THEMIS

Council Regulation (EC) 4/2009 of 18 December 2008 –

Another Qualified Achievement for European Family Law

Centro de Estudos Judiciários – **PORTUGAL**

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1. INTRODUCTION

In order to develop and strengthen an area of freedom, security and justice, which allows free movement of people, the Community has to create ways to achieve this goal, as well as to promote the harmonization of standards applicable in the Member States regarding conflict of laws and of jurisdiction.

Considering the impact that free movement of people often causes in family structures, the European Union decided to deal specifically with the sometimes problematic international enforcement of maintenance obligations, thereby also trying to promote the "fifth freedom" concerning the free circulation of judicial decisions.

Thus, following the Tampere European Council[1], which urged the Council and Commission to establish common procedural rules for cross-border disputes , and the work of the Hague Conference, and considering that enforcement of maintenance orders is, at the level of Member States, a generalized litigation due to the weakening of family relationships and a community problem resulting from the free circulation of European Citizens [2], Council Regulation (EC) No 4/2009 of 18 December 2008[3] was adopted.

This instrument, which replaces Regulation (EC) No 44/2001 of 22 December 2000[4] in respect of maintenance obligations emerging from family relationships and Regulation (EC) No 805/2004 [5], has as its main goal the creation of ways to solve effectively the problems related with maintenance enforcement, arising, in the most of the cases, from the non-payment of such obligations.

The Regulation applies to international or cross-border disputes, which, according to the case law of the Court of Justice of the European Union, are cases that involve some external element.[6]

On the other hand, it must also be noted the recognition that the concepts of "family relationship, parentage, marriage or affinity" and of "maintenance" have to be interpreted independently, according to the scope and spirit the Regulation and European Law, and not

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[1] Which met on 15 and 16 October 1999.
[2] In force since 18 June 2011 (article 76). Concerning the entry into force of the Regulation can put up the problem, the decisions made before this date, to determine which legal instrument to be applied, since article 75 allows room to differing interpretations.
[3] Hereinafter referred to as the Regulation.
[4] Called on by Brussels I.
[5] Except as regards the European Enforcement Orders relating to maintenance obligations issued in a Member State not bound by the Hague Protocol 2007.
[6] Foreign Element Theory - Judgment "Benson" of March 28, 1995 and "Owusu" of March 1, 2005.

based on national law of Member States[7]. This ensures and promotes the uniform interpretation and application of the Regulation, as well as legal certainty and also facilitates the judicial role of national courts, as it allows them to use univocal notions.

Bearing in mind the fragile economic situation of the maintenance creditor if he or she is a child, the Regulation has also foreseen a wide legal aid scheme, assuming all the costs of proceedings relating to maintenance obligations towards children under 21 years.

Moved by the sensitivity that this matter assumes and the practical relevance that it has in the European citizens' lives, it is our intention, eight months after the entry into force of the Regulation, to make a brief assessment about it, weighing the gains that it brought to the judicial cooperation system and reflecting on potential adjustments that need to be made in the future, in order to improve a more effective way to the recovery of maintenance.

Accordingly, after a brief and a more general approach, we will focus on the following aspects: jurisdiction, applicable law, recognition and enforcement of judgments, and, finally, the role of central authorities.

2. JURISDICTION

Regulation presents numerous innovations in relation to Brussels I. For instance, it replaces the criterion of domestic connection by the criterion of habitual residence[8]-[9]-[10].

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[7] Accordingly, Case 120/79 "L. against the Cavel J. the Cavel " (judgment of the Court of 6 March 1980), that equated with the effect of "compensatory payment "after the divorce provided for by French law to a maintenance due to the fact that it is" fixed on the basis of the respective needs and resources ", and also Case C-220/95 , "A. Van den Boogaard against P. Laumem " (judgment of 27 February 1997) in which was decided that *a "judgment given in the context of a divorce process, ordering payment of a flat-rate amount and the transfer of ownership of certain assets of a spouse out of your former spouse must be considered relative to family obligations (...) if its purpose is to ensure the satisfaction of the needs of ex-spouse.*" If, however, it serves only to purpose of division of assets, it will not be treated as maintenance.

[8] Articles 2(2)(3) of the Brussels I and article 3 of the Regulation.

[9] The concept of "*habitual residence"* was adopted in the Convention on the Law Applicable to Maintenance Obligations towards Children, 1956 and the Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Children, of 1961.However there is no common understanding about that term. Some States consider that the concepts of habitual residence and domicile are similar. Meanwhile, other states understand that the concept of habitual residence must be interpreted by combining the meaning of ordinary terms "habitual" and "domicile", because the determination of habitual residence is a particular issue and it is conditioned by the circumstances of the case. There still others for whom the habitual residence is similar to home: simply remove the subjective element (intent to definitive fixation) of the concept of home and fail to give prominence to the element of intent in this concept; we have the notion of residence habitual. In our opinion, to understand the concept of habitual residence, it is necessary to consider the specific purpose of each law and, secondly, its subjective elements (intention of fixing) and purpose (residence in a particular location during a certain period of time). Although the concept of habitual residence differs from state to state, its determinants should be the same: a right intention and the actual duration of residence. The most obvious difference between the residence and domicile is the way each of these concepts is addressed in case law and its importance. If the applicant is resident in a particular country for a specific purpose or just for a certain period, this may be an obstacle to obtaining a voluntary home, but will not affect the formation of habitual residence. Consequently, it remains, therefore, mister the analysis of case law around the concept of "*habitual residence*", established under Regulation (EC) No. 2201/2003 of 27 November 2003. We have emphasized,

However, this alteration does not involve substantial changes, as it only appears as a form of harmonizing the criteria established in the scope of the instruments of family law[11].

