

**European and International Law****Reflections on the Maintenance Obligations  
from the Perspective of the European Law  
Enforcement****Gabriela LUPȘAN<sup>1</sup>**

**Abstract:** As stated, maintaining and developing an area of freedom, security and justice by the European Union, within which it is ensured the free movement of persons, requires the adoption of, among others, the measures relating to judicial cooperation in civil matters which have cross-border implications. These measures are designed to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction. Based on the mobility of persons within the European Union, from the desire to protect both debtors of the maintenance, most often children, and the interest to favor a proper administration of justice within the European Union, there were adopted a number of community instruments relating to maintenance, which has provisions on conflicts of jurisdiction, conflict of laws, recognition and enforceability, enforcement of judgments, judicial assistance and cooperation between central authorities. In the first part of the study we analyzed the rules of jurisdiction according to which it is established the jurisdiction of the court hearing a claim for maintenance, when maintenance obligations arise from a family relationship, parentage, marriage or affinity. In the second part of the study, we limited the analysis to the choice of law applicable on in the case of the obligation between parents and their children.

**Keywords:** maintenance obligation; conflict of jurisdictions; Regulation (EC) no. 4/2009; Hague Protocol of 23 November 2007; the applicable law to the maintenance obligation between parents and their children

**1. Details on the Legal Framework**

Regarding the maintenance obligation with a cross-border dimension, when the courts from Romania shall be informed of such request there are applicable the following European instruments (Onac & Bellows, 2011):

---

<sup>1</sup> Associate Professor, PhD, "Danubius" University of Galati, Romania. Address: 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: gabriela.lupsan@univ-danubius.ro.

- Regulation (EC) no. 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law and enforcement of judgements and cooperation in matters relating to maintenance obligations<sup>1</sup>, applicable between Member States since 18 June 2011. It establishes rules of direct jurisdiction which unifies the rules of jurisdiction in maintenance obligation matters (hereinafter named “the Regulation”);
- Hague Convention on child support abroad for children and other family members, concluded on 23 November 2007 (“the Hague Convention of 2007”), approved on behalf of the European Union by the Council Decision 2011/432 / EU from 9<sup>th</sup> June 2011<sup>2</sup>, represents an important step in creating an efficient system in terms of costs, accessible and simplified for the demands of with a cross-border dimension involving a member of the EU and non-member state of the union, but a Contracting State to the Convention.
- Decision no. 2009/941 / EC of 30 November 2009<sup>3</sup> on the conclusion by the European Union of the Hague Protocol of 23 November 2007 on the Law Applicable to Upkeep Obligations (hereinafter “Hague Protocol 2007”), it includes provisions for the conflict of laws applicable to the maintenance obligation.

Note that by Law no. 36/2012<sup>4</sup>, Romania has adopted some implementing measures of the Regulation and the EU Council decisions mentioned above.

The Courts in Romania (Jugastru, 2014, pp. 81-99)<sup>5</sup>, before which there is an application of maintenance obligation with a cross border element, there must be verified if the request falls within the scope of The Regulation:

- the material scope of the Regulation (according to article 1, paragraph 1 there are stated the maintenance obligations arising from a family relationship, parentage, marriage or alliance without having an interest in the source and legal manner that established this relationship);

---

<sup>1</sup> Published in JO L 7 of 10th January 2009.

<sup>2</sup> Published in JO L 192 of 22<sup>nd</sup> July 2011.

<sup>3</sup> The Decision was published in JO L 331 of the 16<sup>th</sup> December 2009.

<sup>4</sup> Published in Official Monitor of Romania no. 183 from 21<sup>st</sup> March 2012.

<sup>5</sup>The processes of private international law with a cross border dimension are subject to articles 1064-1132 of the new Code of Civil Procedure (NCCP) unless the international treaties to which Romania is a party, the European Union law or the special laws do not provide otherwise.

- the geographical scope of the Regulation, in the sense that the provided jurisdiction norms have direct and universal application in terms of the competent authorities of the Member States of the European Union. Which means that these rules apply also in the situation where the application for maintenance obligations is related to a third state which is a Contracting State to the Hague Convention of 2007 which is a non-member of the European Union;
- temporal scope of the Regulation. As of June 18, 2011, the Regulation applies between EU states, mentioning the article 75 paragraph 1, according to which it produces legal effects for the judicial proceedings, for court settlements approved or concluded, or the authentic documents concluded prior the date of regulation implementation.

After this check, the courts verify the jurisdiction based on the direct jurisdiction rules established in articles 3-8 of the Regulation.

