



Appendix 9

MAINTENANCE OBLIGATIONS: LAW AND PRACTICE IN 2008

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Maintenance Obligations Under European Law ; divergences from the local scenario and significance of the same.

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Malta's accession to the European Union has meant that legal practitioners in any field of law, family and matrimonial law included, have to look outward, beyond the national confines of our own legal system, when seeking all available legal remedies and foreseeing all possible legal ramifications which can present themselves.

In the field of maintenance obligations, the questions to be asked are various:

- Who is a maintenance creditor?
- How can a creditor ensure that the maintenance debtor who lives in another member state pays maintenance.
- How can such creditor enforce a maintenance judgment in another State?
- What provisional enforcement measures are available in another State?
- Would another State enforce provisional or interim maintenance orders obtained in another Member State?
- Are exequatur procedures needed to enforce judgments obtained in another Member State ?
- How can a maintenance debtor, reform a maintenance order obtained against him by the Court of another State?

Recovery of Maintenance – A Community Problem

Council Regulation (EC) No. 44/2001¹ on jurisdiction and Enforcement of judgments in civil and commercial matters (Judgment Regulation) does already lay down rules on special jurisdiction for courts in the creditor's member states concerning maintenance payments. This Regulation has been directly applicable since 1 March 2002 (except in Denmark)² and its provisions can be relied on in a court action in any other Member State. **The recognition and enforcement of decisions is the topic of the next speaker and I will therefore be careful not to impact on the content of the next talk.**

CROSS BORDER CLAIMS

The basic premise in maintenance disputes, as in most cross border claims, is that a common need is felt to simplify and accelerate their settlement. The issue of maintenance obligations in particular concerns directly the lives of ordinary citizens. Persons dependant on others for maintenance are usually *in subsidium* dependant on the State when such support is not forthcoming. Guaranteeing the effective recovery of claims is, therefore essential to the welfare of many people in Europe.³

A summary report concluding a study done for the European Commission states that *"The recovery of maintenance claims in the Member States accounts for a vast mass of litigation as a result of the fragile*

¹ Of the 22 December 2001

² The provisions of the Brussels Convention of the 27th September of 1968 continue to apply in this Member State

³ This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

state of family relationships” and terms it “ A community problem as a result of the free movement of Community citizens.”⁴

This study quotes various statistics which I will take the liberty to reproduce as it does indeed put matters into perspective. According to Community statistics , in 1999 about 6 million citizens of Union Member States resided in another Member State. In many Union countries, the number of divorces per 1000 inhabitants is close to half the number of marriages. The Spanish report shows for example that 80% of the divorce or separation orders award maintenance but that it is not actually paid in 50% of the cases. In Sweden in 2001. 21,000 maintenance debtors registered at the social security authorities resided abroad. These indicate how important the issue of maintenance recovery is within the European Law enforcement area.

Furthermore it is apparent that the cross border recovery of maintenance payments in the European Law enforcement area encounters all manner of difficulties even before the judgment awarding maintenance is given on account of the deficiencies in cooperation between the actual States or at the enforcement stage. Brief reference is made e.g. to the need for cooperation on the debtor’s residence and assets , which needs are being addressed elsewhere.

Two Generations of Community Instruments.:

As reported in the 2007 study, we now have two “different generations” of Community instruments. The “first generation” of which Council regulation 44/2001 is an example, is aimed at the coordination of the autonomous procedural laws of the Member States. Coordination means that the respective Community legislation neither sets up new uniform procedures at Community

⁴ Study JLS/C4/2005/03 Report on the Application of Regulation Brussels I in the Member States
Sep.2007

level nor is aimed at harmonizing national procedures.⁵ The function of the instruments of the first generation is to guarantee cross-border cooperation in civil matters, which is mainly effected by the civil procedures of the Member States. They cover the fields of jurisdiction and the recognition of judgments in civil⁶ and family matters⁷, insolvency⁸ the service of documents,⁹ and the taking of evidence abroad¹⁰. While these instruments implement innovative and efficient concepts of judicial cooperation, their scope is still closely related to traditional instruments in private international law and transnational litigation.

However, under the Hague Programme of 2004, the European Community is implementing a second generation of instruments, which adopt a different approach. These instruments are mainly based on EC principles such as mutual trust and access to justice. They are aimed at overcoming the old paradigm of *exequatur* proceedings and provide for a mutual recognition of titles in the European Judicial Area.¹¹ These instruments do not intend to coordinate the national procedural systems, but contain separate (and comprehensive) procedures in specific fields. Striking examples of these new instruments are the Regulation creating a European order for payment procedure¹² and the Regulation for small claims.¹³ These new instruments provide for comprehensive adjudicative procedures

⁵ In addition, the Commission sets up informal measures aimed at facilitating judicial cooperation such as the Judicial Network in Civil Matters, the European Judicial Atlas, *Storskrubb*, Judicial Cooperation, pp. 217 et seq.