For agreements conferring jurisdiction, the Regulation introduces stricter rules, from the outset from which we emphasize the obligation of its reduction to writing.

Furthermore, article 23 of the Brussels I established only what we designate by formal criteria[12]. Meanwhile, in the scope of the Regulation, the parties may only agree to the jurisdiction of a court or courts of a Member State to settle disputes which have arisen or may arise in connection with maintenance obligations and in which one party is habitually resident or has the nationality. With regard to maintenance obligations between spouses and former spouses it can be elected as competent the court for resolution of disputes in matrimonial matters or the court or courts of the Member State in which territory their last common habitual residence was situated for at least a period of one year[13]. The aforementioned conditions must be met at the time the choice of court agreement is concluded or at the time the actions are brought before the court. However,

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therefore, the case *Barbara Mercredi/Richard Chaffe* (C-497/10 of 22 December 2009), according to which «*the concept of "habitual residence"* (...) *should be interpreted as meaning that it corresponds to the place that reflects a certain integration of the child in social and family environment. To do so, and when it comes to the situation of an infant who is with her mother just a few days in a Member State different from their usual residence, for which he was displaced, in particular should be taken into account, in one hand, the duration, regularity, conditions and reasons for staying in the territory of that Member State and the change from mother to that State, and on the other, in subject to the child's age, the origins geographical and family of the mother and the family and social relationships maintained by her and by the child in the same Member State. It falls to the national court to determine the child's usual residence taking into account all the factual circumstances of each case. In the event that the application of the criteria above leads, in the main case, to conclude that the child's usual residence cannot be fixed, the determination of jurisdiction should be based on the criterion of "presence"»*,that has already been followed in C-523/07.

[10] Thus, in matters relating to maintenance obligations in Member Stats, jurisdiction shall lie with: the court for the place where the defendant is habitually resident (defendant as "*debtor*", namely, any individual who owes or who is alleged to owe maintenance – article 2(11)), or the court for the place where the creditor is habitually resident (*creditor* as any individual to whom maintenance is owed or is alleged to be owed – article 2(10), which has to be articulated with the article 64(1), according to which the term "creditor" shall include a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance), or the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

[11] Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament: Commentary on the articles of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations", COM 2006 (206).

[12] There is a vast jurisprudence of the European Union around this provision, where we highlight the cases: *Duffryn* (C-214/89 of 10.03.1992) according to which the agreement has to be expressed; *Mainschiffahrts/Genossenschaft* (C-106/95 of 20.02.1997) according to which the covenant should be noted and future disputes arising under a specific legal relationship, and *Castelletti* (C-159/97 of 16.03.1999) according to which the parties may conclude a pact that does not designate the court competent to judge but to provide objective evidence to allow their location.

[13] Under article 4(2).

concerning disputes relating to child-maintenance obligation towards children under the age of 18 it is not possible celebrate an agreement for choice of court[14].

Finally, and also regarding the choice of court, given the wording of article 10 examination as to jurisdiction is now of court's own motion[15].

As the jurisdiction based on the appearance of the defendant, referred in Article 5 of the Regulation, sets out the provisions of article 24 of the Brussels I, keeping therefore as extremely important the jurisprudence developed by the Court of Justice concerning the later instrument[16]. Moreover, on one hand, this court should not correspond to a court appointed by the Regulation and, on the other hand, the concept of appearance must be analyzed by examining the national procedural law of the state of demand.

The Regulation establishes, still, a criterion of subsidiary jurisdiction. Thus, when no court of a Member State has jurisdiction pursuant to articles 3, 4 and 5, and no court of a State part of the Lugano Convention which is not a Member State competent by force of the provisions on that Convention, the courts of the Member State of the common nationality of the parties shall have jurisdiction. It is also underlined the fact that this provision would apply only in cases in which the two parties - the creditor and debtor - reside outside the European Union, have not concluded an agreement on the choice of court or did not appear before a court of a member State.

However, the Regulation abolished, almost in its entirety, the criterion of nationality, which only appears in the scope of subsidiary jurisdiction and in a manner mentioned above[17]. In the opinion of Philip Bremner, "*whilst some may argue that subsidiary jurisdiction is not necessary, this does not seem exorbitant because these connecting factors at least indicate a reasonably sufficient connection with the country. This might be more the case for the UK and Ireland because of the continuing link implied by the concept of domicile but not necessarily by nationality*"[18]. We are, however, of the opinion that the Regulation could have gone further and established alternatively the

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[14] This provision is aimed at the protections of the most vulnerable part - children under 18 years - thus preventing the parents opted for a court that does not allow adequate preparation for their interests

[15] Contrary to what happened under the Brussels I, and widely supported in *Spitzley* (C-48/84 of 03.07.1985) according to which there was no control of its own motion powers pointed out by private covenants of competence, and so the court should only decide was whether it had jurisdiction if the issue was raised by the parties.

