

Recognition and enforcement in maintenance obligations cases

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Interplay of legal sources

- Regulation No. 4/2009 (Chapter IV, Art. 75)
- Lugano Convention (30 October 2007) between the EU member states and Denmark, Norway, Switzerland and Iceland
- Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
- Multilateral and bilateral treaties
- National law

Maintenance Regulation Abolition of exequatur (I)

Maintenance Regulation 4/2009
see Recital 9

A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities.

CJEU, 9.02.2017, C-283/16, *M.S. v P.S.*

“Member States are to adjust all the procedures to make direct applications for enforcement to competent institutions possible. This also includes change of case-law, and refusal to apply contradicting provisions of the national law.”

Abolition of exequatur (II)

2 sets of rules

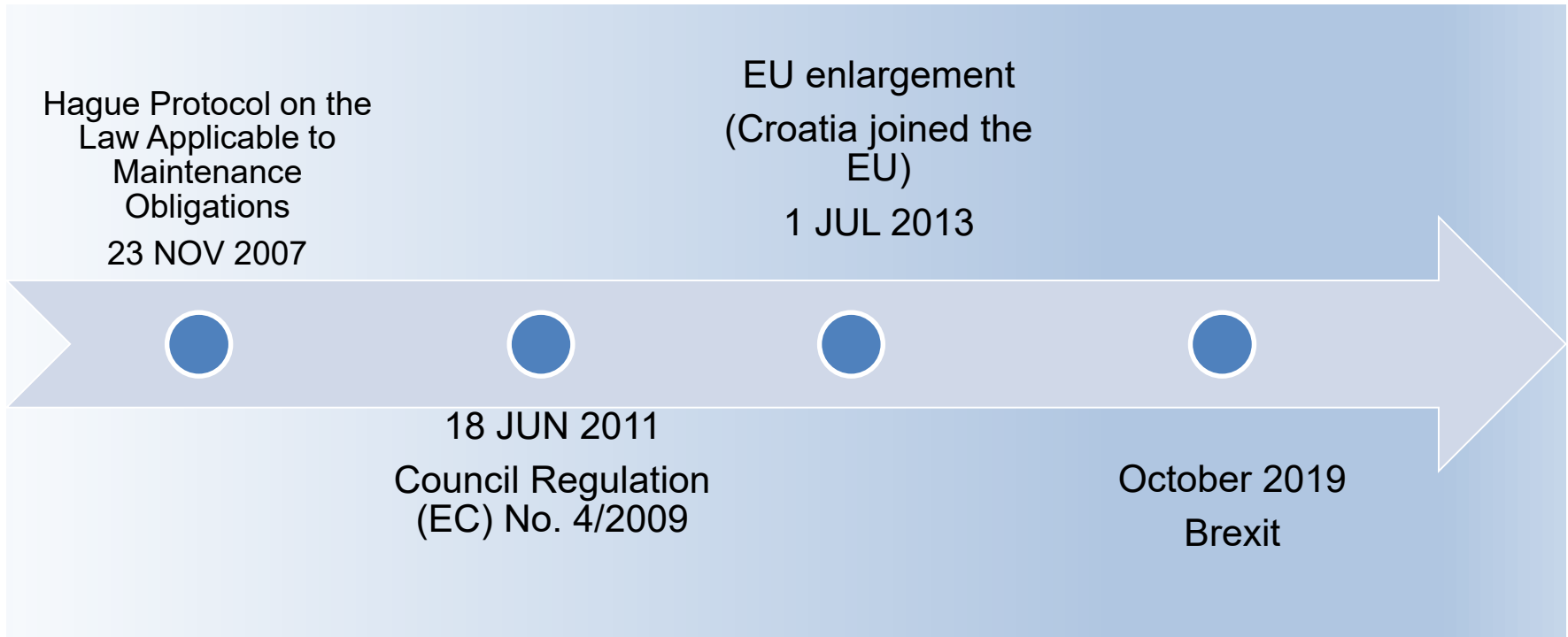
Article 17(1) – decision originating from the Member State bound by the 2007 Hague Protocol – no special procedure required – no possibility to oppose recognition

