Recent case law on cross-border maintenance

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Recent case law on cross-border maintenance

Basic questions of maintenance – case law on:

  - Preliminary questions: recognition / *lis pendens*

- **applicable law** (4/2009, HP)

- **cross-border service of judicial and extrajudicial documents** (1348/2000, 1393/2007, HCD)

- **cross-border taking of evidence** (1206/2001)
Recent case law on cross-border maintenance

- *ex. Art. 220 Treaty of Rome (EEC):*
- Brusel Convention on *jurisdiction* and the *enforcement* of judgments in civil and commercial matters
  - 27. 9. 1968 – effect from 1.2. 1973
  - civil matters: also maintenance
Recent case law on cross-border maintenance

- ex. Art. 65 Treaty of Rome (EC) after Amsterdam amendment in 1997:
- civil matters: also maintenance
Recent case law on cross-border maintenance

- case law – relationship within BC and 44/2001

- C-406/09 Realchemie Nederland:

  (38) ...in so far as Regulation No 44/2001 now replaces the Brussels Convention in relations between the Member States, with the exception of the Kingdom of Denmark, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent. Furthermore, it is clear from recital 19 in the preamble to Regulation No 44/2001 that continuity in interpretation between the Brussels Convention and that regulation should be ensured.
Recent case law on cross-border maintenance

- ex. Art. 65 Treaty of Rome (EC) after Amsterdam amendment in 1997:


  this Regulation should amend 44/2001 by replacing the provisions of that Regulation applicable to maintenance obligations
Recent case law on cross-border maintenance

- **Quantity of case law**
- **before 1.12.2009** – preliminary ruling within BC or regulations in the area of JCCivM just **courts of last instance**
  - **ex Art. 68 (1)** .. court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
- **after 1.12.2009** – Lisbon Treaty – all courts
Recent case law on cross-border maintenance

Case law under 4/2009

C-400/13 a C-408/13 (jurisdiction)

Article 3(b) of 4/2009 must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes a centralisation of judicial jurisdiction in matters relating to cross-border maintenance obligations in favour of a first instance court which has jurisdiction for the seat of the appeal court, 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.
Recent case law on cross-border maintenance

Case law under 4/2009

C-184/14 (jurisdiction)

Article 3(c) and (d) of 4/2009 must be understood as meaning that, in the event that a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation.
Recent case law on cross-border maintenance

Case law under 4/2009

C-499/15 (jurisdiction) !!

Article 8 of 2201/2003 (B IIa) and Article 3 of 4/2009 must be interpreted as meaning that, in a case such as that in the main proceedings, the courts of the Member State which made a decision that has become final concerning parental responsibility and maintenance obligations with regard to a minor child no longer have jurisdiction to decide on an application for variation of the provisions ordered in that decision, inasmuch as the habitual residence of the child is in another Member State. It is the courts of the Member State of habitual residence that have jurisdiction to decide on that application.
Recent case law on cross-border maintenance

Case law under 4/2009

C-283/16 (enforcement)

Chapter IV of 4/2009 regulation, in particular Article 41(1) thereof, must be interpreted as meaning that a maintenance creditor who has obtained an order in one Member State and wishes to enforce it in another Member State may make an application directly to the competent authority of the latter Member State, such as a specialised court, and cannot be required to submit the application to that court through the Central Authority of the Member State of enforcement.
Recent case law on cross-border maintenance

Case law under 4/2009

C-283/16 – cont.
Member States are required to give full effect to the right laid down in Article 41(1) of Regulation No 4/2009 by amending, where appropriate, their rules of procedure. In any event, it is for the national court to apply Article 41(1), if necessary refusing to apply any conflicting provision of national law and, as a consequence, to allow a maintenance creditor to submit her application directly to the competent authority of the Member State of enforcement, even if national law does not make provision for such an application.
Recent case law on cross-border maintenance

Case law under 4/2009

C-214/17 – (applicable law)
On a proper construction of Article 4(3) of the Hague Protocol, the result of a situation such as that at issue in the main proceedings, where the maintenance to be paid was set by a decision, which has acquired the force of res judicata, in response to an application by the creditor and, pursuant to Article 4(3) of that protocol, on the basis of the law of the forum designated under that provision, is not that that law governs a subsequent application for a reduction in the amount of maintenance lodged by the debtor against the creditor with the courts of the State where that debtor is habitually resident.
Recent case law on cross-border maintenance

Case law under 4/2009

C-214/17 – cont.