⁶ Judgment Regulation.(Brussels 1)

⁷ Regulation (EC) No. 1347/2000 since replaced by Regulation (EC) No. 2201/2003, OJ EC 2003 L 338/1, amended by OJ EU 2004 L 367/1

⁸ Regulation (EC) No. 1346/2000; OJ EC 2000 L 160/1, amended by OJ EU 2003 L 36/33, OJ EU 2005 L 100/1.

⁹ Regulation (EC) No. 1348/2000; OJ EC 2000 L 160/37.

¹⁰ 65 Regulation (EC) No. 1206/2001; OJ EC 2001 L 174/1.

¹¹ Cf. Regulation (EC) No. 805/2004 establishing a European Enforcement Order for uncontested claims; OJ EU 2004 L 143/15, amended by OJ EU 2005 L 97/64, OJ EU 2005 L 168/50, OJ EU 2005 L 300/6. Regulation (EC) 1896/2006 establishing a European Payment Order; OJ EU 2006 L 399/1.

¹² Regulation (EC) No. 1896/2006 of 12/12/2006; OJ EU 2006 L 399/1.

¹³ Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ EU 2007 L 199/1

in cross-border cases and guarantee the (automatic) recognition of the (new) European titles.

The Hague Conference

Mention must be made at this juncture of the Hague Conference on Private International Law . Two Conventions of 1973 relate to *The Law Applicable to Maintenance Obligations* ¹⁴ and to *The Recognition and Enforcement of Decisions relating to Maintenance Obligations* .¹⁵ Certain Member States of the EU have ratified these Conventions . Indeed some Member States consider that priority should be given to completing work at the Hague Conference prior to embarking on reforms at Community level. The scope of this discussion does not fall within the purpose of this paper and I will therefore limit myself to this passing comment.

A brief overview of certain issues of substantive law should be helpful to illustrate the diverging systems operative in Member States and the need of uniform rules.

1) WHAT GIVES RISE TO A MAINTENANCE OBLIGATION

Maintenance obligations arise from marriage, paternity and filiation. Between spouses, such obligations arise out of the legal union of marriage itself, or upon a judgment or agreement of divorce or personal separation. Furthermore certain countries do recognize the obligation of support between cohabiting couples even if of the same sex. Normally this subsists only during the cohabitation but legal regimes have also recognized that this right continues to subsist after separation.¹⁶

¹⁴ 2 October 1973 replacing the Hague Convention of the 24th October 1956)

¹⁵ Also of the 2nd October 1973 replacing that of the 15th April 11958

¹⁶ As in the Netherlands.

In Finland in a registered partnership of persons of the same sex the partners have a mutual maintenance obligation towards each other and enjoy the same rights unless otherwise is provided in an act or decree.

The obligation of parents to maintain their children is uniformly recognised throughout the Member States. No distinction is made, or indeed may be made between legitimate and illegitimate offspring. Such would violate the principles of the European Convention on Fundamental Human Rights.¹⁷

Each parent is obliged to maintain and educate their children. On separation, furthermore, the parent entrusted with guardianship or custody should receive maintenance from the non custodial parent.

Interestingly certain states have gone beyond the pre-requisite of filiation and recognize an obligation against the presumed father of a child. Belgium for example recognizes such an obligation without necessitating a declaration of filiation and which would be imposed on a man who has had sexual relations with the child's mother during the legal period of conception. This is also accepted in Greece. One can assume that the broad use of DNA testing would render this presumed obligation defunct as it imposes quite a heavy burden on the debtor.

The age of the child as a premise for maintenance also differs with each State. In Malta the parental obligation ceases when the child reaches the age of 18 or even before if the child is in regular gainful employment. In other States the obligation of the parents extends beyond this age if the child is pursuing his /her education. For example in Finland parents are also responsible for expenses incurred in the education of the child even after eighteen years, if this

¹⁷ Vide the principles embraced by the ECHR in *Marckx contre Belgique*, 13 June 1979, n° 00006833/74

is deemed reasonable. The term "education" refers primarily to higher educational institutions.