[16] For example, *Elefanten* (C-150/80 of 24.06.1981) and *Spitzley* (C-48/84 of 03.07.1985) according to which the tacit acceptance of the forum prevails over the private agreement of jurisdiction temporally prior to, thereby, becomes disabled; *Rohr* (C-27/81 of 10.22.1981), *CHW* (C-201/82 of 31.03.1982) and *Gerling* (C-201/82 of 14.07.1983) according to which the show is irrelevant if the defendant only challenge the international jurisdiction or, cumulatively, to rule on the merits.

[17] Also in the choice of court.

[18] "The EU Maintenance Regulation: A qualified success for European family law, University of Aberdeen" page 14.

criterion of the nationality of the debtor or creditor. Actually, when a case that could allow the application of the criterion of subsidiary jurisdiction, if the parties do not have a common nationality, it will not be possible to guarantee the enforcement of the maintenance obligation.

Another improvement must be highlighted: the establishment of a clause called "*forum necessitatis*", inspired by Swiss law[19], according to which when no court of a Member State has jurisdiction pursuant to articles 3, 4, 5 and 6, the courts of Member State may, in under exceptional circumstances, acknowledge the case if it cannot be reasonably established or conducted, or if it reveals impossible to conduct a process in a third State with which the dispute is closely related, as long the dispute presents a sufficient connection with the Member State of the court in charge. This provision seeks to avoid a miscarriage of justice, which has found expression in England law. In fact, in *Carvalho v Hull Blyth (Angola)*, the English courts "*refused to decline jurisdiction and give effect to a choice of court agreement assigning an Angolan court exclusive jurisdiction due to a revolution in Angola which resulted in civil and political unrest*"[20]. In turn, the Commission justifies this option on the basis that "*legal foreseeability is strengthened, and all situations in which a link with the European Community can legitimately be established are covered*"[21].

Regarding the lis pendens and the connection, the Regulation takes in full what is established in Brussels I[22]. Therefore, in order to ensure prompt and effective intra-Community movement of the targeted court decision permits that the court of a Member State in which the action is submitted in second place automatically stays its proceedings until such time as jurisdiction of the court first seised is established[23]. Moreover, the omission of the treatment related to cases pending in a court of a State that is not a member of the European Union still persists, therefore, in such cases, the proceedings are not stayed

[19] See Swiss Code of Private International Law, article 3.
[20] "The EU Maintenance Regulation: A qualified success for European family law, University of Aberdeen" page 15.
[21] Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament: Commentary on the articles of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations", COM 2006 (206).
[22] Keeping therefore great interest the case law established in the following judgments of the Court of Justice: *Maerst* (C-39/02 of 14.10.2004) and according to which overlap means identity of cause of legal source of the claim, here comprising the facts and legal standards invoked as the basis of the claim; *Overseas* (C- 351/89 of 27.06.1991) whereby the identity of the parties that there is always the same people involved, whatever their procedural position or place; *Tatry* (C-406/92 of 06.12.1994) according to which the identity of the parties is only partial, only evaluates the lis pendens in relation to the parties, pursuing the action on the other.
[23] See Article 12. of the Regulation.

under article 12[24]. Given the silence of the Regulation, in our opinion, the lis pendens can be declared by the court of its own motion.

In the case of related actions[25], the redaction of the Brussels I[26] is maintained and, therefore, action must be pending before the courts of different Member States bound by Regulation. In these cases, the judge may choose between stay the proceedings and consider international jurisdiction of another court over the first action[27], the expected duration of this case and the need to ensure a swift procedure; or decline jurisdiction[28], a mere faculty that can only be used when the actions are pending in first instance, and if the connection process was also known and accepted by the law of the state court of first seised. At last, the judge may choose not to adopt any of the above mentioned solutions.

Finally, and for being innovative, we highlight the provisions of article 8 of the Regulation, according to which when a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given, except as provided in paragraph 2 of the same article.

The Regulation does not foresee, in any of its dispositions, the establishment of the jurisdiction based on the location of the assets.

In Philip Bremner's opinion, "*this could present a practical problem where a decision is obtained in a non-member state where the defendant has no assets. Unless there is an enforcement agreement between that state and the member state where the defendant's assets are, the maintenance decision would be ineffectual. This situation could be resolved by conferring jurisdiction on the basis of the location of assets, which would give a court of a member state jurisdiction which otherwise it would not have had*"[29].

To the best of our judgment, we don't share this opinion.