Article 4(3) of the Hague Protocol must be interpreted as meaning that a creditor does not ‘seise’, for the purposes of that article, the competent authority of the State where the debtor has his habitual residence when that creditor, in the context of proceedings initiated by the debtor before that authority, enters an appearance, for the purposes of Article 5 of Council Regulation (EC) No 4/2009, contending that the application should be dismissed on the merits.
Recent case law on cross-border maintenance

Case law under 4/2009

C-604/17 – jurisdiction

jurisdiction of a court of a Member State to:

1) hear and determine an action relating to parental responsibility where the child is not resident in the territory of that State (according to Article 3 (1) (b) Reg. No 2201/2003 – divorce proceeding)

2) hear and determine an action relating to maintenance obligations according to Reg. No 4/2009 - Article 3 (d)
Recent case law on cross-border maintenance

Case law under 4/2009

C-85/18 – jurisdiction

Article 10 of Reg.No 2201/2003 and Article 3 of Reg. No 4/2009 must be interpreted as meaning that, in a case such as that at issue in the main proceedings, in which a child who was habitually resident in a Member State was wrongfully removed by one of the parents to another Member State do not have jurisdiction to rule on an application relating to custody or the determination of a maintenance allowance with respect to that child, in the absence of any indication that the other parent consented to his removal or did not bring an application for the return of that child.
Basic (early) ECJ case law on cross-border maintenance

ECJ has held that the concept of a maintenance obligation is to be interpreted broadly, to include any obligation designed to enable a person to provide for himself or herself, whether or not payments are periodic and whether or not the obligation is determined on the basis of resources and need.

- payment of a lump sum
- transfer of ownership of property

Case 120/79 de Cavel
Basic (early) ECJ case law on cross-border maintenance

- Concept of a maintenance:
  - such a provision is designed to enable one spouse to provide payment 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 payment relates to a maintenance obligation, and not to rights in property arising out of a matrimonial relationship (outside the scope of the BC/BI/4/2009)

*C-220/95 Van den Boogaard v Laumen*
Basic (early) ECJ case law on cross-border maintenance

- Concept of a maintenance:
  - a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse = maintenance
  - ... if its purpose is to ensure the former spouse's maintenance

- The fact that in its decision the court of origin disregarded a marriage contract is of no account in this regard

*C-220/95 Van den Boogaard v Laumen*
Basic (early) ECJ case law on cross-border maintenance

- ECJ: the concept of ‘maintenance creditor’ is an independent concept that has to be determined in the light of the purpose of the rules of the BC (BI/4/2009), without reference to the national law of the court seised.

- a person whose right to maintenance payments has been recognised

- a person whose right has not yet been established (person who is applying for maintenance for the first time: „applicant for maintenance“)

*C-295/95 Farrell v Long*
Basic (early) ECJ case law on cross-border maintenance

- BUT – earlier judgement not applicable – „not equivalent provisions“
- ECJ: the concept of ‘maintenance creditor’ does not include a public body that brings an action to recover sums it has paid to the maintenance creditor, to whose rights it is subrogated against the maintenance debtor, since in that case there is no need to deny the maintenance debtor the protection offered by the general rule in Article 2 of the BC (art. 5/2 BI, art. 3..4/2009)

*Case C-433/01 Blijdenstein*
Basic (early) ECJ case law on cross-border maintenance

- **ECJ:** *Case C-433/01 Blijdenstein*

- Recital 14 – Reg. No 4/2009: for the purposes of an application *for the recognition and enforcement* of a decision relating to maintenance obligations the term ‘creditor’ includes public bodies which are entitled to act in place of a person to whom maintenance is owed or to claim reimbursement of benefits provided to the creditor in place of maintenance. Where a public body acts in this capacity, it should be entitled to the same services and the same legal aid as a creditor.
Tools for the recovery of maintenance

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Three key EU instruments (procedural)

- Regulation No. 655/2014 establishing a European Account Preservation Order procedure
ESCP vs EPO

- ESCP/EPO – only pecuniary claims
- ESCP/EPO – only Cross-border cases (Art. 2-3)

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Regulation No. 1896/2006 European order for payment procedure

- applicable from 12 December 2008
- possible to apply for EPO in matters of maintenance – see Annex A – application for EPO (part 3 – grounds for the court’s jurisdiction – domicile of the maintenance creditor or part 6 – maintenance agreement as for claim’s ground)
- Art. 6 ...for the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001...
Art. 4: pecuniary claims for a specific amount that have fallen due at the time when the application for a EPO is submitted

Art. 7: The application shall state....description of evidence supporting the claim.... (not evidence / maintenance agreement as such)

Art. 16: defendant shall indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this
Regulation No. 861/2007 European Small Claims Procedure – NO!