## **2. Jurisdiction of Private International Law in Matters of Maintenance Obligations**

From the analysis of articles 3-8 of the Regulation it results the following situations (Bantaş, 2012):

### **2.1. Jurisdiction Determined by the Choice of the Parties**

The creditor and the debtor of a maintenance obligation have the possibility of establishing in writing, no later than the date of referral to court, an agreement on the choice of the court in order to designate a particular court or courts of a Member State that would have jurisdiction to settle the litigations arising or likely to arise between them, in relation to maintenance obligations.

Parties' approval relating to the choice of the court is subject to some limitations expressly provided by article 4 paragraphs 2-4 of the Regulation, namely:

- the agreement cannot regard a litigation on the maintenance obligation for a child smaller than 18 years;
- the court or courts chosen by the parties must be in one of the following Member States:
  - in the State of habitual residence of either party;

- in the state whose citizenship one of the party holds;
- for the maintenance obligations between spouses or former spouses, they can choose between the court which has jurisdiction in matrimonial disputes or the court of the State in which it was the last common habitual residence of the spouses for at least one year.
  - there should be a relevant connection with the court or courts chosen by the agreement;
  - if the parties have agreed to confer exclusive jurisdiction of a court or courts of a Member State party to the Convention on judicial jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30<sup>th</sup> October 2007, and it is not a Member State, the parties' agreement applies, except the litigations regarding the maintenance obligations of a child with less than 18 years.

The agreement between the parties attracts the exclusive jurisdiction of the courts in a certain state designated by the parties, unless they agree otherwise.

## **2.2. The Jurisdiction in the Case where there is no Agreement of choosing the Court by the Parties**

In brief, the rules of jurisdiction established by The Regulation are:

- article 3 letter a and b, according to which the jurisdiction belongs to the courts from the habitual residence of the defendant or creditor;
- article 3 letter c and d, according to which the jurisdiction belongs to a court of a Member State which has jurisdiction in an action on the condition of the person or parental liability when the application on an maintenance obligation is ancillary to those proceedings, unless the cases where that jurisdiction is based solely on the nationality of one of the parties.

These rules do not indicate a hierarchy, the applicant is the one who, by informing a certain court of a Member State, chose, depending on the situation, one of the jurisdictions indicated by article 3 of the Regulation.

### **2.3. Jurisdiction Determined by the Appearance of the Defendant**

If the defendant is on trial, the court being enquired with an action that has as object the maintenance obligation and he does not challenge jurisdiction, then, based on article 5 of the Regulation, that court may have jurisdiction, except the cases where the jurisdiction is derived from other provisions of the Regulation.

### **2.4. Subsidiary Jurisdiction based on the Common Nationality of the Parties**

If none of the courts of a Member State has jurisdiction according to article 3-5 of the Regulation and no court from a State party to the Lugano Convention has jurisdiction under the provisions of this Convention, then according to article 6 of the Regulation, the jurisdiction lies with the courts of the Member State of the common citizenship of the parties.

### **2.5. Jurisdiction Determined by the Forum of Necessity**

If no court of a Member State has jurisdiction according to articles 3-6 of the Regulation, the courts of a Member State seized with an application for maintenance obligation may, exceptionally and after fulfilling few conditions, assume jurisdiction under article 7 of the Regulation (*forum necessitatis*). In order to apply the rule *forum necessitatis*, it is created a legal fiction, so as in the private international law applicant might have access to justice, the court will make the following checks:

- the failure or inability to initiate or conduct the proceedings in a third State with which the litigation has a close connection;
- the existence of a sufficient connection with the Member State of the seized court, such as the citizenship of one of the parties, for example.

Thus, in the hypothesis where the Romanian court receives a claim relating to maintenance obligation, the rule *forum necessitatis* is invoked, therefore the competence of the court is required under article 1069 Paragraph 2 of the NCCP, if the applicant is a Romanian citizen or a stateless person, with residence in Romania or a legal entity with Romanian nationality. (Pancescu, 2013, p. 691)

## **2.6. Procedural Limitations**

As long as the creditor keeps its habitual residence in a Member State in which the Regulation applies or in a Contracting State to the 2007 Hague Convention where the judgment was passed, the action of amending the decision or a new decisions may not be passed in any other Member State (article 8, paragraph 1 of The Regulation similar to article 18, paragraph 1 of the Convention).

From this rule, article 8, paragraph 1 provides four exceptions, namely:

- if the parties concluded an agreement on the jurisdiction of the court from the other Member State;
- if the creditor acknowledges the jurisdiction of the courts of another Member State
- when the competent authority of the State of origin, contracting to the 2007 Hague Convention is unable or refuses to assume jurisdiction in order to modify the judgement or to issue a new decision;
- when the passed judgment in the state of origin, contracting to the 2007 Hague Convention cannot be recognized or its enforcement cannot be authorized in the Member State in which it is desired the introduction of a new legal action, in order to obtain a new decision or a modification to the judgment in question.

