Case study: Cross-border divorce and maintenance (advanced level)

PROJECT: BETTER APPLYING THE EU REGULATIONS ON FAMILY AND SUCCESSION LAW

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Case study 4: Cross-border divorce and maintenance

In 2004, Edyta (**Polish national**) and Martin (**German/Polish national**) meet in Munich, **Germany** while studying medicine. **Following their marriage in 2008, they move to Vienna, Austria**. When Edyta gets pregnant in April 2012, Martin is of the opinion that it is too early for them to have children. For Edyta interrupting the pregnancy is absolutely out of question. **Daughter Irina** (German, Polish national) is **born in January 2013**. Faced with severe relationship problems **in early 2014** the couple decides to separate temporarily. **Edyta moves back to Munich with Irina** to take a job at the University Hospital, while **Martin remains in Vienna** in his well-paid job. The distance is counterproductive: By mid-2016 reconciliation seems unlikely. The couple quarrel all the time and fight about money.

Edyta, who has recently lost her job, depends on financial support from her husband. Martin, who suspects that Edyta has a relationship with another man, stops supporting her financially in August 2016. When Edyta tells him that she will no longer be able to afford the rent in Munich, Martin tells her that either she could come and live with him in Vienna, or she should simply move back to Poland, to her parents' house, assuming they would accommodate her for free. In any case, he refuses to pay the expensive rent in Munich just to allow Edyta to be close to her lover.

Edyta is angry and disappointed. She has suffered from Martin's unfounded fits of jealousy before. She wants to file for divorce as soon as possible and urgently wishes to obtain child maintenance and if possible spousal/ex-spousal maintenance. To avoid accumulating debts in the meantime, she decides indeed to move to Poland, if only provisionally. Since Martin does not oppose her plans, **Edyta leaves Munich on 15 October 2016** and **moves to** the outskirts of **Krakow, Poland** where her parents live. Much to her surprise she immediately finds employment in a Krakow hospital and Irina, who is fluent in German and Polish, attends the nearby kindergarten as of 1 November 2016.

On 2 February 2017, Edyta applies to the local Krakow court in Poland for divorce and spousal/ex-spousal maintenance as well as child maintenance.

Martin is very surprised when he learns that Edyta applied to a Polish court and does not feel at all comfortable having to face Polish court proceedings. He does not speak Polish despite the fact that he has a Polish passport. His Polish mother died when he was 2 years old; he was raised by his father's German family in Munich. He therefore fears that Edyta would have a clear advantage in the Polish proceedings. Martin immediately calls his German lawyer friend from his school days. He specialises in company law but promises to look into things and calls him back two hours later. He tells Martin that the court in Poland does not have jurisdiction over the divorce nor on the maintenance matters. Should the court want to base jurisdiction on their shared Polish nationality this would not work, since Martin's effective nationality was clearly the German one; therefore his Polish nationality would not count. As for the maintenance claim, Edyta, having moved to Poland only recently, would certainly not yet have her habitual residence there, neither would the child. He advises Martin to immediately **seise the court in Vienne with both the divorce and maintenance** matters (the same matters as brought before the Polish court by Edyta) and Martin does so on **14 February 2017**.

Parental responsibility is not an issue the parties want to discuss.

Questions (Please always cite the relevant provisions when answering the questions.)

1. Does the Polish court have jurisdiction over the divorce?

2. Does the Polish court have jurisdiction over matters of spousal/ex-spousal maintenance and child maintenance in our case?

3. Assuming Edyta had not seised the Polish court, would the Austrian court have jurisdiction on matters of divorce, spousal/ex-spousal maintenance and child maintenance in our case?

4. How will the Austrian court deal with the matter when informed by Edyta's lawyer that the Polish court was seised on 2 February?

5. Assuming the Polish court has jurisdiction over the divorce, which rules would be applied to determine the law applicable to the divorce?

6. Assuming the Austrian court had jurisdiction over the divorce in our case, would the Austrian court use the same rules to determine the law applicable to the divorce? The law of which State would the Austrian court apply to the divorce?

7. Assuming the Polish court has jurisdiction over the maintenance matters in our case, which rules would the court apply to determine the law applicable and the law of which State would be applicable in our case under these rules with regard to
a) spousal/ex-spousal maintenance
b) child maintenance?
For the purpose of questions 7 and 8 it should be assumed that mother and child have their habitual residence in Poland.

8. Would an Austrian court apply the same rules to determine the law applicable and would the law applicable to
a) spousal/ex-spousal maintenance
b) child maintenance
be the same if maintenance proceedings were held in Austria?

Case variation 1 (Choice of Court / Choice of Law)
In the first hearing of the case in front of the Polish court, Martin presents a handwritten document dated 1.9.2011. The document is signed by both Edyta and himself and it states that in any disputes occurring in their relationship including a possible divorce and maintenance issues, also including possible future child maintenance, the Munich courts should have jurisdiction and that German law should be applied to these matters.

Could this "paper" change anything in our case as concerns:
- the jurisdiction and / or the applicable law concerning the divorce,
- the jurisdiction and / or the applicable law for spousal/ex-spousal maintenance,
- the jurisdiction and / or the applicable law for child maintenance?

On the advice of her lawyer, Edyta has decided to bring the claim for maintenance before the Austrian court. **On 24 March 2017** the court of Vienna, Austria ordered Martin to pay **child and spousal/ex-spousal maintenance**. Following the breakdown of the marriage Martin now wants to concentrate on his career and has accepted a prestigious **job in** a well-known **New York** hospital in the **USA**. He moves there on **1 April 2017**. He also sees this as chance to escape any financial obligations towards his now ex-wife. Since Martin refuses to pay maintenance, Edyta wants to enforce the Austrian decision. She has heard through friends of friends that Martin has inherited **immovable property in Munich and in Denmark**. Furthermore, she knows which hospital Martin works at and thinks she should also be able to enforce the decision in the USA.

1. In accordance with which rules would Edyta be able to enforce the Austrian decision in
a) Germany
b) Denmark
c) the USA?
2. Would Edyta get assistance from the Central Authority when enforcing the Austrian decision on spousal/ex-spousal maintenance and child maintenance in Germany, Denmark and/or the USA?

METHODOLOGICAL ADVICE

Training Aims:

- Deepening the knowledge of the participants on the substantive, geographical and temporal scope of the Brussels IIa Regulation, the Rome III Regulation, the EU Maintenance Regulation and the 2007 Hague Protocol on Applicable Law as well as the 2007 Hague Convention;
- Practice the use of these instruments;
- Recalling motives behind the instruments, highlighting particularities, innovations and improvements connected with these instruments and their practical implications
- Clarifying the interactions between these instruments and raising awareness of further instruments that can play a role in this field of law
- Familiarising the participants with key decisions of relevant EU case law

Points of particular interest with regard to these instruments:

Brussels IIa Regulation

- proposal to recast the Regulation: no change of rules on matrimonial matters envisaged, i.e. the Regulation will continue to offer several alternative grounds for jurisdiction (problem: rush to court) and offer no choice of court
- applicability to same-sex marriage is an unresolved question

Rome III Regulation

- enhanced cooperation
- applicability to divorce in same-sex marriage is an unresolved question
- a request for preliminary ruling to the CJEU on the applicability of the Regulation to private divorce is currently pending

EU Maintenance Regulation

- drawn up with a view to creating "symmetry" with the 2007 Hague Maintenance Convention; see, *inter alia*, Recitals 8 and 17 of the Regulation
- both instruments simplify and considerably accelerate the cross-border recovery of maintenance and allow for the cost-free recovery of child support through the Central Authorities
- remarkable innovation of the EU Maintenance Regulation: abolition of exequatur
- particularity: two sets of procedures for enforcement – (1) Chapter IV Section 1, abolition of exequatur, for decisions rendered in EU Member States bound by the 2007 Hague Protocol, (2) Chapter IV Section 2, accelerated procedure for enforcement, but exequatur still required for decisions rendered in EU Member States NOT bound by the 2007 Hague Protocol
- particularity of the rules on jurisdiction: the Regulation contains a comprehensive set of jurisdiction rules, a referral to national law should be avoided, see Recital 15 of the Regulation;
- a choice of court is possible (except for child maintenance),
- in Article 3, the Regulation offers several alternative grounds of jurisdiction; not only the international but also the territorial jurisdiction is determined; interesting in this regard CJEU decision on German implementation legislation

Hague Protocol

- particularity: reference in Article 15 of the EU Maintenance Regulation means that an international instrument is made part of directly applicable EU law
- in contrast to older Hague applicable law convention on maintenance: choice of law possible

2007 Hague Convention

- commonalities and differences between the 2007 Hague Convention and the EU Maintenance Regulation
- particularities concerning the substantive scope of the 2007 Hague Convention
- no direct rules of jurisdiction
- importance of the indirect rules contained in the 2007 Hague Convention as concerns the enforceability of a decision in a Contracting State; reservations by Contracting States concerning certain of these bases of jurisdiction are possible
- two sets of procedure for the recognition and enforcement of a decision: default procedure in Article 23 and alternative procedure in Article 24

Further points of interest in the field of cross-border divorce and maintenance

- discussion of **connecting factors** "**habitual residence**" and "**nationality**" as well as relevant CJEU case law
- discussion of the consequences **Brexit** is likely to have on the operation of the above cited EU Regulations

For the national training seminar it would be helpful to provide participants with references to relevant publications available in the participants' mother tongue as well as relevant national case law.