First of all, the Regulation does not apply to the recognition of decision given in a non-member state – the scope of application of the chapter dedicated to "recognition,

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[24] Occurring lis pendens between a Member State and a third State, it will matter whether there is an instrument of international cooperation agreement (bilateral or multilateral) that establishes the solution; what's not be found in it, must be found in the rules of private international law of the states involved, subsidized by the national procedural rules.
[25] Specific concept of international law which finds its definition in article 13(3) of the Regulation.
[26] Article 28.
[27] Article 13(1).
[28] Article 13(2).
[29] *In "The EU Maintenance Regulation: A qualified success for European family law, University of Aberdeen"* page 15.

enforceability and enforcement of decisions is restricted to decisions given in Member States, despite bound or not bound by the Hague Protocol.

Secondly, we believe that articles 3 to 7 only refer to jurisdiction concerning to declaratory proceedings in matters relating to maintenance obligations. In fact, in our point of view, the Regulation does not establish any criteria as to the jurisdiction of the court of enforcement[30] - contrarily to Brussels I - reason why we advanced two different sets of possibilities.

According to the first, the court of the location of the assets does not have jurisdiction to the enforcement, and therefore the creditor will only have to wait until the debtor acquires property in the State of his or her residence to see enforced a maintenance decision.

But this couldn't have been the intention of the Regulation. It is not enough to abolish intermediate measures, which alone only enable a swift implementation, if the legal mechanisms prevent us from the enforcement of the decision in the Member State of the location of the assets, when it differs from the debtor's habitual residence.

We believe that we are before a lack of a specific provision, and it is up to us, the potential executors of the law, to find solutions that best reconcile with the goal that is aimed to proceed with the Regulation, reason why we have advanced a second solution.

Considering this, under the provisions of article 22(5) of the Brussels I, the courts of the Member State of the place of enforcement has exclusive jurisdiction, regardless of domicile, in the enforcement of judgments.

Comparing the two Regulations, greater protection would be granted under Brussels I, where he or she could enforce a decision in the court of the location of the assets, a situation that wouldn't be possible under the current Regulation. And we can say that this Regulation goes further than the former by establishing the enforcement rules, foreseen in article 41(1).

Thus, given the aforementioned omission, it is our understanding that, in this case, we should rely on the application of other instruments in international judicial cooperation; and as it occurred with the article 22(5) of Regulation (EC) No. 44/2001, we must bear in mind the rules of international jurisdiction of each State. Thus, for example, a Portuguese court will never be competent to perform enforcement on assets existing in France, as

[30] Article 2(5): "*the term "Member State of enforcement" shall mean the Member State in which the enforcement of the decision, the court settlement or the authentic instrument is sought".*

jurisdiction for enforcement shall belong to the courts of the country where the goods and property are situated, for reasons of proximity[31].

3. APPLICABLE LAW

Pursuant to Article 15 of the Regulation, the law applicable to maintenance obligations is determined according to the Hague Protocol of 23 November 2007[32] on the Law Applicable to Maintenance Obligations, and this only applies to Member States bound by this instrument.[33]

The Hague Protocol aims at ensuring compliance with maintenance obligations in cross-border cases, when the debtor and creditor do not reside in the same country. The Protocol came up with the Hague Convention of 23 November 2007, and it results from the need to discuss, separately, the rules on the law applicable to family issues, such as maintenance. Its goal is to establish common provisions on such obligations, harmonizing and standardizing rules on the maintenance obligations, emerging from a family relationship, parentage, marriage or affinity, including maintenance obligations towards a child, regardless of marital status of their parents. Protocol should be applied even if the applicable law is the one of a non Contracting State.[34]

To define the applicable law in maintenance obligations, it is important to consider the articles 3, 4, 5, 6, 7 and 8 of the Protocol.

Article 3 enshrines the general rule on the law applicable to maintenance obligations, stating that it shall be governed by the law of the creditor's habitual residence, unless the Protocol provides otherwise[35].This option is understandable as that is the one that normally demands lower costs to the creditor, the party who usually needs financial support. Paragraph 2 also provides that, upon a change of habitual residence of the creditor, the law of the state's new habitual residence is applicable since the moment of that change.

Article 4 establishes a set of special rules in favour of certain maintenance creditors: children, towards their parents, parents, towards their children, and also persons under the age of 21 years, towards persons, other than parents.

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[31] In this sense, the case of Oporto, proc. no. º 7495/09.5TBVNG-A.P1, dated January 25, 2011, available at www.dgsi.pt.

[32]Hereinafter simply referred to as "Protocol".

[33] Currently, all Member States, with the exception of the United Kingdom and Denmark are bound by the Protocol.

[34] Article 2.

[35] This solution has its advantages, as the creditor´s situation can be adapted to the new environment but can also incite creditors to change residence to obtain a change in their claim.

According to article 4(2) the law of the forum shall be applied if the general rule doesn't provide the creditor to obtain maintenance[36]. The establishment of the *lex fori* allows the courts to overcome law interpretation difficulties, as an inherent result of applying a foreign law, and avoid additional costs for the parties, as was alleged by the common-law countries. However, we believe that this solution will encourage forum-shopping and, consequently, juridical insecurity, as it is up to the creditor to decide where to bring a case before the court and, therefore, to choose the most favourable law to his interests.