## **3. The Law Applicable to the Maintenance Obligation between Parents and Children**

Having established jurisdiction of the court, it may proceed in identifying the law applicable to the maintenance obligations. This time, the Regulation excludes its incidence regarding the law applicable to the maintenance obligations, article 15 sending expressly to the provisions of the Hague Protocol in the Member States that have obligations according to the mentioned act (Diaconu, 2012). Moreover, even article 2612 the new Romanian Civil Code refers to the rules of European Union law in order to determine the law applicable to maintenance obligation.

Specifically and particularly in the case of a litigation relating to the maintenance obligation between the parent (debtor) and child (creditor), the law applicable to the maintenance obligation (as this obligation arises from a family relationship, kinship, alliance, regardless of marital status of parents) are identified by the following rules:

- the general rule according to which the law of the Member State where the child is habitually resident (article 3);
- if under the general rule, the child cannot obtain maintenance from the debtor, it applies the law of the forum (article 4, paragraph 2);
- if the application has been submitted to a court from the state where the debtor has his habitual residence, the law of the forum, except the situation where by the application of this law, the child cannot obtain maintenance from the debtor, then it is applied the law of the state of the creditor's habitual residence (article 4, paragraph 3);
- the Law of the common citizenship of the creditor and debtor is applied, if by applying the above rules, the child cannot get maintenance from his parents.

Although the Protocol provides to parties the right to terminate, prior to any special procedures in a particular state, a convention on the law applicable to maintenance obligation, they have the right to choose one of the laws listed in article 8, paragraph 1, the whole protocol is the one that excludes this possibility by paragraph 3 of the same article 8, if the creditor is a person under 18 or he is a person who *“due to deficiency or insufficiency of personal capacity, he cannot defend his interests.”*

Also, the public order may be invoked by the court of the forum, which leads to the removal of law enforcement established under the Protocol (article 13).

The substantive issues that arise from the content of the maintenance obligation between parents and children refer to providing solutions relating to: whether between the parties there is the maintenance obligation, and if so, to what extent the creditor may require maintenance; retroactive application of maintenance; the calculation basis for the value of maintenance and for indexing it; statute of limitations or termination of rights.

#### **4. Conclusions**

The challenges which both the Romanian judge and the Romanian citizen have to face derives from the fact that, on the one hand, after Romania's accession to the European Union, the European law prevails over the national law, and on the other hand, the law underwent a legislative effervescence in the field of material law (the emergence of a new civil Code) and procedural law (the release of the new Code of

Civil Procedure). Under these circumstances, the parties in a lawsuit relating to maintenance obligation of cross-border element are interested in knowing and applying the regulations that are most favourable, in order to obtain satisfaction of their interest. As for the Romanian court, it has to check its jurisdiction, and if it has jurisdiction it shall apply the law governing the case, giving priority to the agreement of the parties, if there is any.

## 5. References

- Onac, V. & Bellows, I. (2011). Regulation (EC) no. 4/2009 of the Council from 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations. Hague Protocol of 23 November 2007 on the Law applicable to maintenance obligations Convention of 23 November 2007 on the recovery of alimony from abroad for children and other family members. *Romanian Journal of Jurisprudence* no. 3/2011, p. 291 (Part I); 4/2011, p. 301 (Part II); No. 5/2011, p. 268 (Part III-a); No. 6/2011, p. 229 (Part IV); No. 1/2012, p. 283 (Part V a).
- Jugastru, C. (2014). Procesul civil internațional - aspecte de nouă reglementare/The International Lawsuit - new regulatory issues. *Acta Universitatis Lucian Blaga. Jurisprudence*, no. 1/2014, pp. 81-99.
- Bantaș, T.M. (2012). Competența jurisdicțională în acțiunile privind obligația de întreținere/Jurisdiction in actions relating to maintenance obligations. *Curierul judiciar /Judicial Courier*, no. 8/2012.
- Păncescu, F.G. (2013). *Procesul civil internațional în Noul Cod de procedură civilă. Comentariu pe articole /International lawsuit in the New Code of Civil Procedure. Comment on articles* (coordinator G. Boro). Vol. II, Bucharest: Hamangiu.
- Diaconu, N. (2012). Legea aplicabilă obligației de întreținere cu un element străin/The law applicable to the maintenance obligation with a cross-border element. *Analele Universității „Constantin Brâncuși” din Târgu- Jiu, Seria Științe juridice/Annals of "Constantin Brancusi" from Targu Jiu, Legal Sciences Series*, no. 1/2012.