Answers

Methodology
When faced with a case with a cross-border component, the following steps can assist in finding the right provisions to be applied:

Step 1. Identify the area of law concerned.
Step 2. Consider which aspect of private international law is at issue.
Step 3. Find the relevant EU and international legal sources.
Step 4. Check the substantive, geographical and temporal scope of the respective EU and international instruments; and where more than one instrument is relevant, check their relation to each other.
Step 5. Find the correct provisions.

Please note, where no EU instrument or international multilateral or bilateral instrument is applicable in a cross-border case, the autonomous private international law rules of the State concerned will have to be considered.

Question 1: Does the Polish court have jurisdiction over the divorce?

Answer: - Jurisdiction in matters relating to divorce:

The ***Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*** (hereinafter: the "**Brussels IIa Regulation**") contains norms on international jurisdiction for the matter of divorce.

The divorce case in front of the Polish court falls within the substantive, geographical and temporal scope of the Regulation. Whether the Polish court has international jurisdiction concerning the divorce is thus to be determined in accordance with this Regulation.

The Brussels IIa Regulation

Substantive scope. The Regulation applies "*in civil matters relating to* […] *divorce, legal separation or marriage annulment*" (Article 1 (a)). The Regulation applies furthermore "in civil matters *relating to* […] *the attribution, exercise, delegation, restriction or termination of parental responsibility"*(Article 1 (b)). The latter is, however, not relevant in our case. The substantive scope in matrimonial matters is further clarified in Recital 8 of the Regulation, which states that "*As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures*."

Geographical scope. The Brussels IIa Regulation applies in all European Union Member States with the exception of Denmark, see Recital 31.

Advice: It is better not to rely on the text of a Regulation alone to determine the applicability of the instrument to Denmark and the UK. In some cases the text of an EU Regulation was adopted with Denmark and/or the UK not taking part, but then, at a later stage, the application of the Regulation was extended.

For the Brussels IIa Regulation the situation today (February 2017) remains the same: Denmark does not participate in its application. See for the up to date information the EUR-lex website.

Temporal scope. The Brussels IIa Regulation applies as of 1 March 2005, see Article 72. The transitional provisions state that the "*Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application* …", see Article 64(1). Article 64 (2) to (4) deals with the applicability of the Regulation to judgments issued before the date of application of the Regulation and to judgments issued after that date but in proceedings instituted before.

Recast of the Brussels IIa Regulation

Changes to the Brussels IIa Regulation are currently being discussed based on an assessment of the operation of the Regulation by the European Commission. The current proposal for a recast retains the *status quo* in respect of the provisions on jurisdiction in matrimonial matters.

For further details, see the Proposal for a *Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (COM(2016) 411 final)* and Explanatory Memorandum.

In our case, the Polish court has international jurisdiction for the divorce in accordance with Article 3 b) of the Brussels IIa Regulation.

None of the listed alternative grounds of jurisdiction in Article 3 (1) would give jurisdiction to the Polish court in our case:

- Article 3 a) Indent 1- Member State of current habitual residence of both spouses – This option does not apply in our case, since the spouses live in different States.
- Article 3 a) Indent 2 – Member State of last common habitual residence, provided that one spouse still resides there – The parties' last common habitual residence was not Poland but Austria.
- Article 3 a) Indent 3 – Member State of respondent's habitual residence – The respondent is Martin and he resides in Austria.
- Article 3 a) Indent 4 – Member State of either of the spouses' habitual residence, provided we have a joint application – We do not have a joint application, whether Edyta in our case has or has not acquired an "habitual residence" in Poland does not need to be answered.
- Article 3 a) Indent 5 – Member State of applicant's habitual residence for at least ONE YEAR – Independently of whether Edyta has or has not acquired "habitual residence" in Poland (and if so when), it is clear from the facts that she could not have had habitual residence for longer than one year in Poland since she moved there only on 15 October 2016, i.e. less than four months ago. Therefore this option is not helping in our case.
- Article 3 a) Indent 6 - Member State of applicant's habitual residence for at least half a year provided the applicant is a national of that Member State (or in the case of Ireland and the UK is domiciled there) – Edyta has Polish nationality, however, we cannot possibly have six months' habitual residence in Poland, see above.

Article 3 b) of the Brussels IIa Regulation gives jurisdiction in matters of divorce to the courts in a Member State of the nationality of both spouses (or in the case of Ireland and the UK of domicile of both spouses). In our case, Edyta and Martin are both Polish nationals.

Martin's friend argued that Martin's Polish nationality is not his effective nationality. Martin's effective nationality is German because he has much closer links with this nationality. Martin grew up in Germany and has never lived in Poland. He speaks German and does not speak a word of Polish.

Favouring one nationality over another in accordance with certain criteria, such as the closest link, is a solution used in some countries' laws when it comes to dual nationality. However, the text of a European Regulation is to be interpreted autonomously and not in the light of the national law. The Court of Justice of the European Union (CJEU) was asked to decide whether, when applying Brussels IIa in cases with dual nationals, the effective nationality could overrule the other. This was clearly denied by the court in *Hadadi*, see below.

CJEU – Judgment of 16 July 2009 – *Laslo Hadadi (Hadady) v. Csilla Marta Mesko (C-168/08)*

Two Hungarian nationals who married in Hungary in 1979 emigrated to France in 1980, where they subsequently resided. In 1985 they became naturalised French citizens. Mr Hadadi instituted divorce proceedings on 23 February 2003 in Hungary, and Mrs Hadadi instituted divorce proceedings in France on 19 February 2003. After the accession of Hungary to the EU on 1 May 2004, the Hungarian court granted the divorce on 4 May 2004. The French court dealing with divorce proceedings declared the proceedings inadmissible. Upon appeal by the (ex-) wife the Cour d'appel de Paris (Paris Court of Appeal) held that the Hungarian divorce decision could not be recognised in France. Mr Hadadi appealed on a point of law to the Cour de cassation (Court of Cassation) reasoning that the Court of Appeal had rejected the recognition of the Hungarian decision solely on the basis of Article 3(1) a) of the Brussels IIa Regulation without having examined Article 3(1) b) of the Regulation. The French Court of Cassation referred the following questions to the CJEU:

"1. *Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?*

2. If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities?

3. If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?'"

The CJEU ruled that "***Where the court of the Member State addressed must verify*** **[…]** ***whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.*****"** The court further clarified that spouses who both possess the nationalities of the same two Member States "***may seise the court of the Member State of their choice***".

 For further reading see, *inter alia*, Opinion of the Advocate General Kokott at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=73736&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=629978>

For further reading on the Brussels IIa Regulation see, *inter alia, "Practice Guide for the application of the Brussels II a Regulation"* published by the European Commission in 2014.

Question 2: Does the Polish court have jurisdiction over matters of spousal/ex-spousal maintenance and child maintenance in our case?

Answer 2 - Jurisdiction in matters relating to maintenance obligations

Jurisdiction in matters relating to maintenance obligations in EU Member States is determined in accordance with the ***Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*** (hereinafter: the "**EU Maintenance Regulation**").

The EU Maintenance Regulation

Substantive scope. The Regulation applies "*to maintenance obligations arising from a family relationship, parentage, marriage or affinity*", see Article 1 (1).

The substantive scope is further clarified in the Recitals of the Regulation. Recital 11 highlights the intention of the legislator to cover "*all*" maintenance obligations arising from a family relationship, parentage, marriage or affinity, "*in order to guarantee equal treatment of all maintenance creditors*" and that "*for the purpose of the Regulation the term 'maintenance obligation' should be interpreted autonomously*".

Recitals 15 and 16 highlight the universal applicability of the jurisdictional rules of the Regulation.

Geographical scope. The EU Maintenance Regulation applies in all European Union Member States, including the UK and Denmark. In Denmark, however, the Regulation only applies partially.

