

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

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



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Cross-border divorce and maintenance

Case I: Jurisdiction and applicable law

Brigitte (**Dutch national**) and Karel (**Slovenian national**) meet in **The Hague, the Netherlands in 2005**. Following their **marriage in 2009** they move to **Marseilles, France** where their daughter **Anna (Dutch/Slovenian national) is born in 2013**. Brigitte and Karel decide to separate at the end of **2016**. Brigitte and Anna move back to **the Netherlands**, while Karel remains in **Marseilles**, where he has a well-paid job. Brigitte has no income and wishes to obtain maintenance from Karel for herself and for Anna. Since Brigitte does not believe that their marriage can be repaired, she also wants to file for divorce. She wants to know whether she would have to bring her case to a court in France or the Netherlands.

Questions

1. In accordance with which rules will jurisdiction for divorce be determined in the EU Member States concerned?

2. In accordance with which rules will jurisdiction for maintenance matters be determined in the EU Member States concerned?

3. Would the answers to question 1 and 2 differ if in our case:

- a) Brigitte were a Mexican national and Karel a Russian national?
- b) Karel were habitually resident in the USA at the time Brigitte wants to bring her case in the Netherlands? or
- c) “Karel” were, in fact, “Karla” and the couple were a same-sex couple who had adopted a child?

4. Going back to the original facts of our Case I, where could Brigitte file

- a) the divorce,
- b) a claim for spousal / ex-spousal maintenance,
- c) a claim for child maintenance?

When answering question 4 and all the following questions for Case I, please assume that Brigitte and Anna have been residing in the Netherlands for 7 months and that they have their habitual residence in the Netherlands at the moment Brigitte brings her case to the court.

5. Could Karel file for divorce in Slovenia in our case? *i.e.* would the courts of Slovenia have jurisdiction if Karel were the applicant?

6. Suppose that Karel files for divorce in a Slovenian court on 1 March 2017 and Brigitte files for divorce in a Dutch court on 2 March 2017. Karel informs the Dutch court that the Slovenian court is already dealing with the divorce. Would the Dutch court nonetheless be able to rule on the divorce?

7. In accordance with which rules will the law applicable in matters of divorce be determined in our case?

For the purpose of this question we assume that

- a) Brigitte has seised a Dutch court,
- b) Brigitte has seised a French court.

8. In accordance with which rules will the law applicable in matters of spousal / ex-spousal and child maintenance be determined?

For the purpose of this question we assume that

- a) Brigitte has brought her case in a Dutch court,
- b) Brigitte has brought her case in a French court.

9. What would be the law applicable to the divorce in our case if the divorce were to be decided by a French court?

10. What would be the law applicable to

- a) spousal / ex-spousal maintenance
 - b) child maintenance
- if a French court were to decide?

11. Would a different law be applied if a Dutch court were to decide on

- a) spousal / ex-spousal maintenance
- b) child maintenance?

12. Imagine Brigitte and Karel had sat down at the end of 2016, when both were still habitually resident in France, to draft an agreement on choice of court and applicable law to reduce the potential for future disputes. Could they have agreed on the following subjects in a binding way? What courts and laws could they have chosen? Please note the relevant provisions.

- a) Choice of court for the divorce
- b) Choice of the law applicable to divorce
- c) Choice of court for spousal / ex-spousal maintenance
- d) Choice of the law applicable to spousal / ex-spousal maintenance
- e) Choice of court for child maintenance
- f) Choice of the law applicable to child maintenance.

Case II: (Enforcement)

Laura (Spanish national) and Andres (Spanish national) divorce after 13 years of marriage in London where they have habitually resided since 2007. In its divorce decision of 3 June 2016, the London court orders Andres, *inter alia*, to pay Laura, who is pregnant, monthly ex-spousal maintenance of £1200. Laura moves back to Spain in June 2016 where their common daughter Christina is born on 1 December 2016. Since Andres not only refuses to pay the maintenance defined in the UK decision but also refuses to give Laura any financial support for Christina, Laura has meanwhile obtained a Spanish court decision (granted on 2 April 2017) ordering Andres to pay monthly child maintenance of 330 EUR. Andres is now living in Belgium where he has well-paid employment in Brussels and he owns immovable property in Denmark.

1. Will Laura be able to enforce both the UK and the Spanish decision under the EU Maintenance Regulation in Belgium and Denmark? If yes, which provisions would be applied?

2. Assuming the London court ordered Andres in the divorce decision to pay Laura a lump sum of £140,000 instead of ordering the payment of monthly maintenance. Would this decision be enforceable in Belgium and Denmark under the EU Maintenance Regulation?

3. Would Laura get assistance from the Central Authority under the EU Maintenance Regulation when enforcing the Spanish child maintenance decision in Belgium or Denmark?