In Ireland, a dependant child is entitled to maintenance from the parents. A child is considered to be "dependant" when he is under the age of 18 or, if in full time education, under the age of 23. He will also be considered dependant if he suffers from a mental or physical disability to such an extent that he cannot maintain himself fully.

In Italy the obligation of parents towards children exists until the children are economically independent, even if they are adults: this point has been clarified by many decisions of the "Corte di Cassazione", the Italian Supreme Court¹⁸ and is settled law.

By virtue of law in the Netherlands parents must care for their children until they are 21.,

2) FAMILY MAINTENANCE

On the issue of between family members other than parents and children, a notable distinction can be drawn between England, for example, and the Scandinavian countries, on the one hand, and those countries with a canonical tradition on the other. The former only recognize an obligation between parents and children and not beyond. The latter on the other hand, recognize obligations between ascendants and descendants and even collaterals (e.g. Italy, France and Malta)

3) Establishment of the quantum of maintenance and mode of maintenance. Maintenance is uniformly established by Judicial intervention. The parties can also agree to maintenance payable but this is usually subjected to the imprimatur of the judicial authority. In

¹⁸ Corte di Cassazione 10th of April 1987 n.3570; 16th of February 2001n n.2289

certain European countries such as England, maintenance is established by the intervention of an administrative body (the Child Support Agency -CSA).Whilst the basis of the maintenance is quite uniform (needs of the creditor and financial means of the debtor) it is interesting to note that in some jurisdictions such as Belgium, the element of fault leads to an indemnity based quantification.

Reference is made to the Italian system which like our own distinguishes between maintenance and alimony. Maintenance is a wider concept which includes the satisfaction of all the needs of the creditor, in proportion with the assets and the possibilities of the debtor. On the other hand, alimony obligations include only what is strictly necessary for the life of the creditor and they imply that the creditor is indigent.

Maintenance may also be established in periodical payments or as a lump sum settlement.

4) CRIMINAL SANCTIONS FOR NON PAYMENT

Many countries like Malta impose criminal sanctions for non payment of maintenance. France, Belgium and Luxembourg consider this to be "abandonment of the family" . Such an infringement attracts imprisonment and/or a fine. In England and Ireland imprisonment is a final measure considered to be an effective means to ensure payment .

GREEN PAPER ON MAINTENANCE OBLIGATIONS

On 15th April 2004 the Commission was presented with a Green Paper on Maintenance Obligations. This is intended to address substantive and procedural issues which have arisen. As is seen above one problem which arises concerns the definition of maintenance obligations , the nature of the claims to which future

instruments should apply, the categories of decisions or acts and the persons to be affected

As reported in the Green Paper on the concept of maintenance obligations, the Court of Justice of the European Communities, in a case concerning the Brussels Convention of 1968, took a broad view. In *L.de Cavel v J. de Cavel*¹⁹ the Court held that the "compensatory payment" after divorce provided for by French law was to be treated as a maintenance obligation since it was "fixed on the basis of their respective needs and resources". Likewise, in *A. Van den Boogaard v P Laumen*,²⁰ it held that "a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance ... if its purpose is to ensure the former spouse's maintenance. On the other hand where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels(1968) Convention A decision which does both these things may, in accordance with article 42 of the Brussels Convention be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond."

The Hague Conventions and the New York Convention do not define maintenance obligations. But there is a specific provision in Article 8 of the 1973 Convention *on the Law Applicable to Maintenance Obligations* that removes all ambiguity as to the application of the Convention to maintenance obligations between divorced spouses²¹

¹⁹ Third Chamber, Case 120/70(1980) ECR 731 (judgment given on 6 March 1980)

²⁰ Fifth Chamber, Case C-220/95(1997) ECR I-01147 (judgment given on 27 February 1997).

²¹ Hague Conference on Private International Law. Preliminary Document No 1, September 1995. Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance, page 8, which states that the uncertain nature of the maintenance allowance to a divorced spouse (which, according to the State, may have the character of maintenance or of an indemnity, or a mixed character) justified the Convention containing a special solution.

ARREARS

The question of arrears, that is to say the recovery of maintenance awarded by a court but not actually paid, arises in a number of cases. Difficulties can arise in particular if the law of the country where the judgment is to be enforced provides that the judgment awarding maintenance can be enforced, after *exequatur*, only for future payments, or permits the recovery of arrears only in respect of a limited period.

Article 11 of the Hague Convention of 1973 *on the recognition and enforcement of decisions relating to maintenance obligations* provides: "*If a decision provided for the periodical payment of maintenance, enforcement shall be granted in respect of payments already due and in respect of future payments*", and this could be taken over in the future Convention.