Please note that the text of the Regulation is misleading in this regard: Recitals 47 and 48 expressly state that the UK and Denmark are not taking part in the application of the Regulation.

Although the United Kingdom did not take part in the adoption of the Regulation, which Recital 47 reflects, **United Kingdom** accepted the Regulation following its adoption and the application of the Regulation was extended to the United Kingdom through a Commission decision (Commission Decision 2009/451/EC of 8 June 2009, OJ L 149, 12.06.2009, p. 73).

Denmark notified the Commission by letter of 14 January 2009 of its decision to implement the contents of the Maintenance Regulation to the extent that this Regulation amends the Brussels I Regulation (see OJ L 149, 12.06.2009, p. 80), based on a parallel agreement concluded with the European Community on 19 October 2005 under which Denmark shall notify the European Commission of its decision as to whether or not to implement the content of amendments to the Brussels I Regulation. This means that the contents of the "*Maintenance Regulation will be applied to relations between the European Community and Denmark with the exception of the provisions in Chapters III and VII*". Also, "*the provisions in Article 2 and Chapter IX of Maintenance Regulation are applicable only to the extent that they relate to jurisdiction, recognition, enforceability and enforcement of judgments, and access to justice*" (see Denmark's notification).

Temporal scope. The EU Maintenance Regulation applies in all EU Member States as of 18 June 2011. The transitional provisions of the Maintenance Regulation can be found in Article 75 of the Regulation as amended by the Corrigenda of 18.05.2011 (OJ L 131, p. 26) and 12.1.2013 (OJ L 8, p. 19). Subject to the details specified in Article 75(2), the Regulation applies to proceedings

instituted, to court settlements approved or concluded, and to authentic instruments established as from its date of application (being the 18 June 2011).

Both child maintenance and spousal/ex-spousal maintenance fall within the scope of the Regulation; see the overview below. Neither geographical nor temporal scope poses a problem here. The Polish court will thus determine its jurisdiction in matters relating to maintenance in accordance with the EU Maintenance Regulation

When applying the rules on jurisdiction of the EU Maintenance Regulation in our case, two matters in particular must be considered: whether Edyta and her daughter have their "**habitual residence**" in Poland and, should this question be answered in the negative, whether the proceedings for spousal/ex-spousal and child maintenance are "**ancillary**" to the divorce proceedings.

Let's start with a step-by-step analysis of the jurisdiction rules of the EU Maintenance Regulation. In contrast to the Brussels IIa Regulation, the EU Maintenance Regulation allows for a choice of court: see Article 4 of the EU Maintenance Regulation. Since the chosen jurisdiction is considered "exclusive" unless otherwise agreed (see Article 4 (1)), it is advisable always to start the examination of jurisdiction on maintenance matters by considering whether a valid choice of court has been made by the parties. In our case, there is no such choice. In absence of a choice of jurisdiction, the next provision to be examined is Article 3 of the Regulation. Only if this Article does not provide us with a ground of jurisdiction, Article 5, and finally, Article 6 and 7 should be applied.

"**Habitual residence", Article 3 b) of the EU Maintenance Regulation**
The grounds of jurisdiction in Article 3 of the EU Maintenance Regulation are alternative grounds of jurisdiction. The applicant can thus choose which one to use. The court in Krakow Poland, which Edyta seised, could have jurisdiction on spousal/ ex-spousal maintenance and child maintenance under Article 3 b) of the EU Regulation. This would, however, presuppose that Edyta (the spousal/ex-spousal maintenance creditor) and her daughter Irina (the child maintenance creditor) have their habitual residence in the court district of Krakow in Poland.

It is for the national court, in this case the Krakow court, to determine where the habitual residence of the person(s) concerned is. However, the test to be applied is a "European one". The term "habitual residence" needs to be interpreted autonomously, see box below.

The CJEU has dealt with "habitual residence" under Article 8 of the Brussels IIa Regulation but not yet in the context of Article 3 b) of the EU Maintenance Regulation. As the CJEU expressly stated in the case A (C-523/07), the case law cannot directly be transposed to other areas of law.

However, at least in respect of the "habitual residence" of a child claiming child maintenance under the EU Regulation, it can be argued that we are still in the "same area" of EU law, namely "child protection" law. Granting jurisdiction to the court at the place of habitual residence of the creditor follows, as the jurisdiction rule in Article 8 of the Brussels IIa Regulation, the idea of proximity to the child. The same test for habitual residence should thus be applicable when determining the habitual residence of a child in Article 3 b) of the EU Maintenance Regulation. One can further argue that for creditors other than children, the application of that same test of habitual residence makes equal sense, since the motive behind the jurisdiction rule in Article 3 b) EU Maintenance Regulation is protecting the (any) creditor by safeguarding their right to seise a court at "proximity". For the factors used by the CJEU to determine "habitual residence", see the box below.

In our case, the Polish court will have to explore the facts of the case in more detail. From what we know of the facts it is conceivable that mother and child may have acquired habitual residence in Poland. Mother and child have been living in Poland for about four months; Edyta has found a new job there; Irina attends the kindergarten; both have the Polish nationality and speak Polish; they live with the maternal grandparents. A certain degree of integration in a social and family environment seems given. Even if Edyta originally considered moving to Poland as a merely provisional solution, the new job and Irina's kindergarten place might imply an intention to settle permanently in Poland. It seems that Edyta ended her rental contract when leaving Munich and there were no concrete plans to return to Munich in the immediate future.

Note that the facts of our case do not suggest a context of international child abduction. The special provisions for child abduction cases do therefore not play a role in our case.

GOOD to KNOW

Habitual residence

"Habitual residence" is a connecting factor originally promoted by the Hague Conference and increasingly used in EU legislation. In contrast to the connecting factor "nationality", it has the advantage of guaranteeing some measure of proximity to the life circumstances of the person concerned and offers the necessary flexibility when it comes to a change of the "home" country. Unfortunately, defining the habitual residence of a person is in many cases much more cumbersome than determining that person's nationality/ies. Neither the modern Hague Family Law Conventions, which employ the "habitual residence" as a connecting factor, nor the EU Regulations using this factor define it. Abstaining from defining the term is meant to allow for flexibility in the interpretation of individual case facts.

The CJEU safeguarding the autonomous interpretation of texts of EU law, has in the past years developed a body of guiding case law as concerns the concept "habitual residence"; see box below.

CJEU (former ECJ) case law - Habitual residence

The first very important principle to note when dealing with this concept is that the "***The case-law of the Court* [CJEU] *relating to the concept of habitual residence in the* [different] *areas of European Union law* […] *cannot be directly transposed* [into other areas]**.

See, *inter alia*, Case A (C- 523/07), decision of 2 April 2009, paragraph 36.

The CJEU has in several decisions set forth very detailed factors that assist in the determination of the "habitual residence" of a child in the context of **Article 8 of the Brussels IIa Regulation**:

CJEU– Judgment of 2 April 2009 – *A (C-523/07)*

The CJEU highlighted that in the context of Article 8 of the Brussels IIa Regulation the 'habitual residence' of a child […] *corresponds to the place which reflects some degree* ***of integration by the child in a social and family environment****. To that end, in particular the* ***duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State****, the* ***child's nationality****, the* ***place and conditions of attendance at school****,* ***linguistic knowledge*** *and the* ***family and social relationships of the child*** *in that State must be taken into consideration.* ***It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case****"* (para 44).

The Court detailed that "*In addition to the physical presence of the child in a Member State other* ***factors*** *must be chosen which are capable of* ***showing that that presence is not in any way temporary or intermittent*** *…"* (para 38) and that *", **the parents' intention to settle permanently with the child***

*in another Member State, **manifested by certain tangible steps** such as the purchase or lease of a residence in the host Member State, **may constitute an indicator** of the transfer of the habitual residence*" (para 40).

CJEU– Judgment of 22 December 2010 – *Mercredi v. Chaffe (C-497/10 PPU)*

The CJEU reiterated the criteria given in ***A (C-523/07)*** and added that "*in order to distinguish habitual residence from mere temporary **presence**, the former **must as a general rule have a certain duration which reflects an adequate degree of permanence**. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, **it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests**, with the intention that it should be of a lasting character. Accordingly, the **duration of a stay can serve only as an indicator** […]*" (para 51). The Court further highlighted the importance of considering the factors comprising the social and family environment **in the light of the child's age** (para 53) and stated that "***An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent**. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case- law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographical and family origins may become relevant*."

CJEU – Judgment of 9 October 2014 – *C. v. M. (C-376/14 PPU)*

Following a French divorce decision, the British mother left France with the four-year-old child to live in Ireland in July 2012. The decision expressly allowed the mother to "set up residence in Ireland" but it was subsequently overturned by the French judgment of 3 March 2013 upon application of the French father, who wanted the child to return to France. The question which arose was whether the child could have established habitual residence in Ireland despite the fact that the decision allowing the mother to move had been provisional.