METHODOLOGICAL ADVICE

Training Aims:

- Familiarising the participants with 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;
- Making the participants feel at ease with the application of these instruments;
- Raising awareness for the motives behind the instruments, highlighting particularities, new features and improvements connected with these instruments;
- Clarifying the interaction between these instruments;
- Familiarising the participants with some key decisions of relevant EU case law.

Points of particular interest with regard to these instruments:

Brussels IIa Regulation

- in matrimonial matters the Regulation offers several alternative grounds for jurisdiction; problem: rush to court;
- no choice of court possible
- applicability to same-sex marriage is an unresolved question
- proposal for a recast Regulation: no change of rules on matrimonial matters envisaged

Rome III Regulation

- enhanced cooperation
- applicability to divorce of same-sex marriage is an unresolved question
- choice of law applicable to divorce possible

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 substantially 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 procedure for enforcement – (1) Chapter IV Section 1, abolition of exequatur, for decision 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, 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

Hague Protocol

- particularity: by reference in Article 15 of the EU Maintenance Regulation, the international instrument is made part of directly applicable EU law
- innovation by comparison with older Hague applicable law instruments in the field of maintenance: choice of law possible

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

In any 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, 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: In accordance with which rules will the jurisdiction for divorce be determined in the EU Member States concerned?

Jurisdiction in matters relating to divorce

In our case, **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**”) is the instrument applicable to determine the jurisdiction in matters of divorce. Neither substantive, geographical nor temporal scope pose a problem here, see overview below.

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 to not rely on the text of a Regulation alone to determine the applicability of the instrument to Denmark and the UK. Sometimes an EU Regulation text is adopted without the participation of Denmark or the UK, but then, at a later stage, the application of the Regulation is extended.

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

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 given before the date of application of the Regulation and to judgments given after that date in proceedings instituted before.



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.



GOOD to KNOW

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 to recast the provisions on jurisdiction in matrimonial matters retains the *status quo*.

See for further details 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.

Question 2. In accordance with which rules will jurisdiction for maintenance matters be determined in the EU Member States concerned?

Answer:

Jurisdiction in matters relating to maintenance obligations

In our case 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**”) is the relevant instrument for determining jurisdiction in matters of both child maintenance and spousal / ex-spousal maintenance. Neither the substantive, geographical nor temporal scope pose a problem here; see overview below.

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. For 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 adoption of the Regulation.)

Although the United Kingdom did not take part in the adoption of the Regulation, which Recital 47 reflects, the **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 according to which Denmark shall notify the European Commission of its decision whether or not to implement the content of amendments to the Brussels I Regulation. This means that the content 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 VI*”. 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 Corrigendum published in the OJ L 131, 18.05.2011, p. 26, and the Corrigendum published in the OJ L 8, 12.1.2013, p. 19. Subject to the provisions 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).

Question 3: Would the answers to question 1 and 2 differ if in our case:

- a) Brigitte were a Mexican national and Karel a Russian national?
- b) Karel were habitually resident in the USA at the time Brigitte wants to bring her case in the Netherlands? or
- c) “Karel” were, in fact, “Karla” and the couple were a same-sex couple who had adopted a child?

Answers:

The answer to the **question 3 a)** is: No, the rules of the Brussels Ia Regulation and those of the EU Maintenance Regulation would still be the rules applied to determine the jurisdiction of a French or Dutch court in matters of divorce or maintenance respectively. Neither the Brussels Ia Regulation nor the EU Maintenance Regulation require that the parties have an EU Member State nationality. For the legislative intentions concerning the rules on jurisdiction in divorce cases in the Brussels Ia Regulation see, *inter alia*, Recitals 4, 8 and 12 of the predecessor EU Regulation No 1347/2000 whose provisions on jurisdiction in matrimonial matters are essentially repeated in the Brussels Ia Regulation. For the EU Maintenance Regulation, see in particular Recitals 14 *et seq.*

The same is true for the **question 3b)**. The fact that one party / the defendant is habitually resident in a country outside the EU does not generally exclude the application of the Regulations’ jurisdiction rules. See for the EU Maintenance Regulation, also Recital 15, which states as follows: “*In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. ...*”.

Question 3 c) is more difficult to answer. Whether the Brussels Ia Regulation applies to same-sex marriages or not is a highly disputed and still unresolved matter.

The Brussels IIa Regulation applies “*in matters relating to [...] divorce, legal separation or marriage annulment*” (Article 1 a) but it does not contain a definition of “marriage”. Same-sex marriages only exist in a number of EU Member States (even though this number is growing) while other EU Member States only allow same-sex partners to register partnerships and some simply deny same-sex partners the opportunity to formalise their relationship in either way. It is therefore obvious that there is no common approach within the EU to the question of whether same sex partners should be able to marry and whether the term “marriage” could hence include same-sex marriage.