Finally, considering that frequently the creditor is the weaker party and that urges to safeguard his right to maintenance obligation, article 4(4) provides a subsidiary rule to those cases where the creditor cannot obtain maintenance from the debtor under the laws referred in article 3 and in the other paragraphs of article 4 – the law of the common nationality of the creditor and the debtor, if it exists. This solution is criticised by Philip Bremner[37]. In fact, in his point of view, it's slightly arbitrary to limit this criterion to a common nationality, that does not necessarily imply any actual connection, whereas there could be other factors which would represent a sufficient link as the domicile.

Article 5 specifically establishes a special rule for spouses and ex-spouses or parties to a marriage which has been annulled[38].

Regarding to maintenance, other than those owed to children and spouses and ex-spouses, article 6 stipulates that the debtor may contest the credit if, cumulatively, that obligation does not exist under both the law of the State of his habitual residence and of the common nationality of the parties, if it exists. In these cases, it's taken into account that there can't be a strong expectation of the maintenance credit, in a manner that the debtor can defence himself under this ground.

Notwithstanding the provisions of articles 3 to 6, article 7 allows the creditor and the debtor for the purpose only of a particular proceeding in a given state to designate its law as applicable. But for that agreement to be valid the designation must result from an agreement between both parties, and be held in writing or appear on any register enabling the subsequent reference.

Article 8 also appears as an exception to the rules foreseen in articles 3 to 6, and provides the possibility for agreements[39], reached at any time, regarding the applicable law.

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[36] The application of the *lex fori* brings the civil and the common-law systems into line.

[37] "*The EU Maintenance Regulation: A qualified success for European family law, University of Aberdeen*", page 19.

[38] Consigning that it will not be applicable the rule of the creditor's habitual residence if a party objects and another law has a stronger connection or bond with the marriage, in which case it applies.

Anyway, as a guarantee of protection of weaker parties, the possibility of designating the applicable law will never be allowed in case of maintenance obligations towards children under the age of 18[40] or towards a person who is not in a position to protect his or her interest by reason of an impairment or insufficiency of his or her personal faculties; thus, the possibility to renounce to the right to maintenance shall always be determined by the law of the State of the habitual residence of the creditor at the time of the designation - this the law that offers the most clarity and legal certainty.

It must also be noted that the determination of law is restricted to the possibilities given by article 8(1)(a to d), which prevents the application of a law with no relevant connection with the dispute under the parties autonomy.

As a "*safety valve*", article 8 also establishes that the law designated by the parties shall not be applied if and where that application would lead to manifestly unfair or unreasonable consequences for any of the parties, unless they were fully informed and aware of them at the time of the designation.

At this point, is also important to refer the emergent effects of the choice of the law, established in article 11 of the Protocol, as the law applicable shall determine for example, whether, to what extent and from whom the creditor may claim maintenance and retroactive maintenance and the prescription or limitation periods, or even the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in a place of maintenance.

Finally, a word to say that the application of the law determined under the above mentioned rules may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum, an open clause that should be interpreted *cum granu salis* and to be used only in exceptional cases – article 13.

4. RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

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[39] It must be in writing or recorded by other means and also be signed by both parties.

[40] A statement that is also criticised by Philip Bremner, although we don't agree with his arguments and think the Protocol's solution in this particular is appropriate. Quoting this author, *"the rationale for this is intuitively understandable as being for their protection so they are not exploited. However, this rests on an assumption that prior agreements designating the applicable law will necessarily disadvantage these parties. In the present writer's submission, this is no more likely the case than with any other party. The increased possibility that these parties' interests might be jeopardised calls for closer scrutiny of these agreements, but not extinguishing party autonomy altogether."* - "*The EU Maintenance Regulation: A qualified success for European family law, University of Aberdeen*", page 20.

As previously referred, recognition, enforceability and enforcement of decisions[41] concerning maintenance obligations are also in the scope of Regulation, in particular, in its Chapter IV.

This Chapter is designed on a dual basis, depending whether those decisions were given in a Member State bound by the 2007 Hague Protocol or not.

However, the aim of the Regulation is the same in both cases: the recognition and the enforcement in a member state of a maintenance decision delivered in another Member State; once enforceable in both states, that decision shall be enforced under the same conditions as a decision given in the Member State of enforcement – article 41(1).

Therefore, the review as to substance of a decision given in a Member State is not allowed under the Regulation, as a natural consequence of its intention to guarantee the free circulation of decisions given in the Member States, only possible in a context of mutual confidence and cooperation– article 42.

It must be highlighted that the modification of a previous decision, following an application for that purpose, under article 56(1)(e)(f)(2)(b)(c), shall not be considered a review as to substance as on the basis of changed circumstances, as the debtor's insolvency, and consequently, an exception to the rule foreseen in article 42.

It also results from the words used in article 16 with a high level of certainty that recognition and enforcement apply only in the case of decisions given by the courts of a Contracting Member State[42], excluding decisions given in a third State.

As previously mentioned, the Regulation has instituted a two track regime– one for Member States bound by the Protocol, another for Member States not bound this instrument.