The Advocate General had pleaded that "*the fact that proceedings relating to the child's custody are still pending in the Member State of origin does not alter* [the finding that a child who lawfully moved to another Member State can in principle acquire habitual residence in that Member State], *as habitual residence is a factual concept and is not dependent on whether or not there are legal proceedings."*

The CJEU, however, decided that the national court when assessing all circumstances of fact specific to the individual case to determine the child's habitual residence at the time of the alleged wrongful retention, "***it is important that account be taken of the fact that the judgment authorising the removal***" **was only provisionally enforceable *"and that an appeal had been brought against it."***

Since without further exploration of the facts it is difficult to say whether the Polish court would conclude that mother and child have acquired habitual residence in Poland, we should also consider other grounds of jurisdiction.

"**Ancillary matter", Article 3c) of the EU Maintenance Regulation**

Since the Polish court has jurisdiction in matters of divorce, Article 3 c) of the EU Maintenance Regulation also gives jurisdiction to that court for maintenance matters if the "*matter relating to maintenance is ancillary*" to the divorce proceedings, "*unless that jurisdiction is based solely on the nationality of one of the parties*." The latter is not relevant in our case because the jurisdiction of divorce was based on the nationality of **both** parties (Article 3 b) of the Brussels IIa Regulation).

CJEU – Judgment of 16 July 2015 – *A. v. B. (C-184/14)*

The spouses A, B and their 2 minor children (all Italian nationals) habitually resided in London, UK. A brought proceedings for separation in Italy and also tried to have the Italian court rule on matters of parental responsibility as well as spousal and child maintenance. B contested jurisdiction on parental responsibility and child maintenance. The Italian court decided it had no jurisdiction on matters of parental responsibility in accordance with the Brussels IIa Regulation since the habitual residence of the children was London. The court likewise denied jurisdiction on child support, since this was a matter "ancillary" to the proceedings on parental responsibility in the sense of Article 3 d) of the EU Maintenance Regulation. A appealed to the Court of Cassation, claiming the Italian court had jurisdiction on child maintenance under Article 3 c) of the EU Maintenance Regulation. The court referred a question for a preliminary ruling to the CJEU.

The CJEU clarified that the "*the scope of the concept of 'ancillary matter', referred to* […in Article 3 c) and 3d)], *cannot, however, be left to the discretion of the courts of each Member State according to their national law*" (para 30) and highlighted that the "*concept must be given an autonomous and uniform interpretation throughout the European Union*" (para 31).

Even though the arguments employed by the CJEU show a clear tendency of the Court to consider child maintenance as a matter ancillary to parental responsibility proceedings only, the Court left it open whether an application relating to child maintenance could be a matter ancillary to divorce in the sense of Article 3c) of the EU Maintenance Regulation. The Court only ruled on the question in the particular situation in which two different courts were seised, one with the divorce proceedings and one with the proceedings on parental responsibility. The Court decided that in such a situation "*an* ***application for*** [child] ***maintenance*** […], ***cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation, and to the proceedings concerning the status of a person, within the meaning of Article 3(c) of that regulation***. *They may be regarded as ancillary only to the proceedings in matters of parental responsibility*."

The question is whether the spousal/ex-spousal and child maintenance are "*ancillary matters*" to the divorce proceedings. As the CJEU clarified, the concept of "ancillary matter" is to be given an autonomous uniform interpretation throughout the EU, see case A. v. B. (C-184/14) above.

Spousal or ex-spousal maintenance is undoubtedly a matter ancillary to divorce proceedings. But how about child maintenance? In A. v. B. (C-184/14), the CJEU was faced with the situation that one court (in Italy) had jurisdiction over the divorce and another one (in the UK where the children were habitually resident) had jurisdiction over parental responsibility. In this situation, the CJEU stated that the matter of child support can only be a matter ancillary to the proceedings on parental responsibility. The CJEU referred to the distinction that the Brussels IIa Regulation makes concerning jurisdiction in divorce and parental responsibility proceedings, highlighting the importance given to the connecting factor of habitual residence for parental responsibility in the light of the best interests of the child.

The facts of our case differ from those in A. v. B. (C-184/14) insofar as proceedings on parental responsibility have not been filed with any court. In our case, neither of the parties wants a decision on the matter of parental responsibly and, given the few facts we have, it would be unlikely that such proceedings would be brought before the court of another country.

Can we consider child maintenance proceedings a "matter ancillary" to divorce proceedings in a case where such proceedings are brought in the State in which the child is located and no proceedings on parental responsibly are pending in another State? (Evidently, if the child had already clearly acquired

her habitual residence in Poland, we could simply use Article 3 b) of the Maintenance Regulation as ground for the jurisdiction of the Krakow court.) The answer to this question is unclear. Arguments could be found in favour of answering in the affirmative.

Summarising the answer to question 2, we can state that the Krakow court clearly has jurisdiction on spousal/ex-spousal maintenance. This can be based on Article 3 b) of the EU Maintenance Regulation should the Polish court consider that Edyta had her habitual residence in Poland. If this is not the case, the jurisdiction could instead be based on Article 3 c) of the EU Maintenance Regulation, since spousal/ex-spousal maintenance is a matter ancillary to the divorce proceedings pending before the Polish court.

Important difference between the jurisdiction rules of the EU Maintenance Regulation and those of the Brussels IIa Regulation:

The latter are classic rules of international jurisdiction. That is to say, they simply determine that the courts of a certain State will have jurisdiction, while the decision on territorial jurisdiction, *i.e.* which local court inside that State will deal with the case, is left to national procedural law. The EU Maintenance Regulation regulates both international and territorial jurisdiction.

Compare the exact wording: Articles 3 a) and 3 b) of the EU Maintenance Regulation state: "*the COURT of the PLACE where the … is habitually resident*" Article 3 of the Brussels IIa Regulation "*jurisdiction shall lie with the COURTS of the Member State a) in whose territory…*".

Concerning child maintenance, the situation is less clear. Should the Polish court consider that Irina has her habitual residence in Poland, jurisdiction can be based on Article 3 b) of the EU Maintenance Regulation. Otherwise Article 3 c) of the EU Maintenance Regulation might arguably be used as basis of jurisdiction.

CJEU – Judgment of 18 December 2014 - *Joined Cases Sanders v Verhaegen (C-400/13) and Huber v Huber (C-408/13)*

The interpretation of Article 3 b) of the EU Maintenance Regulation has already been dealt with by the CJEU in ***Joined Cases Sanders v Verhaegen (C-400/13) and Huber v Huber (C-408/13).*** Two German courts had requested a preliminary ruling concerning the interpretation of Article 3 b) and whether the provision precludes national legislation concentrating jurisdiction in a court of first instance other than that of the place of habitual residence of the creditor.

German national provisions on jurisdiction determine that the jurisdiction of first instance for matters relating to cross-border maintenance obligations is the court of first instance at the seat of the appeal court; *i.e.* the normal court of first instance at the habitual residence of the defendant /creditor does not have jurisdiction under the implementing legislation. The aim of this provision was to concentrate jurisdiction in a number of courts specialised in dealing with cross-border maintenance matters.

The CJEU ruled that "***Article 3(b)* […], *must be interpreted as precluding national legislation such as that at issue* […], *except where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, which is, however, a matter for the referring courts to verify*."**

For further reading see, *inter alia*, Opinion of the Advocate General Jääskinen at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157397&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=82267>

Question 3: Assuming Edyta had not seised the Polish court, would the Austrian court have jurisdiction over matters of divorce, spousal/ex-spousal maintenance and child maintenance in our case?

Answer:
Assuming the case was not referred to the Polish court, the Austrian court would have jurisdiction on the divorce in accordance with Article 3 a) TIRE 5 of the Brussels IIa Regulation. It would equally have jurisdiction on matters of spousal/ex-spousal maintenance in accordance with Article 3 c) of the EU Maintenance Regulation. As for the jurisdiction on child maintenance, again, the understanding of "ancillary matter" in the sense of Article 3 c) of the EU Maintenance Regulation would have to be discussed. Here, however, the facts are closer to those in the case decided by the CJEU with regard to Article 3c) and 3 d) in that the divorce proceedings are brought in a place remote from the habitual residence and location of the child. To be discussed.

Recent case law on, *inter alia*, jurisdiction concerning maintenance obligations in the context of the EU Maintenance Regulation

CJEU – Judgment of 15 February 2015 – *W v. X (C-499/15)*

Question 4: How will the Austrian court deal with the matter when informed by Edyta's lawyer that the Polish court was seised on 2 February?