For further reading on the legal situation of same-sex couples in Europe: Boele-Woelki/Fuchs, *Same-Sex Relationships and Beyond, Gender Matters in the EU*, 3rd edition Cambridge 2017.

When it comes to the term marriage in the Brussels IIa Regulation, the need for an autonomous interpretation must be stressed, *i.e.* the applicability of the Regulation to same-sex marriage cannot depend on the national law notion of the term “marriage”. Nonetheless the different approaches to same-sex marriage in the EU play a role in the arguments exchanged between those who favour the applicability of Brussels IIa to same sex marriage and those who argue against it.

Those opposing the applicability of the Brussels IIa Regulation to same-sex marriage refer, *inter alia*, to the fact that at the time the Regulation was drafted only one EU Member State (the Netherlands) allowed same-sex marriage and that therefore clearly it was not intended that Brussels IIa would include same-sex marriage. Others argue that even if Brussels IIa was drafted at a time when same-sex marriage was not yet widely permitted, this is no argument against its application to same-sex marriage today. The Regulation does not define “marriage” and thus does not expressly exclude same-sex marriage. Furthermore, the rules of EU law must today be applied in a way that is compatible with the rights enshrined in the EU Charter of Fundamental Rights, and the Charter expressly prohibits any discrimination based on grounds of sex or sexual orientation (Article 21 (1) of the Charter). As said, the issue is not yet resolved, the Court of Justice of the EU (CJEU) has not yet had occasion to decide the matter and we might, for the time being, see different interpretations of the term “marriage” in the Brussels IIa Regulation across Europe.

As concerns the applicability of the EU Maintenance Regulation to matters of maintenance between same-sex spouses, similar questions arise. However, the EU Maintenance Regulation has a very broad substantive scope since it applies to **ALL** “maintenance obligations arising from a family relationship, parentage, marriage or affinity”, see Article 1(1) and Recital 11. Even if a same-sex marriage were not regarded as a marriage within the meaning of the EU Maintenance Regulation, maintenance between life-partners could be considered other “family maintenance”. Whether a maintenance obligation actually exists is, in any event, a question answered by the applicable law.

Finally, when it comes to the maintenance for the child Anna, the EU Maintenance Regulation applies without any restriction, independent of the marital status of the parents.

Question 4:

Returning to the original facts of our Case I, where could Brigitte file

- a) for divorce,
- b) a claim for spousal / ex-spousal maintenance,
- c) for child maintenance?

When answering this and all following questions regarding Case I, please assume that Brigitte and Anna have been residing in the Netherlands for 7 months and that they have their habitual residence in the Netherlands at the moment Brigitte brings her case before the court.

Answers:**a) Jurisdiction for divorce:**

Brigitte could file for divorce in either France or the Netherlands.

The courts of France would have jurisdiction in accordance with Article 3 a) TIRE 2 and TIRE 3 of the Brussels IIa Regulation. The spouses were last habitually resident in France and one of them still resides there. The respondent is habitually resident in France.

The courts of the Netherlands would have jurisdiction in accordance with Article 3 a) TIRE 6 of the Brussels IIa Regulation. Brigitte is habitually resident in the Netherlands as she has resided there for more than 6 months immediately before the application and she is a national of the Netherlands.

Brigitte is free to choose between the alternative grounds of jurisdiction.

**Important case law on residual jurisdiction, Article 7 of the Brussels IIa Regulation:****CJEU (ECJ) – Judgment of 29.11.2007 - *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo (C-68/07)***

Before their separation, Mrs Sundelind Lopez (Swedish national) and Mr Lopez Lizazo (Cuban national) had their common habitual residence in France. Mr Lopez Lizazo then left to live in Cuba. Mrs Sundelind Lopez filed for divorce in Sweden. It was not disputed that the French courts had jurisdiction in accordance with Article 3(1) a) of the Brussels IIa Regulation.

The CJEU (ECJ) was asked whether the courts of a Member State could base their jurisdiction on national law “[w]here the respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State, even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3 [of the Regulation]”.

The Court ruled that “*Articles 6 and 7 of [the Brussels IIa Regulation] [...] are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.*”

b) Jurisdiction for spousal / ex-spousal maintenance

Brigitte could bring a claim for spousal / ex-spousal maintenance before the court of her place of residence in the Netherlands or before the court of the place of residence of Karel in France.