Article 23 – decision originating from the Member State NOT bound by the 2007 Hague Protocol – declaration of enforceability – possibility of appeal



Abolition of exequatur (III)

Ratione temporis



- CJEU, 20.12.2017, C-467/16, *Schlömp*

Procedure and documents

Decision is from Member State bound by the 2007 Hague Protocol

Documents to be presented to the enforcement authority in the Member State of enforcement:

- Copy of the decision sufficient for establishing its authenticity (no need to translate as a general rule)
- Extract from the decision (Annex I)
- Optional:
 - Documents related to calculations
 - Translation or transliteration of the extract (Annex I)

Rights of the Debtor to oppose enforcement (I)

- Apply for review in the Member State of origin:
 - Non-awareness of the process
 - Force majeure or extraordinary circumstances prevented the Debtor from contesting the maintenance claim
- Non-extendable term of 45 days.

Rights of the Debtor to oppose enforcement (I)

- Apply for suspension or refusal of enforcement
 - Where the right to enforce is extinguished under the law of either the Member State of enforcement or of origin, whichever provides for a longer limitation period;
 - For the time period of review of the decision as requested under Article 19
 - If the decision from another Member State is irreconcilable with a decision given in the Member state of enforcement

Procedure and documents: Decision is from Member State NOT bound by the 2007 Hague Protocol (I)



Basic set of documents
to be delivered to the
court (Article 28)

Formal check, no
recourse to the grounds
of refusal of recognition,
no right to contest

Declaration as
enforceable

Notice to the applicant
and to the debtor (if not
served before)

Similar to the procedure under Regulation Brussels I (No. 44/2001), however with strict time limits.

**Decision is from Member State
NOT bound by the 2007 Hague Protocol.
Appeal – Grounds for revocation**

Exhaustive list in Article 24

- Contradiction to public policy
(autonomous interpretation of the definition)
- Failure to notify the debtor of the proceedings
- Irreconcilability with another decision, as set in Article 24(c) and (d)

Central Authorities

Right or obligation to act through a Central Authority?

(CJEU, 9.02.2017, C-283/16, M.S. v. P.S.)

It follows from Articles 51 and 56 of Regulation No 4/2009, read in the light of recitals 31 and 32 thereof, that a person has a right but is not under any obligation to make an application to the Central Authorities for assistance pursuant to the provisions in Chapter VII of the regulation. It is, therefore, optional and that right will be exercised only if the maintenance creditor wishes to avail herself of it, in order, for example, to overcome certain specific difficulties, such as the location of the maintenance debtor.

Enforcement

- National law applies:
 - Direct application of national law of other States?
 - Challenges due to cross-border nature of the case
- Cooperation through Central Authorities
 - Applies to all stages of the case
 - Repetitious requests to be granted

Summarising conclusions

- Recognition and enforcement > no exequatur
- MS bound or not by the 2007 Hague Protocol

Recognition and enforcement in maintenance obligations cases

Case study

FACTS

Eric and Catherine, both French nationals, married in 2005 in Nantes, France, hometown of both. They have a son Paul, of 12 years old, and a daughter Isabelle of 10 years old.

Right after marriage the couple moved to London, where Eric has started his own small investment firm. Catherine, after graduating from the university has never worked. Her primary occupation was taking care of the home, family life in general, and children, as they were born very soon after the marriage; in her spare time, Catherine participated in voluntary and charity programmes supported by local women club in the place of their residence.

While Eric was devoting a lot of his time for building his career, Catherine was not happy living in London. Affection between spouses has passed away gradually, as each of them has started living his own life.

In 2011, Eric and Catherine divorced in England. They also consented on division of family assets and spousal maintenance, the arrangement being approved by order of the Central Family Court of London. The terms of consent were as follow:

1. Eric retained sole ownership in investment firm and ancillary rights to profit from his investment business, as Catherine waived any right in regards to it.
2. In regards to Catherine and children, the court order provided for:
 - (a) the family home in Hampstead, London was to be sold and, after discharge of the mortgage and other associated costs of sale, the net proceeds (GBP 925,389) were to be paid to the wife;
 - (b) the husband was to pay a lump sum of GBP160,000. This amount was a compensation for the sum that the couple has accumulated up to the date of delivery of the court order through the life insurance plan, which has further been modified by splitting into two separate plans: Eric has retained the existing plan and a new life insurance plan has been made for Catherine and children. Eric undertook to further pay Catherine's and children insurance fees;
 - (c) In respect of Catherine's income for herself (spousal periodical payments) and the two children of the family (child support), the husband agreed to pay a total sum of GBP 70,000 per annum (index-linked) "for the benefit of herself and the children of the family" until Paul reaches age of 18; then until Isabelle's 18 year old the sum would be reduced by 25 percent, and upon age of maturity of both children, the sum of maintenance would constitute 40% of the initial amount (always indexed);
 - (d) Eric was to pay the children's school fees and summer camps (up to GBP 20 000 per year);

- (e) Finally, Eric had to compensate to Catherine the expenses of her lawyers in England, in total GBP 30,000 for carrying out her total divorce case; and
- (f) For any delay of payment, Eric would pay to Catherine monthly penalty amounting to 3% of the total unpaid sum.

While Eric has been providing financial support to Catherine from time to time, however he has never paid any of listed sums in full, thus Catherine decided to seek for assistance to enforce the order of the London family court in France, from where, due to approaching Brexit, Eric has started servicing the EU customers.

Related questions

- 1) Which legal instruments would apply at the stage of recognition and enforcement of the maintenance order? If further, Catherine may need to seek recovery of maintenance debt in Switzerland or the United States, which legal instrument(s) would apply then?
- 2) In order to enforce the English court order (maintenance and other claims) in France, does it need to be recognized and/or declared as enforceable? What would be the procedure, and which documents does Catherine need to deliver?
- 3) Suppose that the court order originates from France and Catherine needs to enforce it in England. What would be the procedure for recognition and enforcement, and which documents would be necessary then?
- 4) Which Annex of the Regulation 4/2009 should the Family Court of London use for issuing the extract of the court decision? Working in group, fill in the appropriate Annex of the Regulation 4/2009 by deciding which categories of payments could be recovered as “maintenance”.
- 5) Should Catherine need legal aid, could she refer to Central Authorities? How else Central Authorities may assist Catherine in seeking for enforcement of the English court order in France?

Variation No 1

Suppose that Catherine has succeeded to initiate recovery procedure of maintenance order in France, however it does not go successfully, as suspiciously Eric’s bank accounts are from time to time in deficit of money. At the meeting in the club, she finds out that Eric’s firm has now moved its activities to Frankfurt, Germany, as his investment firm has merged into a German company. Now Eric’s income is split between England and Germany. Catherine files petition to the court in England pleading for issuance of another extract of court order intended for starting enforcement procedure in Germany, however her petition is rejected on the ground of civil procedure rules, stating that at the same time only one enforcement document shall be issued in respect of the same claim.

Related questions

- 6) Is English court's refusal to issue second extract of the court decision in breach of the Regulation 4/2009?

Variation No 2

Suppose that Catherine moves to Belgium, where maintenance income is subject to the maintenance tax (applicable under Belgian law, payable by recipient of the maintenance), payable by the person in receipt of maintenance instalments.

Related questions

- 7) Can tax on maintenance, applicable in Belgium, be recovered through mechanism of recognition and enforcement of maintenance decisions under the Regulation 4/2009? How would this circumstance affect procedure of English court order enforcement?
- 8) What could Catherine do in order to receive the amount of tax which she is paying from the amount of received maintenance?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 4/2009

2007 Hague Protocol

Questions with guidelines

- 1) **Which legal instruments would apply at the stage of recognition and enforcement of the maintenance order? If further, Catherine may need to seek recovery of maintenance debt in Switzerland or the United States, which legal instrument(s) would apply then?**

The court order originates from the UK, and enforcement is sought in France, both are the EU member states, thus Maintenance Regulation applies.

If recognition and enforcement is sought in Switzerland, the Lugano Convention (The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 30 October 2007) will apply (it is also applicable in case of Iceland, Norway).

In case of recognition and enforcement in the US, the Hague Convention (Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance) will apply.

Possible issues to be discussed:

Application of national PIL rules. What if the country of enforcement or if the country of origin of the court decision is not the EU MS, or is not party to the Hague Convention (eg., Russia, Israel,)?