Answer:
Article 19 (1) of the Brussels IIa Regulation states that "*Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established*". The Austrian court must thus stay its proceedings until the Polish court has examined its jurisdiction. In accordance with Article 19 (3) of the Brussels IIa Regulation, which states that once "*the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court*" the Austrian court will upon establishment of the jurisdiction by the Polish court decline its jurisdiction on matters of divorce.

As concerns the matters of maintenance also brought before the Austrian court, "they share the destiny" of the divorce proceedings, since (see answer 3 above) the sole ground of jurisdiction which could be put forward here is Article 3 c) of the EU Maintenance Regulation. In the absence of jurisdiction on matters of divorce, Article 3 c) is no longer relevant.

Of course, had there been an independent ground of jurisdiction in our case, the *lis pendens* provision of the EU Maintenance Regulation, Article 12, would come into play. Its wording is nearly identical to that of Article 19(1) and 19(3) of the Brussels IIa Regulation. This means that exactly the same mechanism as described above for determining the jurisdiction on divorce would be used.

Case law on "*lis pendens*" in the context of the Brussels IIa Regulation

CJEU – Judgment of 5 October 2015 – *A v B (C-489/14)*
French spouses, parents of two children, residing for years in the UK, separated in 2010. The husband brought proceedings for judicial separation in France, the wife filed a petition for divorce in the UK.

Question 5: Assuming the Polish court had jurisdiction over the divorce, which rules would be applied to determine the law applicable to the divorce?

Answer:
Since 2012 a new Regulation determines the law applicable to divorce: ***Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*** (hereinafter "the **Rome III Regulation**"). This Regulation is however not applicable in all EU Member States. Since there was no agreement among the EU Member States about the adoption of the instrument, "enhanced cooperation" was chosen as a second best option to introduce applicable law rules for matters of divorce in Europe. Enhanced cooperation is possible if at least 9 EU Member States agree to implement the measure. The other EU Member States can, in accordance with Article 331 Treaty on the Functioning of the European Union, participate in the enhanced cooperation.

The EU Member States originally participating in the Rome III enhanced cooperation were the following 14 countries: **Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia**. **Lithuania, Greece and Estonia** later joined the enhanced cooperation, see the box on the substantive, geographical and temporal scope of the Regulation below for details.

Poland is not bound by this Regulation. The Polish court will thus determine the law applicable to the divorce in accordance with its autonomous rules on private international law.

The Rome III Regulation

Substantive scope. Under Article 1 (1), the Regulation "*shall apply, in situations involving a conflict of laws, to divorce and legal separation*". It is further clarified in Article 1 (2) that the Regulation does not apply to matters such as: "*the existence, validity or recognition of a marriage*", "*the property consequences of the marriage*" and maintenance obligations.

Geographical scope. The courts of all EU Member States participating in the enhanced cooperation are required to base the determination of the law applicable to matters of divorce and legal separation on the Rome III Regulation.

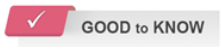
The EU Member States originally participating in the Rome III enhanced cooperation were the following 14 countries: **Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia**. The following three States have since joined the enhanced cooperation: **Lithuania** (see decision of the European Commission of 21 November 2012); **Greece** (see decision of the European Commission of 27 January 2014); **Estonia** (see decision of the European Commission of 10 August 2016).

It is important to note the "*universal application*" of the Regulation's applicable law rules: In accordance with Article 4 of the Regulation "*The law designated by this Regulation shall apply whether or not it is the law of a participating Member State*."

Temporal scope. The Regulation applies as from 21 June 2012 in the original 14 participating States.

Article 18 (1) provides that "*This Regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 concluded as from 21 June 2012. However, effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with Articles 6 and 7*." Article 18 (2) adds that the "*Regulation shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seised before 21 June 2012*."

For States joining the enhanced cooperation at a later stage, the date of application is determined in the relevant decision of the European Commission (for Lithuania from 22 May 2014; for Greece from 29 July 2015; for Estonia from 11 February 2018).



Applicability of the Rome III Regulation to private divorce?

The Oberlandesgericht (Higher Regional Court) Munich has requested a preliminary ruling concerning the applicability of the Rome III Regulation to private divorce on 29.6.2016.

A first request for a preliminary ruling from the same court had been rejected. The request related to the recognition of a private divorce granted in a non-EU State. The CJEU noted that the case falls outside the scope of EU law and explored whether it nonetheless had jurisdiction to answer the question referred. It stated, *inter alia*, that an interpretation by the Court "*of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way, in order to ensure that internal situations and situations governed by EU law are treated in the same way*." But the CJEU made it clear that it is the task of the national court to give sufficiently precise indications concerning such particular circumstances. Since such indication was missing in the request, the CJEU declined jurisdiction, see the order of the court in *Sahyouni v Mamisch (C-281/15)*.

Question 6: Assuming the Austrian court had jurisdiction over the divorce in our case, would the Austrian court use the same rules to determine the law applicable to the divorce? The law of which State would the Austrian court apply to the divorce?

Answer:

The Rome III Regulation applies to Austria as from 21 June 2012. The Austrian court would thus determine the law applicable to the divorce in accordance with this Regulation. The case falls clearly within the substantive, geographical and temporal scope. In particular, the fact that the case has a connection to a Member State not bound by the Regulation does not affect its application in a State bound by the instrument.

In the absence of a choice of law, Article 8 of the Rome III Regulation is decisive in determining the law applicable to the divorce in our case. It should be noted that the laws referred to in Article 8 are not listed as alternatives but in the form of a cascade. The connecting factors listed in Article 8 have thus to be examined in sequence. In our case, the conditions of Article 8 a) are not fulfilled: the spouses no longer have their habitual residence in the same State. The same is true for Article 8 b): the last common habitual residence (in Austria) ended in 2014, *i.e.* more than one year ago. In our case, Article 8 c) is the relevant provision determining the law applicable to divorce: the law of the State of which both spouses are nationals. In our case this is Polish law, since both spouses have Polish nationality.

7. Assuming the Polish court has jurisdiction over the maintenance matters in our case, which rules would the court apply to determine the law applicable and the law of which State would be applicable in our case under these rules with regard to
a) spousal/ex-spousal maintenance
b) child maintenance?
For the purpose of questions 7 and 8 it should be assumed that mother and child have their habitual residence in Poland.

Answer:
Article 15 of the EU Maintenance Regulation provides that the "*law applicable shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument*."
Here we have quite an unusual situation. An EU Regulation makes a Hague Conference international law instrument, the 2007 Hague Protocol, directly applicable as part of the EU law. The reason behind this unusual step is that the EU wanted to support the establishment of new uniform rules on applicable law in international maintenance matters drawn up in the Hague Protocol. Replicating the rules in the text of the EU Regulation, even with the exact same wording, could have undermined the new Hague rules and thus have been counterproductive. The use of the same "applicable law rules" inside and outside Europe holds the promise that commonly develloped jurisprudence and interpretation of these rules will assist in providing legal certainly in the international recovery of maintenance.

As the formulation of Article 15 of the EU Maintenance Regulation indicates, not all EU Member States are (currently) bound by the Hague Protocol: The EU joined the Hague Protocol without Denmark and the UK.

The 2007 Hague Protocol

Substantive scope. In accordance with Article 1(1), the 2007 Hague Protocol "*shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents*". The very broad substantive scope matches that of the EU Maintenance Regulation.

Geographical scope. The 2007 Hague Protocol has currently (February 2017) been joined by one State: Serbia (by ratification) and one Regional Economic Integration Organisation, the EU (by approval). However, the EU joined without Denmark and the UK, which are therefore not bound by the Protocol; see the European Union Declaration on joining the Protocol, which states "*For the purpose of this declaration, the term "European Community" does not include Denmark, by virtue of Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and the United Kingdom, by virtue of Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community*", available at the Hague Conference website "www.hcch.net".

As a result 27 States (26 EU Member States and Serbia) are currently bound by the 2007 Hague Protocol.

It is important to note the "*universal application*" of the applicable law rules. In accordance with Article 2 of the Protocol "*This Protocol applies even if the applicable law is that of a non-Contracting State*."

Temporal scope. The 2007 Hague Protocol entered into force on 1 August 2013. The Protocol has however been provisionally applied within the European Union (with the exception of Denmark and

the United Kingdom) since 18 June 2011. The European Union took this unusual decision in order not to delay the application of the Maintenance Regulation whose entry into force (see Article 76 of the Regulation) depended on the applicability of the 2007 Hague Protocol, see the declaration of the EU, available at the Hague Conference website "www.hcch.net".