The French court would have jurisdiction in accordance with Article 3 a) of the EU Maintenance Regulation. Karel, the defendant, is habitually resident in Marseilles. The Dutch court would have jurisdiction in accordance with Article 3 b) of the EU Maintenance Regulation. The creditor, Brigitte, is habitually resident in the Netherlands. Article 3 c) of the EU Maintenance Regulation allows the applicant furthermore to file for maintenance at the court with jurisdiction in matters of divorce, provided the maintenance claim is ancillary to those proceedings. Knowing that the jurisdiction for matters of divorce in our case lies either in France or the Netherlands, Article 3 c) does not provide us with a further forum for the maintenance claim.



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 to be considered “exclusive” unless otherwise agreed (see Article 4 (1)), it is advisable to always 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 the 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 should Article 5, and finally, Articles 6 and 7 be looked at.

Please note that Articles 5, 6 and 7 of the EU Maintenance Regulation do not have an equivalent in the matrimonial provisions of the Brussels IIa Regulation. In accordance with Article 5 of the EU Maintenance Regulation, the court of a Member State before “*which a defendant enters an appearance*” without contesting jurisdiction “*shall have jurisdiction*”. Supplemented by Article 6 (subsidiary jurisdiction) and Article 7 (*forum necessitatis*), the jurisdiction rules of the EU Maintenance Regulation are intended to constitute a comprehensive set of jurisdiction rules which will make the recourse to national rules on jurisdiction obsolete; see Recitals 15 and 16 of the EU Maintenance Regulation.

c) Jurisdiction for child maintenance

The claim for child maintenance could be brought at the court of the child’s place of residence in the Netherlands or at the court of the place of residence of Karel in France. The French court would have jurisdiction in accordance with Article 3 a) of the EU Maintenance Regulation. Karel, the defendant, is habitually resident in Marseilles. The Dutch court would have jurisdiction in accordance with Article 3 b) of the EU Maintenance Regulation. The creditor, Anna is habitually resident in the Netherlands.

Article 3 d) of the EU Maintenance Regulation would not provide us with another forum. The jurisdiction for matters of parental responsibility would, in accordance with Article 8 of the Brussels IIa Regulation, lie with the courts of the Member State of habitual residence of the child: here, the Netherlands.

Remark: In many EU Member States judges hearing a divorce in purely national cases naturally also deal with matters of maintenance and parental responsibility. This is in accordance with the national procedural rules. It is important to emphasise that in international family disputes, jurisdiction **must** be based on the relevant EU and international instruments. As a result of the application of these rules it can happen that different courts will be dealing with the matters of divorce, spousal maintenance, child maintenance and / or parental responsibility.



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 the international and the territorial jurisdiction.

Compare the exact wording: Articles 3 a) and 3b) of the EU Maintenance Regulation states: “*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...*”.

See also relevant case law of the CJEU in the next box.



CJEU – Judgment of 18.12.2014 - *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 Court of Justice of the EU 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 first instance court other than that of the place of habitual residence of the creditor.

Germany has enacted implementing jurisdiction in accordance with which the first instance jurisdiction for matters relating to cross-border maintenance obligations is centralised in the first instance court at the seat of the appeal court, *i.e.* the normal first instance court 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*, the Opinion of Advocate General Jääskinen.

Question 5: Could Karel in our case file for divorce in Slovenia; *i.e.* would the courts of Slovenia have jurisdiction if Karel was the applicant?

Answer:

No, there is no provision of the Brussels IIa Regulation that would give jurisdiction to the courts of Slovenia in our case.

Question 6: Suppose that Karel files for divorce in a Slovenian court on 1 March 2017 and Brigitte files for divorce in a Dutch court on 2 March 2017. Karel informs the Dutch court that the Slovenian court is already dealing with the divorce. Would the Dutch court nonetheless be able to decide on the divorce?

Answer:

As stated in answer 5, the Slovenian court has no jurisdiction in matters of divorce under the Brussels IIa Regulation. However, the Dutch court cannot simply ignore the fact that a Slovenian court was seised first. 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 Dutch court must thus wait until the Slovenian court has examined its jurisdiction. Article 17 of the Brussels IIa Regulation states that “*Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.*” The Slovenian court thus has to declare that it has no jurisdiction. The Dutch court can then proceed to deal with the divorce.



GOOD TO KNOW

Lis pendens

The EU Maintenance Regulation contains the same rules for cases where two courts are seised with the same matter between the same parties. See Articles 10 and 12 of the EU Maintenance Regulation.



Case law on “*lis pendens*” in the context of the Brussels IIa Regulation:

CJEU – Judgment of 5.10.2015 – *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 7: In accordance with which rules will the law applicable in matters of divorce be determined in our case?

For the purpose of this question we assume:

- a) Brigitte has seised a Dutch court,
- b) Brigitte has seised a French court.

Answers:

The law applicable to matters of divorce is regulated in the **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**”). However, this Regulation is not applicable in all EU Member States. Since there was no agreement among the EU Member States concerning the adoption of the instrument, “enhanced cooperation” was chosen as the best option for introducing rules applicable to 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 of the Treaty on the Functioning of the European Union, participate in the enhanced cooperation at a later stage.