PERSONS TO WHOM THE FUTURE INSTRUMENTS SHOULD APPLY

As we have seen the different rules of domestic law in the European Union Member States show that the types of relationship that can generate a maintenance obligation between two people vary from one State to another, since sometimes only parents and their children or spouses or ex-spouses are concerned whereas elsewhere the family circle is broader, extending even to *cohabitees* and "registered partners".

Moreover, the recovery of maintenance is sometimes handled by public agencies, acting either on behalf of the creditor or subrogated to the creditor's rights or seeking recovery of welfare benefits paid to help the creditor meet his or her needs in the event of default by the debtor. But certain Member States refuse to cooperate in recovering sums that these agencies claim.

The assistance given to maintenance creditors by public bodies, whatever its form, is based on a policy of national solidarity. It is costly, and the sums paid to maintenance creditors should not be left to be borne definitely by States where the debtor has the means to settle the debt.

In *Gemeente Steenberghe v Luc Baten* ²²the Court of Justice of the European Communities interpreted the first paragraph of Article 1 of the Brussels Convention of 27 September 1968 *on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* as meaning that *“the concept of ‘civil matters’ encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations”*. It also held that the concept of ‘social security’ does not encompass the action, as it is excluded from the scope of the Convention. But it held that *“Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in ‘civil matters’”*.

These questions are also being considered in the context of the Hague Conference. The two 1973 conventions indeed provide that maintenance refers to *“to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate”*. The 1973 Hague Convention on Recognition and Enforcement furthermore applies to:

“ a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising ... between:

1. a maintenance creditor and a maintenance debtor; or

²² Case C-271/00 (Fifth Chamber) [2002] ECR I-10489 (judgment given on 14 November 2002).

2. a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor

Malta is not a State party to the Hague Conventions aforementioned and would be governed by EU regulations and EU law on the matter or by residual private international law rules.

Neither Regulation (EC) No 44/2001 nor any other Community instrument contains conflict-of-law rules concerning maintenance obligations. Article 1 §2 b), third indent, of the Rome Convention of 19 June 1980 *on the law applicable to contractual obligations*, the only instrument of civil law applicable between the European Union Member States containing conflict-of-law rules, excludes from its scope *“rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate*

The case-law consequently tends to diverge as there are no rules designating the law applicable to paternity, where certain courts apply the law designated by their conflict rules while others apply the law applicable to the maintenance obligations.

The 1973 Hague Convention provides in article 4 that *The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to in Article 1*”. If the creditor changes his /her habitual residence, the applicable law would be of the new habitual residence from the date of the change onwards. In default of this rule, the common nationality rule shall apply (Article 5) In the case of maintenance obligations between persons related collaterally or by affinity, however, the debtor may demand that the internal law of the debtor’s habitual residence shall apply (article 7).

However *“the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance*

obligations between the divorced spouses and the revision of decisions relating to these obligations".(article 8)

DELINEATION OF CIVIL AND FAMILY MATTERS

As for procedural concerns , as is already evident , an important issue is the delineation of the instruments in civil and in family matters. The latter are now governed by Brussels II ²³ which is largely identical with Regulation (EC) No. 1347/2000. The problems raised are therefore still of relevance as is shown by the albeit sparse case law.

Basically the question is: Which Regulation applies to maintenance claims? The Judgment Regulation or Brussels II on the broader issues of matrimonial matters and parental responsibility? What if a maintenance claim is ancillary to a matrimonial cause e.g. divorce or personal separation or ancillary to custody or paternity proceedings as in some Member States? Which Regulation would apply?

Most of the reported case law on these issues relate to maintenance claims.

In Hungary, problems have arisen if the claim for maintenance is submitted in a custody or paternity action since claims for maintenance are - according to Hungarian law – ancillary to custody or paternity actions. In such cases, it is difficult to determine the criteria for the judge to choose between the Judgment Regulation and Brussels II.

Similar problems were reported in Germany in relation to default judgments on paternity and maintenance by Polish courts.²⁴ Problems occur with regard to decisions rendered in joined proceedings since then different recognition regimes apply with regard to issues concerning maintenance on the one hand and issues concerning matrimonial law on the other hand. Furthermore, it is pointed out that a distinction between maintenance proceedings and proceedings concerning the matrimonial property regime may be difficult.

²³ Regulation (EC) No. 2201/2003

²⁴ According to information obtained from the German Institute for Youth Human Services and Family Law, the recovery of maintenance claims is mainly effected under the Hague Convention on Maintenance Claims of 1973 and not under the Judgment Regulation,

In Belgium several decisions on maintenance related to divorce proceedings. In this context, Belgian courts applied Article 5 no 2 of the Judgment Regulation.