The transitional provision in Article 22 of the Protocol provides that it "*shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State*".

Our case clearly falls within the substantive, geographical and temporal scope of the 2007 Hague Protocol. The Polish court will therefore determine the law applicable to the maintenance matters in accordance with Article 15 of the EU Maintenance Regulation in conjunction with the 2007 Hague Protocol.

a) Spousal/ex-spousal maintenance

For spousal/ex-spousal maintenance, the general rule set out in Article 3 of the Hague Protocol applies, *i.e.* "*maintenance is governed by the law of the State of habitual residence of the creditor*". Given that Edyta has her habitual residence (see clarification in Question 7) in Poland, Polish law would apply.

For spousal/ex-spousal maintenance the Protocol, however, provides a further option in Article 5. A spouse may object to the application of the general rule in Article 3 of the Protocol if "*the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply*". Whether the marriage does or does not have a closer connection with another law is a question that needs to be looked at in much detail in each case concerned.

Please note that there is no CJEU guidance on the interpretation of a "closer connection" in a family law context. The Explanatory Report is of assistance in the interpretation of the wording of the 2007 Hague Protocol, see box below.

Good to know: Each Hague Convention (as well as the Hague Protocol) is accompanied by an Explanatory Report, which aims to provide information on the sense intended by the diplomatic representatives of the States adopting the particular Hague instrument.

In our case, from the few facts known, one could argue that the marriage has a closer connection to the law of Germany and possibly to the law of Austria. The couple met in Germany in 2004 and they lived there for 4 years and got married there, before moving to Austria. They lived in Austria from 2008 until 2014 and their child was born there. The marriage has no particular connection to Poland. The only connection is the common nationality of the spouses. It should be noted that a closer connection to another law in the sense of Article 5 will only be explored by the court if one of the parties objects the application of Article 3 and claims a closer connection of the marriage to another law.

GOOD to KNOW

Article 5 of the 2007 Hague Protocol

The reference to the "last common habitual residence" in Article 5 of the Protocol is not a presumption but merely an indication of significant connection this law is likely to have with the marriage. It does not exclude that a law other than that of the last common habitual residence may have a closer connection with the marriage. See the Explanatory Report of the 2007 Hague Protocol, paras 86 *et seq*., available online at Hague Conference website: "*www.hcch.net*" under "*Instruments*" then "*Conventions*" then "*Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*".

b) Child maintenance
For child maintenance, the 2007 Hague Protocol provides special rules in Article 4; see Article 4 (1)a) referring to maintenance obligations of parents towards their children. The idea behind this rule is to protect a group of privileged creditors by offering a 3-step cascade with "fall-back" options of applicable law. Should the creditor be unable to obtain maintenance under the law primarily applicable, the next step of the cascade will be applied. And should the creditor be unable to obtain maintenance under that law, the third and last step of the cascade will be applied.

Article 4 needs to be read very carefully to understand the mechanism. One particularity that makes the provision difficult to grasp at first reading is that Article 4 actually contains two different 3-step cascades:

"Cascade I" (habitual residence of creditor / *lex fori* / common nationality)
The law applicable is that of the habitual residence of the creditor, Article 3; should the creditor be unable to obtain maintenance, the law applicable is that of the forum, Article 4(2); and finally should the creditor be unable to obtain maintenance under this law, the law applicable is that of the common nationality (or domicile, see Article 9) of the debtor and the creditor, if there is one, Article 4(4).

"Cascade II" (*lex fori* / habitual residence of creditor / common nationality)
Should the creditor seise the court of the State of habitual residence of the debtor, and only in that case, the first two steps of the above described "Cascade I" are reversed. As a result the law primarily applicable to the child maintenance claim is the *lex fori*, Article 4 (3), should the creditor be unable to obtain maintenance, the law of the habitual residence of the creditor, Article 4 (3) and finally should the creditor be unable to obtain maintenance under that law, the law applicable is that of the common nationality (or domicile, see Article 9) of the debtor and the creditor, if there is one, Article 4(4).

In our case the Polish court, being the court at the place of habitual residence of the creditor, would apply "Cascade I". This means the law primarily applicable would be the law of the State of habitual residence of the creditor, Article 3, namely Polish law. Should the creditor be unable to obtain maintenance under this law, the second step of the cascade would apply. Under Article 4(2) of the Protocol this is the *lex fori*, which would in our case likewise be Polish law. The third step of the cascade leads us to the application of the law of the parties' common nationality, Article 4 (4) of the Protocol. Father and daughter both have Polish and German nationality. Therefore, should the child be unable to obtain maintenance under Polish law, German law could be applied as a fallback option in accordance with Article 4(4) of the Protocol.

Question 8: Would an Austrian court apply the same rules to determine the law applicable and would the law applicable to
a) spousal/ex-spousal maintenance
b) child maintenance
be the same if maintenance proceedings were held in Austria?

Answers:
The Austrian court would equally determine the law applicable to both child maintenance and spousal/ex-spousal maintenance in accordance with Article 15 EU Maintenance Regulation in connection with the 2007 Hague Protocol.

a) Spousal/ex-spousal maintenance
For spousal maintenance the law applicable would be exactly the same.

b) Child maintenance

The law applicable to child maintenance would differ! Since Austria is the State of habitual residence of the debtor, "Cascade II" of Article 4 of the 2007 Hague Protocol (see above) would be applied. The law primarily applicable to the child support would be the law of the forum, Article 4(3) of the Protocol. This is Austrian law. Only if the creditor were unable to obtain maintenance under this law, would the law of the habitual residence of the creditor apply, as the second step of the cascade, see Article 4 (3) of the Protocol. This would in our case be Polish law. The third step of "Cascade II" is identical with the third step of "Cascade I". Therefore we would again have German law as the law of the common nationality of father and child as a fallback option under Article 4(4) of the Protocol.

 For further reading on the interpretation of the rules of the 2007 Hague Protocol see the Explanatory Report, drafted by Andrea Bonomi, available online at Hague Conference website: "*www.hcch.net*" under "*Instruments*" then "*Conventions*" then "*Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*".

Case variation 1 (Choice of Court / Choice of Law)

In the first hearing of the case in front of the Polish court, Martin presents a handwritten document dated 1.9.2011. The document is signed by both Edyta and himself and it states that in any disputes occurring in their relationship including a possible divorce and maintenance issues, also including possible future child maintenance, the Munich courts should have jurisdiction and that German law should be applied to these matters.

Questions: Could this "paper" change anything in our case as concerns:
- the jurisdiction and / or the applicable law concerning the divorce,
- the jurisdiction and / or the applicable law for spousal/ex-spousal maintenance,
- the jurisdiction and / or the applicable law for child maintenance?

Agreement concerning jurisdiction and/or applicable law concerning the divorce

The Brussels IIa Regulation does not allow for a choice of forum. An agreement made on the jurisdiction of a court in matters of divorce is therefore irrelevant.

By contrast, the Rome III Regulation offers the spouses the option of determining the law applicable, see Article 5 of the Regulation. The Rome III Regulation only applies as of 21 June 2012, but Article 18 of the Regulation makes it clear that effect shall also be given to agreements on the choice of applicable law concluded before that date, provided that the agreement complies with Articles 6 and 7 of the Regulation, *i.e.* the rules on consent, material and formal validity.

The choice of applicable law is, however, not a free choice. Only the laws listed in Article 5 can be chosen. In our case the law chosen as applicable to the divorce is German law. This would be a valid choice in accordance with Article 5 c) of the Rome III Regulation, because German law is the law of the State of nationality of one spouse (Martin) at the time the agreement was concluded.

Before getting into the details of examining the material and formal validity of the agreement in accordance with Articles 6 and 7 of the Rome III Regulation, we should recall that the Rome III Regulation does not apply in Poland. Thus the Polish court will not determine the law applicable in accordance with that Regulation but will use its own autonomous rules of private international law. It is conceivable that an agreement on the law applicable to the divorce could be given importance under Polish law, but it would then be Polish private international law which would determine the rules under which the material and formal validity of the agreement would be tested.

Agreement concerning the jurisdiction and/or applicable law for spousal/ex-spousal maintenance

The EU Maintenance Regulation allows a choice of court, see Article 4 of the Regulation. The parties can choose among the options listed in Article 4. The document Martin submitted determined the court of Munich as having jurisdiction over maintenance matters. Since Germany is a State of which one party is a national, the choice of German law is valid under Article 4 b) of the Regulation. As concerns the validity of the agreement, Article 4 (2) requires the agreement to be made in writing. Unless further exploration of the facts of the case will raise doubts as to the authenticity of the document, etc., we can assume that the choice of forum for spousal/ex-spousal maintenance is valid. Since the choice of forum is, unless otherwise agreed, to be considered an exclusive choice – see Article 4 (1) of the EU Maintenance Regulation – the Polish court would have to declare that is has no jurisdiction over spousal maintenance.