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.**

Later the following States joined the enhanced cooperation:

- **Lithuania** (see decision of the European Commission of 21 November 2012; Rome III Regulation applicable from 22 May 2014);
- **Greece** (see decision of the European Commission of 27 January 2014; Rome III Regulation applicable from 29 July 2015);
- **Estonia** (see decision of the European Commission of 10 August 2016; Rome III Regulation applicable from 11 February 2018).

To answer question 6, the substantive, geographical and temporal scope of the Rome III Regulation has to be examined, see box below.

The Rome III Regulation

Substantive scope. In accordance with 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 bound 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 subsequently 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); and **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 (hence Rome III is applicable to Lithuania from 22 May 2014; to Greece from 29 July 2015; and to Estonia from 11 February 2018).

Answer 7a)

The Dutch court dealing with the divorce (international jurisdiction is given in accordance with the Brussels IIa Regulation, see answer 2 above) is not bound by the Rome III Regulation, since the

Netherlands takes no part in the enhanced cooperation. Therefore the autonomous private international law rules of the Netherlands will determine the law applicable to the divorce.

Answer 7b)

Where a French court (international jurisdiction is given in accordance with the Brussels IIa Regulation, see answer 2 above) is dealing with the divorce in our case, the rules of the Rome III Regulation will apply. France is one of the original 14 States participating in the enhanced cooperation.

Question 8: In accordance with which rules will the law applicable in matters of spousal / ex-spousal and child maintenance be determined?

For the purpose of this question we assume that

- a) Brigitte has seised a Dutch court,
- b) Brigitte has seised a French court.

Answers:

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 EU law. The reason behind this unusual step is that the EU wanted to support the establishment of new uniformly applicable law rules in international maintenance matters drawn up in the Hague Protocol. A replication of the rules in the text of the EU Regulation, even if with the exact same wording, could have undermined the new Hague rules and could have thus been counterproductive. The use of the same “applicable law rules” inside and outside Europe holds promise that commonly developed jurisprudence and interpretation of these rules will assist in providing legal certainty in the international recovery of maintenance.

As the formulation of Article 15 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 (*i.e.*, Denmark and the UK 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. However, it had already 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 to not delay the application of the Maintenance Regulation, whose entry into force (see Article 76 of the Regulation) was dependent on the applicability of the 2007 Hague Protocol; see the EU declaration, available at the Hague Conference website “www.hcch.net”.

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

Answers 8a) and b)

In both cases, Article 15 of the EU Maintenance Regulation in conjunction with the 2007 Hague Protocol would be applied to determine the law applicable to matters of maintenance.

Question 9: What would be the law applicable to the divorce in our case if the divorce were to be decided by a French court?

Answers:

As stated in answer 7, the French court would apply the Rome III Regulation to determine the applicable law in matters of divorce. In absence of a choice of law by the parties, Article 8 of the Regulation determines that the law applicable is “*the law of the State:*

- (a) *where the spouses are habitually resident at the time the court is seised; or, failing that*
- (b) *where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that*
- (c) *of which both spouses are nationals at the time the court is seised; or, failing that*
- (d) *where the court is seised.*”

In our case the spouses do not have their habitual residence in the same States. The conditions of Article 8 a) are not fulfilled and, as a next step, Article 8 b) needs to be considered. Article 8 b) is the relevant provision for our case: the spouses had their last common habitual residence in France, it ended less than 1 year ago and Karel still resides in France. The law applicable would therefore be French law.

Question 10: What would be the law applicable to

a) spousal / ex-spousal maintenance

b) child maintenance

if the claims were to be decided by a French court?

Answers:

As stated above, the French court would determine the law applicable to matters of maintenance in accordance with Article 15 of the EU Maintenance Regulation in conjunction with the 2007 Hague Protocol.

a) For spousal / ex-spousal maintenance the general rule, Article 3 of the Protocol, would apply, *i.e.*, “*maintenance is governed by the law of the State of habitual residence of the creditor*”. Since Brigitte has her habitual residence in the Netherlands, the Dutch law would apply. However, the Protocol provides a further option for spousal /ex-spousal maintenance in Article 5. A party may object to the application of the general rule in Article 3 of the Protocol if the “*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” to another law is a question that needs to be looked at in 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. Of assistance in the interpretation of the wording of the 2007 Hague Protocol is the Explanatory Report, see box below.