Brexit. If/when UK quits the EU, which legal instrument would apply? – it is not sure yet, as we do not know the deal, however the UK has acceded to the Hague Convention, therefore the most likely scenario is that depending on the *rationae temporis*, either MaintReg or Hague Convention will apply.

- 2) **In order to enforce the English court order (maintenance and other claims) in France, does it need to be recognized and/or declared as enforceable? What would be the procedure, and which documents does Catherine need to deliver?**

NB: In question 4 you will have to specify which claims are “maintenance” and which are not, therefore here concentrate only on applicable instrumentas and procedures for maintenance/non-maintenance claims. The idea is to point out is that when seeking for enforcement on cross-border basis, different claims will fall under different recognition and enforcement regimes, thus different rules apply and multiple enforcement cases are very possible in case of a cross-border matter.

1. Maintenance claims (discuss further in question 4, which claims are in scope and out of it for the purpose of MaintReg): The UK is a non-Hague Protocol country, therefore court order need not to be recognized (Art.23), but must be declared as enforceable (see Art. 26).

Procedure: - See article 27 for defining the competent court in the state of enforceability to approach for declaration of enforceability.

- See art. 28 for procedure and deliverable documents.
- See art. 30-31 for timing of declaration as enforceable and service of the declaration of enforceability.

2. Non-maintenance claims. The UK did not adopt the Council Regulation (EU) 2016/1103 (also should other MS be involved, due to *rationae temporis*), therefore it is not applicable, and Catherine should rely on French national law at seeking enforcement of matrimonial property claims.

National rules will apply in respect of documents and procedure.

If the Council Regulation (EU) 2016/1103 was applicable, then declaration as enforceable in accordance with the Chapter IV of the Regulation.

Possible issues to be discussed: translation of the decision and extraction from the decision. If done voluntarily in advance of court requirement to provide a translation, will translation costs be covered? (Lithuanian court has refused to cover such costs, stating that translation has not been requested and is not mandatory under the MaintReg thus are out of scope of litigation costs).

3) Which Annex of the Regulation 4/2009 should the Family Court of London use for issuing the extract of the court decision? Working in group, fill in the appropriate Annex of the Regulation 4/2009 by deciding which categories of payments could be recovered as “maintenance”.

France is a Hague Protocol state, thus Art. 17 abolishing exequatur, should apply (notwithstanding that it is being enforced in the non-Hague Protocol country).

The court order shall be directly applicable in France, therefore Catherine will simply have to submit necessary documents (Art. 20 copy of the decision, extract from the decision issued by the court of origin in the form of Annex I, if needed translation of the extract, and necessary calculation of amounts/their parts payable).

Please note that the court order dates back to 2011, not specifying the exact date. MaintReg entered into force on the 18 of June 2011. In accordance with art. 75(1), abolition of exequatur will apply only to decisions delivered in proceedings initiated after 18/06/2011. Otherwise, the non-Hague Protocol regime procedure will apply.

4) Which Annex of the Regulation 4/2009 should the Family Court of London use for issuing the extract of the court decision? Working in group, fill in the appropriate Annex of the Regulation 4/2009 by deciding which categories of payments could be recovered as “maintenance”.

Art. 28(1)(b) – Annex II will be issued.

Maintenance/non-maintenance classification of amounts payable to Catherine :

- (a) Money received for sale of the family home in the UK: in this situation, this is NOT maintenance. In the context of other receivable sums this is an amount received at distribution of property;

Possible issue to be discussed: If amount received from sale of the family house was the only sum the wife would be receiving, or the house would have been attributed to Catherine for the purpose of living there with children, could it be regarded as maintenance?

- (b) - Lump sum as part of accumulated sum from the life insurance plan: should NOT be regarded as maintenance, as life insurance plans are intended for savings, they do not provide for satisfying any current need of a spouse (as an example, there is a Lithuanian court order refusing to issue extract of decision in accordance with the MaintReg for the amounts payable to the life insurance plan for the benefit of a child).
- Life plan insurance fees for Catherine and children: should neither be considered a form of maintenance for the reasons provided above. NB, even if they are defined as for the purpose of ensuring children's future education, their purpose is savings;
- (c) Annual maintenance fee for Catherine and children – is maintenance.

