valid? Which are the relevant legal instrument and provision?

Regulation 4/2009 provides for the party autonomy (even if it is limited – see *infra* question no. 3) in the selection of the courts having jurisdiction over maintenance obligations.

Under Article 4(2) of Regulation 4/2009 the agreement must be in writing.

- Therefore, the agreement between the spouses is valid as to the formal aspect.

#### Possible issues to be discussed:

Could an e-mail be a valid proof of the agreement?

See Article 4 of the Regulation according to which also a communication by electronic means which provides a durable record of the agreement is valid because it is considered equivalent to 'writing'.

### 2) How would you contest the Italian jurisdiction over parental responsibility matters?

Marco asked the Italian judge to rule on parental responsibility matters, but Giovanna wants to contest the Italian jurisdiction.

The Italian judge should decline its jurisdiction according to Article 8 of Brussels II *bis* Regulation because the child is habitually resident in Lisbon (at the time the Italian court was seised).

### 3) Has the Tribunal of Milan jurisdiction over spousal maintenance claims? Which is the relevant provision?

In the agreement, the spouses have chosen Italian courts for maintenance claims towards both the spouse and the child.

With regard to the spousal maintenance, the Italian court has jurisdiction, because, according to Article 4(1)(a), Italy is the place where one of the parties is habitually resident (the husband), at the time the court is seised, and also because both parties have the nationality of this Member State (letter b), both at the time the agreement was concluded and the court was seised.

Moreover, Article 4(1)(c) provides that, in the case of maintenance obligations between spouses or former spouses, (i) the court which has jurisdiction to settle their dispute in matrimonial matters, shall have jurisdiction over spousal maintenance. This is the case; the Italian courts have jurisdiction over the divorce claim under Article 3(b) of Regulation 2201/2003 (they are both Italian nationals).

- Insofar, Italian courts have jurisdiction over spousal maintenance claims.

Possible issues to be discussed:

With regard to the previous session: is it possible a choice-of-court agreement over matrimonial matters?

What if no valid agreement was signed? Which court could have jurisdiction over the spousal maintenance claim filed by Marco against Giovanna?

See under Article 3:

- Portuguese court under Article 3(a)
- Italian court under Article 3(b)
- Italian court under Article 3(c)? (>>> see what is the triggered ground for divorce?)

**4) Has the Tribunal of Milan jurisdiction over child maintenance claims? Which is the relevant provision?**

As to the child maintenance, the agreement is not applicable because Article 4(3) states that the provisions therein shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18.

The grounds of jurisdiction under Article 3 are alternative.

The Italian courts do not have jurisdiction pursuant to Article 3 on the child maintenance claim filed by the father Marco, because the defendant (the mother Giovanna) is habitually resident in Portugal (letter *a*), and so is the creditor, i.e. the child (letter *b*); and also because the Italian court has no jurisdiction over the child custody, thus letter *d* on maintenance claims ancillary to parental responsibility proceedings cannot apply.

On the other side, letter *d* could be applicable to ground the jurisdiction of the Portuguese courts, because the child is habitually resident in Portugal, and the mother has already initiated custody proceedings there.

- Thus, Giovanna can challenge the Italian jurisdiction on the child maintenance claim filed by the father due to i) inapplicability of prorogation under Article 4; ii) lack of jurisdiction under Article 3.

Possible issues to be discussed:

- Italian court lacks jurisdiction on the child maintenance claim filed by the father. NO operation for Article 3: no 3(a) (defendant is mother, resident in Portugal); no 3(b) (creditor is child, also resident in Portugal)); no 3(d) (because custody proceedings are pending in Portugal).

- Should Giovanna not contest the Italian jurisdiction, she could file a counterclaim (before the Italian court) for child maintenance against the father (for instance, realizing Italian courts would award higher maintenance than what the courts in Portugal would do).

Has the Italian court jurisdiction over this counterclaim? Yes, it can ground its jurisdiction on Article 3(a) (the defendant in the counterclaim, i.e. the father, is habitually resident in Italy). This head of jurisdiction is autonomous from the ancillary one in Article 3(d), and the father could not contest the Italian jurisdiction opposing Article 3(d), not even if in the meantime a maintenance claim had been filed there.

- Does *lis pendens* apply? Is *lis pendens* given in this case, where the Portuguese court was previously seized with a custody claim, but not with a maintenance obligation? Does the maintenance claim have to be filed for *lis pendens* to exist? (No, there would be no *lis pendens*; and also not a case for Article 3(d): no ancillary claim was lodged before the Portuguese court) Would you have suggested Giovanna to file for child maintenance in Portugal?

- Food for thought: Do you think letter *d* should be applied in all cases involving children?

How would you support the claim to apply letter *d* and contest the application of letter *a*?