Beginning by a decision given in a Member State bound by the 2007 Hague Protocol, its recognition is automatic and it produces the same effects in the State of Origin and in the State of Enforcement. In fact, article 17(1) of the Regulation, does not require any special procedure to and doesn't foresee any possibility of opposing to that recognition, which represents a striking measure in order to charge the credit emerging from the maintenance obligation. And this goal is so prominent that the court of the State in which enforcement is sought can not take into account public policy arguments to challenge the recognition of a decision given by another Member State.

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[41] The term 'decision' shall mean a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses – article 2 (1)(1), without prejudice to court settlements and authentic decisions, which shall be recognised in another Member State and be enforceable there in the same way as decisions, regarding the prediction of article 48(1) of the Regulation.

[42] Its definition is given by article 1(2).

This option is understandable considering the level of harmonization between Member States concerning their legal principles and constitutional traditions, which would probably lead to a scarce application of the public policy clause, and, above all, the new criterion to the determination of the applicable law, stated by article 15 of the Regulation, as article 13 of the Protocol allows the refusal of the application of the law determined, based on public policy of the forum.

Nevertheless, considering the essential role of the maintenance debtor's rights of defence and his or her entitlement to a fair legal process in the common traditions of Member States, the Regulation created an escape valve to those situations in which the defendant didn't enter an appearance in the Member State that delivered the decision, assigning him or her the right to apply for a review[43] of the decision in two situations: when the defendant was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence[44]; or when he was prevented from contesting the maintenance claim by reason of force majeure or due to extraordinary circumstances without any fault on his part.

The goal of these exceptions is to respect and assure effective possibility of defence; therefore, if the defendant had the possibility to challenge the decision and failed to do so, he or she hasn't the right to apply for its review.[45] It should be taken that he has that possibility if he was served on a reasonable time so that he could, in sufficient time, have exercised his rights effectively before the courts of the State in which the judgment was given.

This right to a review is added to strict time restrictions and should be considered an extraordinary remedy[46]. On the other hand, it doesn't collide with the prohibition of review as to substance, provided by article 42, as it is a competence of the Member State of Origin and grounded on specific reasons related to the adversarial system that affect the definitive effectiveness of the decision given.

The scenery is different if the decision is given in a Member State not bound by the Protocol – articles 23 and 24.

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[43] In this case, the debtor can apply for the suspension, either wholly or in part, of the decision in the competent authority in the Member State of enforcement.

[44] In fact, identical problems related to these issues raised from the application of Regulation 44/2001.

[45] Similar jurisprudence was pronounced by the Court Of Justice of the European Union in C-420/07, related to the recognition or enforcement of a default judgment under Article 34(2) of Regulation (EC) No 44/2001. The Court Of Justice decided that "*the recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence*".

[46] Eleri Jones *in The New Maintenance Regulation: A Guide for Family Lawyers.*

Although it is not required any special procedure to the recognition of a decision, it's possible to refuse it based on the grounds stated in article 24(1)(a), where reasons of public policy remain included. Due to the obstacle that those grounds represent to the attainment of the free movement of judgments and decisions, the grounds of refusal of recognition shall be strictly interpreted, envisaging that the primary aim of the Regulation is to safeguard the interest of the maintenance creditor by assuring the – almost – automatic recognition and enforceability of decisions within the Member States.

Nonetheless, perhaps the most striking achievement of the Regulation, is the suppression, albeit partial, of the *exequatur*[47]. In fact, in the regime implemented by the article 17(2), a decision emanating from a Member State bound by the 2007 Hague Protocol – the majority of States also bound by the Regulation -, as long as enforceable in that State, is enforceable without the need for a declaration of enforceability, a requirement previewed by its antecessor, Brussels I[48].

But still partial, as the decisions given by a Member State not bound by the Protocol need to be subjected to the mentioned declaration of enforceability – article 26. In a practical approach, this means that if the decision is given by a court which is not bound by the Protocol, it will be required a declaration of enforceability in the member state of enforcement, whereas if the decision is given by a Member State bound by the Protocol, there is no need for a declaration in the member state of enforcement, even if this state is not bound by the Protocol.

It should be noted that the existence of harmonised conflict of law rules between States bound by the Protocol, due to the content of article 15 of the Regulation, guarantees that the same law will be applied regardless of the Member State where the decision will be given, so that it becomes easier to the Member State of execution to accept the enforceability of this decision[49]. In fact, despite emanating from another Member State's Court, that decision should be similar to the one that would be given, inasmuch based on the same rules, by the own State of enforcement. On the contrary, if the decision is not given according to harmonised rules, Member States didn't renounce to their sovereignty and

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[47] As it was noted by Philip Bremner in the text "*The EU Maintenance Regulation: A qualified Success for European Family Law"*, page 13.

[48] The enforcement of maintenance obligations was previously governed by article 38(1) of Brussels I which required a declaration of enforceability.