For the law applicable to spousal maintenance, the 2007 Hague Protocol also allows a choice, see its Article 8. Again, only one of the laws listed can be chosen as applicable. The connecting factor of nationality of one of the spouses is again one of the listed connections, see Article 8 (1), a) of the Protocol. Choosing German law is thus a valid option. The agreement submitted to the court by Martin seems to meet the formal requirements of Article 8 (2) of the Protocol, since it is in writing and signed by both parties. Article 8 (5) of the Protocol will have to be tested before applying the law designated: were the parties at the time of the designation "*fully informed and aware of the consequences of their designation*"? And if not would the application of the designated law "*lead to manifestly unfair or unreasonable consequences for any of the parties*"? If the answer to the latter question is yes, the designated law will not apply. In our Case variation 2 these questions would have to be considered by the Munich court, not by the Polish court. It would, as explained above, be the Munich court that has jurisdiction over spousal maintenance.

Agreement concerning the jurisdiction and/or applicable law for child maintenance

Choosing a court for child maintenance is not permitted, see Article 4 (3) of the EU Maintenance Regulation. Likewise, a binding choice of law applicable to child maintenance in advance is impossible, see Article 8 (3) of the 2007 Hague Protocol. However, an ad hoc choice of the law of the forum is an option also available for child support, see Article 7 of the 2007 Hague Protocol. But this does not help us in our case. The agreement submitted to the court by Martin made in 2011 does not have any effect on the jurisdiction and applicable law for matters of child maintenance.

A matter that could be discussed with regard to the agreement is whether the fact that the agreement is partially invalid is of importance. Would the parties still have wanted to make the choice under the agreement on jurisdiction and applicable law for spousal maintenance if they had known that the agreement was invalid for divorce and child maintenance and that thus not all matters would be dealt with by the same court?

Case variation 2 (Enforcement)
On the advice of her lawyer, Edyta has decided to bring the claim for maintenance before the Austrian court. **On 24 March 2017** the court of Vienna, Austria ordered Martin to pay **child and spousal/ex-spousal maintenance**. Following the breakdown of the marriage Martin now wants to concentrate on his career and has accepted a prestigious **job in** a well-known **New York** hospital in the **USA**. He moves there on **1 April 2017**. He also sees this as chance to escape any financial obligations towards his now ex-wife. Since Martin refuses to pay maintenance, Edyta wants to enforce the Austrian decision. She has heard through friends of friends that Martin has inherited **immovable property in Munich and in Denmark**. Furthermore, she knows which hospital Martin works at and thinks she should also be able to enforce the decision in the USA.

Question 1: In accordance with which rules which rules would Edyta be able to enforce the Austrian decision in
a) Germany
b) Denmark
c) the USA?

Enforcement inside the EU
It is important to note that the EU Maintenance Regulation contains two sets of enforcement provisions. For decisions being rendered in an EU Member State bound by the 2007 Hague Protocol, the Regulation abolishes the "*exequatur*". The provisions for enforcement are regulated in Chapter IV, Section 1 of the Regulation. For EU Member States NOT bound by the 2007 Hague Protocol, the Regulation makes provision for accelerated and simplified enforcement (in comparison with the rules applicable previously), but it retains the need for an "*exequatur*". This is regulated under Chapter IV, Section 2 of the Regulation.

See Article 16 of the Regulation, which states that "*Section 1 shall apply to decisions given in a Member State bound by the 2007 Hague Protocol*" and that "*Section 2 shall apply to decisions given in a Member State not bound by the 2007 Hague Protocol*".

As noted under the description of the scope of the EU Maintenance Regulation above, currently two EU Member States, the UK and Denmark, do not participate in the application of the 2007 Hague Protocol.

As a result, question 1 a) and b) are to be answered as follows:

a) Enforcement of the Austrian maintenance decision in Germany
The enforcement provisions of **Chapter IV, Section 1 of the EU Maintenance Regulation would apply when seeking to enforce the Austrian decision in Germany**. That is to say, the Austrian decision will be enforced without the need of an exequatur, *i.e.*, it will be enforced in Germany as if it were a decision rendered by a German court. However, to make the Austrian decision "readable" for the enforcement authorities in Germany, certain documentation has to be provided, including the completed Annex I of the Regulation, see Article 20.

b) Enforcement of the Austrian maintenance decision in Denmark
The same is true for enforcement in Denmark: the **Chapter IV, Section 1 enforcement provisions of the EU Maintenance Regulation would apply**.

The fact that the Regulation applies only partially in Denmark (see above the details on the scope of the Regulation) and that the 2007 Hague Protocol does not apply in Denmark, may be misleading. If

answering the question too quickly, one might be tempted to think that the Chapter IV, Section 2 enforcement provisions of the Regulation would apply to the enforcement of the Austrian decision in Denmark. A decision rendered today in an EU Member State bound by the 2007 Hague Protocol such as our Austrian decision, will be enforceable in **ALL** EU Member States without need for an exequatur.

c) Enforcement of the Austrian decision in the USA

Enforcement outside the EU
For enforcement outside the EU, the EU Maintenance Regulation cannot be applied, since only EU States are bound by this instrument. Here, the applicability of global, regional or bilateral instruments will have to be considered.

The 2007 Hague Convention

Substantive scope. The substantive scope of the 2007 Hague Convention is narrower than that of the EU Maintenance Regulation and it is somewhat complex since the Convention allows Contracting States to further narrow or extend the scope when joining the instrument.

In a nutshell, the Convention applies (by default) to

- maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years (Article 2(1) a));
- the recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim for the above child support (Article 2(1) b)), and
- to other spousal support, with the exception of Chapters II and III (Article 2(1) c)).

The Convention applies to children regardless of their parents' marital status (Article 2(4)).

The application of Article 2(1) a) of the Convention can be limited by reservation to maintenance obligations arising from a parent-child relationship towards a person under the age of 18 years (Article 2(2)). On the other hand, by declaration, the application of the Convention or parts of the Convention can be extended to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons (Article 2(3)).

The EU declared, when joining the 2007 Hague Convention, that the application of the Chapters II and III of the Convention will be extended to spousal support.

It should be noted that the Convention follows the principle of reciprocity regarding the substantive scope, *i.e.* where a Contracting State limits the application of the Convention, this State is not entitled to claim the application of the Convention to persons of the age excluded by its reservation (Article 2(2)) and where a Contracting State declares an extension of the Convention's application, the declaration will only give rise to obligations between two Contracting States in so far as their declarations cover the same maintenance obligations and parts of the Convention (Article 2(3)).

Geographical scope. The 2007 Hague Convention has (as of February 2017) been joined by six States, namely Albania, Bosnia Herzegovina, Norway, Turkey, Ukraine and the United States of America (by ratification) and one regional economic integration organisation, the EU (by approval).

As a result, 34 States (28 EU Member States and six non-EU States) are currently bound by the Protocol.

Any state is free to join the instrument, see Article 58 of the Convention. For the up to date status table see the website of the Hague Conference.

Temporal scope. The 2007 Hague Convention came into force on 1 January 2013. Under Article 60 of the Convention this was subject to the deposit of two instruments of ratification. The first two

States bound by the instrument were Norway and Albania. Please note that for States joining the instruments at a later stage a different date of entry into force applies. For the updated list of Contracting States and dates of entry into force for each State, see the website of the Hague Conference at www.hcch.net.

For the EU the 2007 Hague Convention came into force on 1 August 2014.

The Convention applies to some extent retroactively. As stated by the transitional provisions in Article 56,

"*The Convention shall apply in every case where –*

a) a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;

b) a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed."

This means that as long as the request for recognition and enforcement is made after the date of entry into force between the States concerned, it does not matter when the maintenance proceedings commenced and when the decision was rendered. (But see the particularities of Article 56 (2) and (3)).

 For further reading on the interpretation of the rules of the 2007 Hague Convention see the Explanatory Report, drafted by Alegría Borrás and Jennifer Degeling and the Hague Conference's "Practical Handbook for Caseworkers" available in all EU languages at available online at Hague Conference website: "*www.hcch.net*" under "*Instruments*" then "*Conventions*" then "*Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*".

In our case, it is the 2007 Hague Convention which will assist Edyta in enforcing the Austrian decision in the USA. See the box above for the substantive, geographical and temporal scope of the Convention.