Case law: on ancillary claims (letters *c* and *d*): see CJEU, 16 July 2015, Case C-184/14, *A c. B*.

See also Italian Supreme court, 15 November 2017 no. 27901, which, allegedly mistakenly, has qualified letters *c* and *d* as grounds of jurisdiction that prevail over the others laid down in letters *a* and *b*.

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

In the 2010 agreement the spouses have chosen the Italian law to be applied to both spousal and child maintenance.

According to Article 15 of Regulation 4/2009, The Hague Protocol of 2007 applies to determine the applicable law.

Article 8 provides the possibility to choose the applicable law between (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.

- Therefore, the Italian law can be applied because it is the law of the State of which both parties are nationals (a), as well as it is the law of the State of the habitual residence of the spouses at the time of designation (b). The other provisions (c and d) are not applicable.

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

The chosen Italian law is applicable only to spousal maintenance and not towards the child.

Therefore, according to Article 3 of the Protocol, the law of the State of the habitual residence of the creditor (the child) will apply, which is the Portuguese law since the child is habitually resident there.

- Italian courts shall apply Portuguese law on child maintenance claim (as also Portuguese courts would do in case they were seised with a child maintenance claim).

Possible issues to be discussed:

Is there any possible ground of non-application of the Portuguese law?

The limit of the public order of the *forum*.

Case law:

on the choice of the applicable law under Arts. 7 and 8 of the Protocol: see CJEU, 20 September 2018, Case C-214/17, *Mölk*

**7) How would you consider the claim concerning the award of the home in Milan? Could it be qualified as the family home? If yes, which are the relevant provisions to determine jurisdiction and applicable law?**

In the main case, only the father has lived in the home in Milan, so it could not be considered as the family home. Therefore, it would fall under the matrimonial property regime. In this regard, Giovanna's defense against the husband's claim may result well-founded.

On the contrary, if the apartment were qualified as the family home [*the trainees should imagine grounds for doing so: for instance relying on the couple's intention to relocate the whole family there*], according to the Italian case law, such issue is deemed to be related to the protection of children, and therefore subject to the respective jurisdictional regime and the rules on the determination of the applicable law.

- In the latter case, Portuguese courts shall decide over the award of the family home and apply the Portuguese law (similar to the claim on parental responsibility – based on the habitual residence of the child).

Possible issues to be discussed:

When does an apartment, property of one of the spouses, qualify as family home?

Is the award of a family home part of the maintenance obligation? And which is the applicable regime?

**8) How would you address the claim concerning damages for unpaid child maintenance? Does it relate to family matters?**

According to Italian law, damages for unpaid child maintenance can be claimed in the same proceedings, in accordance with family procedural law (Article 709-ter cpc). However, as the Italian Supreme Court has interpreted, this issue does not fall within family matters, but relates to civil and commercial matters. Therefore:

- Jurisdiction over damages for unpaid maintenance must be determined according to Brussels I bis Regulation (no. 1215/2012), because the situation consists in a breach of an obligation as it could be considered as a compensation for the delay of the payments, even if it is related to the maintenance obligation. Thus, Article 7(2) applies (the place of the harmful event, which is interpreted as the place where the damage occurs: in most cases at the residence of the child).
- The applicable law must be determined according to Rome II Regulation (no. 864/2007), Article 4, according to which the law of the country in which the damage occurs applies.
  - In this case, whether the Italian court is requested to rule on this matter, it shall decline its jurisdiction in favor of the Portuguese courts, which shall apply Portuguese law.

Possible issues to be discussed and Case law:

Possible inconsistency of the Italian case law with the interpretation given by the CJEU with regard to the enforcement of penalty payment in case of breach of rights of access, which was considered relating to parental responsibility matters: see CJEU, 9 September 2015, Case C-4/14, *Bohez*.

**9) When the wife and the child will move to Switzerland, which court will have jurisdiction over the modification of child maintenance obligations?**

In case the wife and the child will move to Switzerland, where they will habitually reside, the situation involves Italy and Switzerland (a non-EU State).

The relevant instrument to determine jurisdiction over maintenance claims is the Lugano Convention of 2007 (which applies among EU Member States and Switzerland, Denmark, Norway, Iceland).

According to Article 5(2)(a), actions in matters relating to maintenance can be brought before the courts for the place where the maintenance creditor (the child) is domiciled or habitually resident.

- Thus, the wife can bring an action before the Swiss court to request the modification of child maintenance obligation.

As to the applicable law, Switzerland is a contracting party to The Hague Convention of 2 October 1973 on the law applicable to maintenance obligations (it is not a contracting party to the 2007 Convention and Protocol).

According to Article 4, the law of the habitual residence of the creditor (the child) shall apply.

- Thus, Swiss law should be applied.