[49] Recital 24. As also emphasized by the Commission of the European Communities, "*decision is less problematic to accept if it is given in accordance with a law designated according to harmonised rules*", *in* "*Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*", [1.2.2.], available in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0649:FIN:EN:PDF, accessed 7 May 2011.

demanded the existence of a declaration of enforceability in order to convert this decision into an enforcement order – articles 26 to 30.

We could be induced by article 30[50] that this final solution[51] and the difference established between those States was more symbolic than real, as the procedure for a declaration of enforceability, modelled on Brussels I but with strict time limits, was simplified and swift and, above all, didn't admit any review of the decision based on the grounds of refusal, under article 24.

Nevertheless, the possibility to appeal against the decision on the application for the declaration of enforceability represents a significant disadvantage of the regime applied to decisions given by Member States not bound by the Protocol[52]. First of all, it enables the debtor to delay the satisfaction of the creditor's right, and besides, the Court with which an appeal is lodged shall judge and review the grounds specified in article 24, just the reverse of what is supposed to be done by the court or authority competent to declare the enforceability of the decision.

There is also a preoccupation to limit the costs of enforcement proceedings, which demonstrates concern and awareness of the economical situation of the maintenance creditor, frequently weak, as it isn't required any translation, unless enforcement is contested, and no levy of any charge, duty or fee in the member state of enforcement – articles 28(2) and 38.

In accordance to article 27, *the local jurisdiction for the application for a declaration of enforceability shall be determined by reference to the place of habitual residence of party against whom enforcement is sought, or to the place of enforcement*[53]. This article only defines the jurisdiction to the declaration of enforceability and not the jurisdiction to enforcement.

The procedure for enforcement of decision given in another Member State is governed by the law of the Member State of enforcement, a legal solution that was previously supported by the Case Law of the Court Of Justice, under Brussels I[54] – article 41(1).

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[50] Article 30 rules that the decision shall be declared enforceable without any review under Article 24 immediately on completion of the formalities in Article 28 and at the latest within 30 days of the completion of those formalities, except where exceptional circumstances make this impossible and the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

[51] The Commission's proposal contained the abolition of *exequatur* between all the Member States of the European Union.

[52] Articles 32 to 34.

[53] A rule that is similar to article 39(2) of Brussels I.

[54] For example the C-145/86, *Hoffmann/Krieg*, 4 of February 1988.

In addition to those existing under the law of the Member State of enforcement, article 21 sets forth special grounds for refusal - or suspension - of the enforcement, such as the prescription of the obligation or the limitation of action and the irreconcilability of the decision of the court of origin with another given in another Member State and even in a third State, which fulfils the conditions necessary for its recognition in the Member State of enforcement.

Although with a scope of application limited to the decisions given in a Member State bound by the Protocol, which is regrettable as it would be useful to extend it to other Member States, this legal provision is advantageous and should be applauded. In fact, assuming that the law applicable to maintenance obligations also defines its term of prescription, the consequences of the application of article 15 of the Regulation could be difficult to conciliate with those consequences that emerge from the application of article 41(1).

The article 21(2) prevents those eventual interpretation's difficulties, in a field with vital importance as the term of prescription and of limitation of action, and makes clear that the relevant law concerning these matters in enforcement suits, is the one that provides for the longer limitation period, being irrelevant if it is from the Member State of origin or of enforcement, a solution that simultaneously represents a more favourable regime for the maintenance creditor.

The irreconcilability criterion, justified by exigencies of harmonisation between the decisions falling within the scope of the Regulation, is a necessary condition to the free circulation of the decisions and their effectiveness in other State Members and for that reason it's an advisable achievement its definition as a ground of refusal of enforcement.

Also an important measure focused on the interest of the maintenance creditor, albeit restricted to the decisions given in a Member State not bound by the protocol[55], is the opportunity given to the applicant to the recognition to avail himself of provisional or protective measures, which allow him to prevent a defendant from having the possibility to protect his assets against the enforcement measures – article 36.

As the Member State of enforcement is in the best position to give effectiveness to the measure's purposes if it coincides with that of the location of the defendant's assets, those measures are given in accordance with the law of the Member State of enforcement - article 36(1). Those measures are carried with the declaration of enforceability as its

[55] To decisions given in a Member Stare bound by the protocol, provisional, including protective measures are provided by article 14.

automate effect (article 36(2)), but they can be applied even if the decision is not yet enforceable.

It can be subjected to criticism the insertion of article 22 in the section 1 of chapter IV of the Regulation, as it should, in our opinion, be a common provision. The article 22 envisages that recognition and enforcement of a decision on maintenance doesn't imply the recognition of the family relationship, parentage, marriage or affinity, as the goal of the Regulation is to allow the recovery of the maintenance claim determined in the decision and not the relationship itself, underlying the claim. This option, more restrained, can symbolize a lack of consensus in the area of substantive family law between European States, where sovereignty arguments still seem to prevail.

Under this scenery, the maintenance obligation established in a decision under family law is seen and treated as a mere pecuniary obligation like any other, without prejudice to the possibility given to the creditor to apply for the establishment of parentage, when necessary to give a decision in a maintenance claim[56]. However, in our opinion, the establishment of parentage, should be considered as a secondary decision and never should be valid *erga omnes*.