Good to know: Each Hague Convention (as well as the Hague Protocol) is accompanied by an Explanatory Report, which aims at providing information as to 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 close connection to both the law of the Netherlands and the law of France. The couple had originally lived in the Netherlands and married there. One spouse has a Dutch nationality and the child of the marriage also has a Dutch passport. On the other hand, the couple have lived together for nearly 7 years in France and France was their last common habitual residence. Should one of the parties oppose the application of the Dutch law in our case and request the application of the French law, it is conceivable that the court might conclude that French law has a closer connection to the marriage. It should be emphasised that Article 5 will only be applied if one of the parties objects to the application of Article 3.



The reference to the “last common habitual residence” in Article 5 of the Protocol is not a presumption but merely an indication of the significant connection this law is likely to have with the marriage. The wording of Article 5 does not exclude that a law other than that of the last common habitual residence may have a closer connection with the marriage. See further 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) For child maintenance, the 2007 Hague Protocol provides special rules in Article 4; see Article 4 (1)a) referring to the 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 in accordance with the primarily applicable law, the next step of the cascade will be applied. Should the creditor be unable to obtain maintenance in accordance with that law the third and last step of the cascade will be applied.

It is advisable to read Article 4 carefully to understand the mechanism. A particularity that makes the provision difficult to grasp at the first reading is that Article 4 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 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).

“Cascade II” (*lex fori* / habitual residence of creditor / common nationality)

Should the creditor seise the court of the State of the habitual residence of the debtor, and only in that case, the first two steps of “Cascade I” as described above 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 applies, 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, if Brigitte seises the French court for child maintenance, she seises the court of the State of habitual residence of the debtor and “Cascade II” applies. The law primarily applicable to child maintenance claim is therefore the *lex fori*, *i.e.* French law, Article 4(3). Should the child be unable to obtain maintenance under French law, the court would, as a second step, apply the law of the habitual residence of the creditor, here Dutch law, Article 4(3). Finally, should the creditor be unable to obtain maintenance under step two of the cascade, step three would apply, Article 4(4). In our case, this would mean that Slovenian law, being the law of the common nationality of father and child, would apply.

 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*”.

Question 11: Would a different law be applied if a Dutch court were to decide on

- a) spousal / ex-spousal maintenance
- b) child maintenance?

Answer 11

- a) As concerns spousal / ex-spousal maintenance nothing changes concerning the law applicable should Brigitte seise a Dutch court.
- b) In the case of child maintenance, seising the Dutch court affects the applicable law. Now that the claim is no longer brought in the State of the habitual residence of the debtor, the “Cascade I” applies. This means that the law primarily applicable to child maintenance will be that of the State of the creditor’ habitual residence , *i.e.*, Dutch law, under Article 3. If in accordance with that law no maintenance could be obtained, the court would use the second step of the cascade, Article 4(2). This step, however, now leads to the same law as step one, since the *lex fori* is Dutch law. Only step

three of the cascade will give us an additional applicable law, namely Slovenian law, as the law of the common nationality of father and child, Article 4 (4).

Question 12: Imagine Brigitte and Karel had sat down at the end of 2016, when both were still habitually resident in France, to draft an agreement on choice of court and applicable law to reduce the potential for future disputes. Could they have agreed on the following subjects in a binding way? What courts and laws could they have chosen? Please note the relevant provisions.

- a) Choice of court for the divorce
- b) Choice of the law applicable to divorce
- c) Choice of court for spousal / ex-spousal maintenance
- d) Choice of the law applicable to spousal / ex-spousal maintenance
- e) Choice of court for child maintenance
- f) Choice of the law applicable to child maintenance.

Answers:

a) Choice of court for the divorce

The Brussels IIa Regulation does not allow for a choice of court. The introduction of a choice-of-court provision was proposed in the discussion on the recast of Brussels IIa. However, as stated above, the current proposal for recasting retains the status quo as concerns jurisdiction in matrimonial matters.

b) Choice of the law applicable to divorce

The Rome III Regulation allows for a choice of law applicable to divorce. However, the spouses are not free to choose a law; they must select one of the laws referred to in Article 5 of the Regulation. The laws they can choose from are:

“(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or

(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or

(c) the law of the State of nationality of either spouse at the time the agreement is concluded; or

(d) the law of the forum.”

In our case the parties could have therefore chosen:

- **French law** as the law of the State of their habitual residence when the agreement was concluded, Article 5(a) of the Rome III Regulation;
- **Dutch law** as the law of the State of nationality of one of the spouses (Brigitte) at the time the agreement was concluded, Article 5 (c);
- **Slovenian law** as the law of the State of nationality of one of the spouses (Karel) at the time the agreement was concluded, Article 5 (c).

For the requirements of a valid agreement, see Article 6 and 7 of the Regulation.

c) Choice of court for spousal / ex-spousal maintenance

The EU Maintenance Regulation allows the spouses to agree that the court or courts of a certain EU Member State should have jurisdiction in matters of spousal / ex-spousal maintenance, see Article 4 of the Regulation. Only the options expressly mentioned in Article 4 may be chosen.