In Ireland, the question arose whether the term “maintenance creditor” in Article 5 (2) JR referred only to a person already in possession of a maintenance order or also a person seeking such an order for the first time. This question had been referred to the *ECJ*, which held that “maintenance creditor” should not be interpreted in accordance with the *lex fori*, but that the objective of Article 5 (2) JR had to be taken into consideration. Since its purpose was the protection of the maintenance applicant – who was in general the weaker party – no distinction was drawn between those already recognized and those not yet recognised as entitled to maintenance.

However, the Austrian Supreme Civil Court (*OGH*) held that proceedings for advance payments of maintenance between spouses did not fall within the scope of application of the Judgment Regulation.

Two cases which illustrate potential difficulties concerning the relationship between Regulation (EC) No. 44/01 and Regulation (EC) No. 2201/03/EC.:

Firstly, *Wermuth./Wermuth*²⁵ which concerned an application for maintenance pending suit under the provisional and protective measures provision of the Brussels II Regulation (Article 12 Regulation (EC) No. 1347/00). The Court of Appeal held, having regard to the Judgment Convention, that the relief sought was neither a provisional nor protective measure. Therefore, the Court of Appeal had no reason to focus on the issue whether the Judgment Regulation or Regulation 1347/2000 applied.

The parties, both German nationals, had married in Moscow but had elected domicile in England. When they had separated, the husband had begun divorce proceedings in Germany. Shortly thereafter, his wife had submitted a petition for divorce in England which resulted

²⁵ *Wermuth./Wermuth* [2003] 1 W.L.R. 942.

in the aforementioned decision. Article 12 of Council Regulation (EC) No.1347/2000 stipulates that in urgent cases, the courts of a Member State may take provisional or protective measures in respect of the persons or assets in that State as may be available even if the court of another Member State has jurisdiction as to the substance of the matter. The judge at the court of first instance had found that a provisional decision with regard to the obligation to provide maintenance fell within the field of application of "provisional or protective measures" and had fixed the amount of alimony at £150,000 per year, two thirds of this amount to cover solicitor's fees for the representation instructed by the wife in the case in question. Lord Justice Thorpe stated that it was quite clear that the obligation to provide maintenance could not be classified as being of a provisional nature. There was no realistic prospect of reimbursement in the event that the subsequent judgment as to the substance of the case so required. Neither was it a protective measure. It could not be classed as an "urgent case". Going beyond the facts of the case, the judge stated that the matters brought to court following the breakdown of a relationship generally pertained to money and children. Nowadays, the law ordering provisional payment of alimony was less-widely used. In such cases of an international nature, attempts by the parties involved to employ all manner of subterfuge in order to have a court's jurisdiction recognised should be limited. For political reasons, Article 12 in question should be interpreted strictly

Secondly, in *Prazic./Prazic*²⁶, the claimant wife brought proceedings against her husband claiming a beneficial interest in English properties **after** her husband had initiated proceedings in France, which involved consideration of questions of ancillary relief. The Court of Appeal stayed the English proceedings on the basis of Article 28 of the Judgment Regulation without raising the question as

²⁶ *Prazic./Prazic* [2006] E.W.C.A. Civ. 497, following the decision of the ECJ, 05/15/1994, C-294/92 *Webb./Webb*, ECR 1994 I-1717

to whether the French proceedings fell within the scope of the JR rather than the Regulation 2201/2003. The complication of this case is due to the fact that in French divorce proceedings also issues of how to apportion the spouses' assets are involved.

These and other difficulties have necessitated the drafting of a Future Regulation which would address the problems comprehensively and directly.

It is apparent that maintenance obligations should be defined and should include orders falling within those of the Cavel and Van den Boorgard cases. Whether such orders should extend to capital sum orders ,property adjustment orders and pension sharing orders made upon divorce or legal separation should also be seriously considered. These could have real practical advantages for the beneficiaries. The inclusion of sale of family property in the concept of a maintenance obligations has also been mooted in the response to the Green Paper.

On the matter of applicable law, this is usually the *lex fori* and with reason as it ensures uniformity and certainty within a national jurisdiction. The introduction of rules of applicable law must be studied with great prudence given the diversity between the laws of the 27 Member States . Would this exercise facilitate efficiency albeit perhaps eliminate forum shopping? Perhaps the simplest approach would be to recognize that the law of the country which has jurisdiction in a maintenance claim should apply.

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