Finally, another important measure in order to achieve the effective recovery of maintenance obligation and avoid delaying actions is the provision on provisional enforceability of the decision, even if it isn't enforceable according to the national law – article 39.

5. CENTRAL AUTHORITIES

Regulation assigns a role of utmost importance to the central authorities of the Member States in achieving the objectives underlined in regulation in question[57]. This is a novel addition to the system instituted by Brussels I.

These authorities should assist creditors and debtors in asserting their rights in another Member State by submitting applications for recognition, enforceability and enforcement of decisions, for the modification of such decisions or for the establishment of a decision. One of the main roles of the central authorities is the exchange of information in

[56] Article 56(1)(a).
[57] This system of close administrative cooperation existed in most Member States under the New York Convention.

order to ease the recovery of maintenance obligations[58], as well promoting cooperation between the competent authorities of the Member State.

As it can raise problems with privacy and personal data issues, the use and transmission of such data should meet the requirements of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

It is still possible for the central authority of the Member State of the applicant's residence, requested by him, to carry out to the central authority of the requested State the following demands: the recognition or the recognition and declaration of enforceability of a decision; the enforcement of a decision given or recognized in the requested Member State; establishment of a decision in the requested Member State where there is no existing decision, including if necessary the establishment of parentage; establishment of a decision in the requested Member State, when it is not possible the recognition and declaration of enforceability of a decision given in terms of a State other than the requested Member State; modification of a decision given in the requested Member State; the modification of a decision given in a State other than the requested Member State. On the other hand, when requested by the debtor, the central authority can make applications for the following: recognition of a decision leading to the suspension, or limiting the enforcement, of a previous decision in the requested Member State; modification of a decision given in a requested Member State; modification of a decision given in a State other than the requested Member State[59].

These applications will be treated under the law of the requested Member State and subjected to the rules of jurisdiction applicable in that Member State, unless the Ruled otherwise – 56(4).

To provide effectiveness of all these requests the Regulation sets certain deadlines: 30 days to acknowledge receipt of the request, and 60 days starting from the date on which it was acknowledge the reception of the request[60]. On the other hand, the central authority may refuse to deal with an application if the failure to comply with this Regulation is clear[61].

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[58] However, nothing prevents these actions from being performed by public bodies, or other bodies subject to the supervision of the competent authorities of that Member States, permitted under the law of the Member State concerned – article 51(3).

[59] Under the initial Commission proposal, applications had to be made to a court first, which would forward them to the Central Authority. This would only serve to slow the proceedings down. In Philippe Bremner opinions "*this is a more efficient and speedy system*" *(in The EU Maintenance Regulation: A qualified success for European family law, University of Aberdeen*" page 17).

[60] Article 58(3)(4).

[61] Article 58(8).

The costs of each central authority are supported by itself, with the exception of expenses related to an application for special measures made pursuant to Article 53.

We emphasize the fact that the Final Version of the Regulation represents a retreat to what was purposed by the Commission, as there was not included some hitting enforcement measures as the European Statement of Assets if debtors, based on the measure that exists in certain European Union Member States and that would enable creditors to question the other side on their asset or the European Bank Account Seizure Order on the basis of an enforceable judgment that could be enforced abroad.

In this particular area could also be effective to provide that a salary attachment order in one European Union Member State could be enforceable without further proceedings in other Member State.

The implementation of such innovations in all Member States, replacing or coexisting with national enforcement measures, would be very useful for the recovery of maintenance claims.

6. FINAL REMARKS

The Regulation rules the core of a fundamental, but not new, family law issue – maintenance obligation.

In its ambitious goals are the suppression of intermediate measures required for the recognition and enforcement, harmonisation of conflict-of-law-rules and of the procedures, aimed at boosting the effectiveness of the means by which creditors safeguard their rights, without ignoring the defendants' guarantees and the respect to an adversarial system.

It represents a reform of the previous regime and a step forward in the recovery of maintenance obligation which will have a real impact on the lives of European citizens.

However, there is still room for improvement.

We highlight the jurisdictional rules that, although extended, don't cover all the foreseeable situations; the provision of conflict-of-law rules, that harmonises the civil and common law systems and facilitates the judge's functions by the application of his own national law, but brings the risk of *forum shopping*; the abolition of exequatur, between almost, but not all, the European Union States; the creation of a swifter system of administrative - and judicial - cooperation, which will assist enforcement within the European Union, despite the non-establishment of common enforcement measures.

On the other hand, some practical problems, related to the service and the appearance at court of the maintenance debtor, are predicted, as they were already in

Brussels I, being important to take into account the abundant Court of Justice's Case Law in these matters.

The provision of article 22 in a section only applicable to Member States bound by the Protocol will also raise some interpretation difficulties, which are not cleared up by the Regulation Recitals.

Despite all these notes, we believe that, as the Commission pointed, although Regulation (EC) No. 4/2009 will not abolish the economic and social precariousness, it will certainly enable the creation of a legal environment adapted to satisfy, in a simple, swift and generally free form, the maintenance obligations.

In different words – another qualified achievement for European Family Law.