The parties can choose:

“(a) a court or the courts of a Member State in which one of the parties is habitually resident;

(b) a court or the courts of a Member State of which one of the parties has the nationality;

(c) in the case of maintenance obligations between spouses or former spouses:

1. *(i) the court which has jurisdiction to settle their dispute in matrimonial matters; or*

2. (ii) *a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.*"

In our case the spouses could have chosen:

- a court or the courts of **France** as the State in which they were both habitually resident at the time the agreement was concluded, Article 4 (a);
- a court or the courts of the **Netherlands** as the State of which one of the parties (Brigitte) has the nationality, Article (b);
- a court or the courts of **Slovenia** as State of which one of the parties (Karel) has the nationality, Article (b);

Article 4 (c) would not provide an additional choice of forum in our case.

For the requirements of a valid agreement, see Article 4 (2) of the Regulation.

d) Choice of the law applicable to spousal / ex-spousal maintenance

The rules applicable are Article 15 of the EU Maintenance Regulation in conjunction with the 2007 Hague Protocol. Article 8 of the Protocol allows creditor and debtor to choose a law applicable to a maintenance obligation among the following options:

- "a) the law of any State of which either party is a national at the time of the designation;*
- b) the law of the State of the habitual residence of either party at the time of designation;*
- c) the law designated by the parties as applicable, or the law in fact applied, to their property regime;*
- d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation".*

In our case the spouses could have thus chosen:

- **Dutch law** as the law of the State of nationality of one of the spouses (Brigitte) at the time of designation, Article 8 (a);
- **Slovenian law** as the law of the State of nationality of one of the spouses (Karel) at time of the designation, Article 8 (a).
- **French law** as the law of the State of their habitual residence at the time of designation, Article 8 (b) of the Rome III Regulation.

Article 8 c) and d) are unlikely to lead to the applicability of another law in the situation the parties are in at the time the agreement is concluded.

(Further, the new EU Matrimonial Property Regime Regulation, which applies in Member States participating in enhanced cooperation in this area as from 29 January 2019, would not offer a connection to another law. The law that could be chosen would be that of the habitual residence or nationality of one of the parties, see Article 22 of the Regulation and the law applicable in the absence of a choice would be the law of the State of the spouses' first common habitual residence after the conclusion of the marriage.)

e) Choice of court for child maintenance

The EU Maintenance Regulation expressly bars the choice of court for child maintenance, see Article 4 (3) of the Regulation.

f) Choice of the law applicable to child maintenance.

The couple would also be unable to include a binding choice of law applicable to child maintenance in their agreement, see Article 8 (3) of the 2007 Hague Protocol.

It should be noted that an “*ad hoc* choice” of the *lex fori* as the law applicable to maintenance in accordance with Article 7 of the 2007 Hague Protocol is possible. Of course this would not help the couple in our case when they wish to determine the law applicable to a possible dispute in the long-term future.

Case II: (Enforcement)

Laura (Spanish national) and Andres (Spanish national) divorce after 13 years of marriage in London where they have habitually resided since 2007. In its divorce decision of 3 June 2016, the London court orders Andres, *inter alia*, to pay Laura, who is pregnant, monthly ex-spousal maintenance of £1200. Laura moves back to Spain in June 2016 where their common daughter Christina is born on 1 December 2016. Since Andres not only refuses to pay the maintenance defined in the UK decision but also refuses to give Laura any financial support for Christina, Laura has meanwhile obtained a Spanish court decision (rendered on 2 April 2017) ordering Andres to pay monthly child maintenance of 330 EUR. Andres is now living in Belgium where he has well-paid employment in Brussels and he owns immovable property in Denmark.

Question 1: Will Laura be able to enforce both the UK and the Spanish decision under the EU Maintenance Regulation in Belgium and Denmark? If yes, which provisions would be applied?

Answer:

Here the scope of the EU Maintenance Regulation needs to be discussed. The enforcement of an ex-spousal and child maintenance decision falls within the substantive scope of the Regulation. What is requested is the enforcement of a maintenance obligation arising from parentage and from marriage in the sense of Article 1 of the Regulation. Nor does the geographical scope pose any difficulties. The decision was rendered in EU Member States in which the Regulation applies and it is meant to be enforced in two EU Member States (Belgium and Denmark) in which the Regulation also applies. It goes without saying that there are no problems with the temporal scope. The proceedings commenced long after the date of application of the Regulation.

As regards the enforcement of decision under the EU Maintenance Regulation, it is important to note that the Regulation contains two sets of enforcement provision. For decisions 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 provides provisions for (in comparison with the formerly applicable rules) accelerated and simplified enforcement, but it retains the need for an “*exequatur*”. This is regulated in 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 we have seen in our discussion of the scope of the EU Maintenance Regulation, currently two EU Member States, namely the UK and Denmark, are not taking part in the application of the 2007 Hague Protocol.