The 2007 Hague Convention is in force between the EU and the United States of America. The maintenance obligation at stake in Case variation 2 is (ex-)spousal and child maintenance for a four-year-old child. The recognition and enforcement of the maintenance decision falls within the substantive scope of the 2007 Hague Convention under Article 2 (1) a) and b) (in our case the application for spousal support will be made together with the claim for child support). The temporal scope does not pose any problems in our case. The 2007 Hague Convention applies to all requests for recognition and enforcement made after the entry into force of the Convention between the two States concerned. The 2007 Hague Convention entered into force for the European Union as a regional economic integration organisation (thus binding Austria) on 1 August 2014 and for the USA on 1 January 2017. The Convention therefore came into force between the USA and Austria on 1 January 2017.

2007 Hague Convention – two sets of procedures

The 2007 Hague Convention allows a State to declare that it wants to apply the alternative procedure for recognition and enforcement in Article 24 of the Convention instead of the default procedure in Article 23. It is therefore important always to consult the Hague Conference website for possible declarations made by Contracting States in order to determine which of the two procedures will be applied between any given pair of States. The reservations, declarations and notification of

Contracting States can be found (in form of a link) in the last column of the status table available at the Hague Conference website "www.hcch.net".

Between the EU (and thus all EU Member States bound by the 2007 Hague Convention) and the USA, the "regular" procedure for recognition and enforcement – Article 23 of the Convention – applies. Neither the EU nor the USA have made a declaration to apply the alternative procedure in Article 24 of the Convention.
When it comes to the question whether a maintenance decision rendered in one Contracting State is enforceable in another, the indirect rules of jurisdiction contained in the 2007 Hague Convention come into play. In fact, not all maintenance decisions are recognised and enforced under the Convention, but only those rendered on the basis of grounds of jurisdiction listed in its Article 20. It is important to note that the USA made a reservation in accordance with Article 20(2) and 62 of the Convention as a consequence of which "*it will not recognize or enforce maintenance obligation decisions rendered on the jurisdictional bases set forth in subparagraphs 1(c), 1(e), and 1(f) of Article 20 of the Convention*": see the Hague Conference website "*www.hcch.net*" under "*Instruments*" then "*Conventions*" then "*Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*" and then "Status table".

In our case, the maintenance decision was rendered in Austria, the State of habitual residence of the respondent (Martin) at the time the proceedings were instituted. Therefore, the decision, being based on Article 20 1) a) of the 2007 Hague Convention can be recognised and enforced in the USA under the Convention.

GOOD to KNOW

2007 Hague Convention – indirect rules of jurisdiction

The 2007 Hague Convention does not include any direct rules on jurisdiction. Nonetheless, the Convention's provisions on recognition and enforcement are based on the idea that only decisions made by an authority considered competent to render a decision due to a certain link with the case will have to be recognised and enforced: see the indirect rules on jurisdiction in Article 20 of the Convention. Apart from that, the negative rule on jurisdiction in Article 18 of the Convention (which is the same as Article 8 of the EU Maintenance Regulation) can play a role at the recognition and enforcement stage, see Article 22 f).

If the recognition and enforcement of a decision rendered in a court of an EU Member State is sought in a non-European Union Contracting State to the 2007 Hague Convention, the decision may not be recognised and enforceable under the Convention in the event that the court of origin based its jurisdiction on a ground of jurisdiction not "supported" by the 2007 Hague Convention.

Such a scenario is easily possible, since not all grounds for jurisdiction referred to in the EU Maintenance Regulation have an equivalent in the indirect rules of jurisdiction of the 2007 Hague Convention. Besides minor differences (such as that the Convention does not provide an equivalent to Article 2(3) of the Regulation according to which the reference to 'nationality' in the jurisdiction rules is to be understood as reference to 'domicile' for certain States), it should be noted that, in particular, Articles 6 and 7 of the EU Maintenance Regulation (subsidiary jurisdiction and the *forum necessitatis*) have no equivalent in Article 20 of the 2007 Hague Convention.

Furthermore, Contracting States to the 2007 Hague Convention can apply a reservation to some of the indirect jurisdiction rules in Article 20, as a result of which even some further grounds of jurisdiction of the Maintenance Regulation (for example jurisdiction by agreement) may not be "supported" by the 2007 Hague Convention for the relevant State: for details see Article 20 of the Convention.

As an aside, had the maintenance decision been rendered by the Polish court together with the divorce decision in our case, it would not be enforceable in the USA under the 2007 Hague Convention. Yes, it is correct, Article 20 (1) f) does include a basis of jurisdiction applicable in our case: "*the decision was made by an authority exercising jurisdiction on the matter of personal status* ...." and, possibly jurisdiction in our case might have been based on Article 3 b) of the EU Maintenance Regulation, which corresponds to the basis of jurisdiction contained in Article 20 (1) c) of the 2007 Hague Convention. However, the USA has, as stated above, made a reservation with regard to Article 20 (1) b), c) and f).

Question 2: Would Edyta get assistance from the Central Authority when enforcing the Austrian decision on spousal/ex-spousal maintenance and child maintenance in Germany, Denmark and / or the USA?

Answer:

Assistance from the Central Authorities

Edyta will be able to file an application for enforcement of the Austrian decision on spousal/ex-spousal and child maintenance with the Central Authority if she wants to enforce the decision in Germany, in accordance with Chapter VII of the EU Maintenance Regulation.

Please note that Edyta would, in accordance with Article 55 of the EU Maintenance Regulation, make her application through the Central Authority where she resides, *i.e.* the Polish Central Authority, and this Central Authority would transmit the application to the German Central Authority.

GOOD to KNOW The provisions on Central Authority cooperation for the EU Maintenance Regulation and the 2007 Hague Convention are nearly identical. A major innovation offered by both instruments is the generally COST-FREE recovery of child maintenance across borders with the assistance of the Central Authorities.

For enforcement in Denmark, an application through the Central Authority under the EU Maintenance Regulation is unfortunately not possible. As set forth above, the EU Maintenance Regulation applies only partially to Denmark. Chapter VII regulating Central Authority cooperation is not applicable in relation to Denmark.

Please note that another international instrument, which provides some "Central Authority" support in the cross-border recovery of maintenance, namely the United Nations Convention of 20 June 1956 on the Recovery Abroad of Maintenance, is in force between Denmark and Austria. However, in order to use the authority support under the UN Convention the mechanisms this Convention provides must be used, and these are far less favourable than the recognition and enforcement provisions of the EU Maintenance Regulation.

GOOD to KNOW **Other international/regional instruments that will at least for a certain time continue to play a role in the cross-border enforcement of maintenance decisions outside the EU or respectively enforcement in the EU from outside the EU.**

In the long run we can hope that, for the international recovery of maintenance, the modern 2007 Hague Convention will gradually replace the existing older global instruments and thereby simplify the complex area of international recovery of maintenance.

Instruments that continue to play a role in the international recovery of maintenance include:

The 1956 UN Convention - United Nations Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956, in force since 25 May 1957, 65 States parties;

The 1958 Hague Maintenance Convention - The Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, in force since 1 January 1962, 20 States parties;

The 1973 Hague Maintenance Convention - The Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, in force since 1 August 1976, 24 States parties;

The "new" Lugano Convention of 2007 - Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007, applicable in relations between European Union Member States and the EFTA States: Iceland, Norway and Switzerland (not Liechtenstein)

Several further bilateral and regional instruments can be relevant in this field of law. It will depend on the case in hand and the countries concerned which instruments can be applied. It is also conceivable that a case could fall within the substantive, geographical and temporal scope of more than one of these instruments.

Please note that the 2007 Hague Convention replaces the two older Hague Conventions and the 1956 UN Convention between Contracting States only insofar as their scope coincides, see Articles 48 and 49. Furthermore, the two older Hague Conventions are still given a residual field of application in the transitional provisions in Article 56 of the 2007 Hague Convention.

For enforcement in the USA, Edyta would be able to file an application with the Central Authority in accordance with Chapter III of the 2007 Hague Convention. Again, she would make her application through the Central Authority of her country of residence, see Article 9 of the Convention.

Please note that under both the EU Maintenance Regulation and the 2007 Hague Convention, applicants are free to make direct applications for enforcement to the competent body, *i.e.* individuals are not obliged to make their application through the Central Authority. See also a recent decision from the CJEU in this regard.

Recent case law on direct application for enforcement to the competent court under the EU Maintenance Regulation

CJEU – Judgment of 9 February 2017 – *M.S. v. P.S. (C-283/16)*
The CJEU clarified that "***a maintenance creditor*** *who has obtained an order in one Member State and wishes to enforce it in another Member State* ***may make an application directly to the competent authority*** *of the latter Member State, such as a specialised court,* ***and cannot be required to submit the application*** *to that court* ***through the Central Authority*** *of the Member State of enforcement*".