Possible issue to be discussed: does lump sum of maintenance for spouse and children without specifying portions attributable to each person receiving maintenance, contradict to public order/imperative rules of your country? May this be a ground for refusing to enforce? – NO, because of the autonomous interpretation of the concept of public order.

- (d) children's school fees and summer camps (up to GBP 20 000 per year) – are maintenance as they are intended for satisfying needs of children.

Possible issue to be discussed: do only basic needs fall into the scope of maintenance? Is the stage of recognition and enforcement of a court decision suitable for questioning this issue? – this may be an issue at the stage of litigation and defining, under applicable law, to what extent the spouse and/or children are entitled to receive maintenance, is it inly basic needs, or more. However in accordance with Art. 42, the decision given in another MS may in no circumstance be reviewed as to its substance.

- (e) legal expenses for carrying out total divorce case – they are not maintenance, but procedural costs incurred at litigation over maintenance. In MaintReg Art. 2, decision is defined also to cover a decision by an officer of the court determining the costs or expenses.

Possible issues to be discussed:

- Where the decision is delivered in respect of multiple claims, how to determine which of them are related to maintenance? – Answer not clear, probably determined by each court in accordance with national rules on litigation costs.

- MaintReg provided for the scheme of legal aid, which is broader than legal aid available under B2a. Basically, Central Authorities undertake to provide legal aid to any applicant. If legal aid has not been used, but was available for such applicant, does it fall within the scope of MaintReg?

(f) Penalty for unpaid amounts. – ref. Case CJEU Bohez v. Miertz

5) Should Catherine need legal aid, could she refer to Central Authorities? How else Central Authorities may assist Catherine in seeking for enforcement of the English court order in France?

Ref. MaintReg Art. 44-47 for legal aid provisions. In particular, art. 45 provides for the range of assistance to be provided. Art. 56 provides that at recognition, declaration as enforceable and enforcement of court decisions Central Authorities will assist both creditor and debtor by facilitating or provision of legal aid, collection of necessary data and evidence, encouragement of amicable solutions, facilitate collection of recovered amounts, etc. (art. 51).

Possible issues to be discussed:

You can consider asking participants to share their experience at co-operation with Central Authorities, or social workers to share their experience at assisting in recovering maintenance and problems of applying MaintReg they mainly face.

6) Is English court's refusal to issue second extract of the court decision in breach of the Regulation 4/2009?

There isn't a clear answer to this question. The MaintReg is silent about enforcement simultaneously in two MS. Neither CJEU has provided any interpretation in regards to this matter. However it should be questioned whether limitation of application of MaintReg basing on national procedural rules is generally compliant with the principle of superiority of the EU law.

The rationale for restricting reinforcement to only one MS could be protection of debtor's rights against creditor's fraud. However is it proportionate to the purpose of the MaintReg?

On another hand, if recognition and enforcement is sought on the basis of Hague Convention, or basing on national procedural rules, generally the creditor seeking for enforcement of a monetary claim is not required to provide evidence that enforcement is not commenced in another State.

Conclusion: most likely, MaintReg does not prohibit enforcement in more than one MS at the same time, thus issuance of extract of the decision should not be restricted.

7) Can tax on maintenance, applicable in Belgium, be recovered through mechanism of recognition and enforcement of maintenance decisions

under the Regulation 4/2009? How would this circumstance affect procedure of English court order enforcement?

Tax issues (if any applicable to maintenance) are not in scope of the MaintReg, thus there is no possibility to gross up maintenance payments by payable tax amount.

Tax should be then deducted from the amount of maintenance as appears in the court order, and subsequently in the extract of the decision, and paid to local tax authorities in accordance with Belgian law.

8) What could Catherine do in order to receive the amount of tax which she is paying from the amount of received maintenance?

Catherine can consider applying for modification of the court order in scope of maintenance. However this is a procedure out of scope of recognition and enforcement.

Possible issues to be discussed: You can consider discussing the jurisdiction for modification of maintenance court order and the possibility to *suspend enforcement* of the current maintenance court order.