As a result, question 1 should be answered as follows:

Enforcement of the UK decision in Belgium

Provided the UK decision is indeed a decision on spousal maintenance in the sense of the EU Maintenance Regulation (see above), the enforcement provisions of Chapter IV, Section 2 of the EU Maintenance Regulation would apply to the enforcement of the decision in Belgium.

Enforcement of the UK decision in Denmark

The same is true for enforcement in Denmark: the Chapter IV, Section 2 enforcement provisions of the EU Maintenance Regulation would apply.

Enforcement of the Spanish decision in Belgium

For the enforcement of the Spanish decision, the enforcement provisions in Chapter IV, Section 1 of the EU Maintenance Regulation would apply. That is to say, the Spanish decision will be enforced without the need of an *exequatur*, *i.e.*, it will be enforced in Belgium as if it were a decision rendered by a Belgian court. However, to make the Spanish decision “readable” for the enforcement authorities in Belgium, certain documentation has to be provided, including the completed Annex I form of the Regulation (see Article 20).

Enforcement of the Spanish decision in Denmark

The same is true for the enforcement of the Spanish decision in Denmark: the enforcement provisions of the Chapter IV, Section 1 EU Maintenance Regulation would apply.

The fact that the Regulation applies only partially in Denmark (see above for details of the scope of the Regulation), and that the 2007 Hague Protocol does not apply to Denmark, may be misleading. A too-hasty response to this question might conclude that the Chapter IV, Section 2 enforcement provisions of the Regulation would apply to the enforcement of the Spanish decision in Denmark. But a decision rendered today in an EU Member State bound by the 2007 Hague Protocol, such as our Spanish decision, will be enforceable in **ALL** EU Member States without the need of an *exequatur*.

Question 2: Assuming the London court ordered Andres in the divorce decision to pay Laura a lump sum of £140 000 instead of ordering the payment of monthly maintenance. Would this decision be enforceable in Belgium and Denmark under the EU Maintenance Regulation?

Answer:

As regards the UK decision ordering a lump sum payment as result of a divorce, the question is whether this amounts to a decision on “maintenance” in the sense of the EU Maintenance Regulation. The Court of Justice of the European Union (then still called European Court of Justice) was asked to address such a question in the case of *Van den Boogaard v. Laumen* (C 220/95), see box below. The case concerned the interpretation of “maintenance” under the so-called Brussels Convention, later transformed into the Brussels I Regulation, which has now been replaced in respect of maintenance by the EU Maintenance Regulation. The case law on the interpretation of the term “maintenance” is still pertinent.

Our UK decision ordering a lump sum payment would be regarded as amounting to “maintenance” if it was clear from the reasoning of the decision that the sum awarded is “*designated to enable*” Laura to “*provide for herself*” or that the “*needs and resources of each of the spouses are taken into consideration in the determination of its amount*”. Case II does not give sufficient information to answer this question.



CJEU (ECJ) – Judgment of 27.2.1997 - *Van den Boogaard v. Laumen* (C-220/95)

In this case, the Court had to decide whether a “*decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party*” could be regarded as a decision “*relating to maintenance*” and would therefore fall within the scope of the

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of the Convention of 9 October 1978.

The Court stated “*If the reasoning of a decision rendered in divorce proceedings shows that the provision which it awards is **designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount**, the decision will be concerned with maintenance*”. If the provision awarded “*is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention.*” A decision that does both these things, the Court noted, “*may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.*”

Question 3: Would Laura get assistance from the Central Authority under the EU Maintenance Regulation when enforcing the Spanish child maintenance decision in Belgium or Denmark?

Answer:

The answer is yes in the case of enforcement in Belgium, and no for enforcement in Denmark. As stated above (see box on the scope of the EU Maintenance Regulation), the EU Maintenance Regulation does not apply fully in Denmark. Chapter VII, on Central Authority cooperation, does not apply to Denmark.

For the enforcement of the Spanish decision in Belgium, Laura can apply to the Spanish Central Authority (*i.e.* the CA in her Member State of residence, Article 55 of the Regulation) in accordance with Article 56 of the EU Maintenance Regulation. The necessary content of the application is set forth in Article 57. Under Article 58, the Central Authority will assist the applicant in ensuring that the application is accompanied by all the necessary documents and information and will then transmit the application to the Central Authority in the “requested State”, in our case Belgium.



GOOD to KNOW

An important innovation in the EU Maintenance Regulation is the generally **cost-free** recovery of child maintenance across borders with the assistance of the Central Authorities; see Article 46 of the Regulation.