- applicable from 1 January 2009
- not possible to initiate ESCP in matters of maintenance (Art. 2 (2) (b)) expressly
  - Therefore not possible to issue a certificate concerning a judgment in the ESCP using standard Form D
  - Therefore not possible to recognize and enforce such judgement and use such Form D - BUT HOW? (Art. 22)

Note: it is not rare that Forms are issued under wrong regulations
Regulation No. 655/2014 establishing a European Account Preservation Order procedure


- EAPO is applicable from 18 January 2017

- EAPO prevents the subsequent enforcement of the creditor’s claim from being jeopardised through the transfer or withdrawal of funds up to the amount specified in the Order which are held by the debtor or on his behalf in a bank account maintained in a Member State
Regulation No. 655/2014 establishing a European Account Preservation Order procedure

- Art. 2 – **positive scope** (... applies to pecuniary claims in civil and commercial matters in cross-border cases...)
- Art. 2 (2) (b) – **negative scope** ....wills and succession, including *maintenance obligations arising by reason of death*;
- Recital (18) – *maintenance in principle yes*
Regulation No. 655/2014 establishing a European Account Preservation Order procedure

- **Art.3: Cross-border cases**
  - **special definition:** case in which the **bank account or accounts to be preserved** by the Preservation Order are maintained in a **Member State** other than:
    1. the **Member State** of the **court seised of the application** for the Preservation Order pursuant to **Article 6** (**parties and court are in the same MS**); or
    2. the **Member State** in which the **creditor is domiciled** (**debtors with account and court are in the same state**)
Art. 4 (1) bank account or ‘account means any account containing funds which is held with a bank in the name of the debtor or in the name of a third party on behalf of the debtor

Art. 4 (5) claim means a claim for payment of a specific amount of money that has fallen due or a claim for payment of a determinable amount of money arising from a transaction or an event that has already occurred, provided that such a claim can be brought before a court
Art. 5

EAPO shall be available to the creditor in the following situations:

- (1) **before** the creditor initiates proceedings in a Member State against the debtor on the substance of the matter, or at any stage during such proceedings up until the issuing of the judgment or the approval or conclusion of a court settlement

- (2) **after** the creditor has obtained in a Member State a judgment, court settlement or authentic instrument which requires the debtor to pay the creditor’s claim
Art. 7 further conditions

court shall issue EAPO:

- (1) after ...(1) plus creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor’s claim against the debtor will be impeded or made substantially more difficult

- (2) before ...(1) plus creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor
Regulation No. 655/2014 establishing a European Account Preservation Order procedure

Art. 6 - jurisdiction
court shall issue EAPO:

- (1) before ... courts of the MS which have jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable (e.g. Reg. 4/2009) (in consumer matters: only ..debtor is domiciled)

- (2) after ... jurisdiction to issue a EAPO for the claim specified in the judgment or court settlement shall lie with the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded
Art. 14 - Details of the debtor's bank account – creditor can ask the court to request that the information authority in the Member State(s) where the account is located obtain the necessary information to identify the bank and the debtor's account or accounts in the Member State

Regulation No. 805/2004 creating a European Enforcement Order for uncontested claims

- Art. 68 (2) Reg. 4/2009 ....shall replace, in matters relating to maintenance obligations, Regulation No 805/2004, except with regard to EEO on maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol -
  - UK (YES) !
  - Denmark (NO !)
Regulation No. 606/2013 on mutual recognition of protection measures in civil matters – NO!

- applicable from 11 January 2015
- for protection measures ordered on or after 11.01.2015, irrespective of when proceedings have been instituted
- this Regulation should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk
- this Regulation applies to all victims, regardless of whether they are victims of gender-based violence
- applies only to protection measures ordered in civil matters
Regulation No. 606/2013 on mutual recognition of protection measures in civil matters – NO!

- for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion
Recovery of maintenance in the Third States

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Third States...

- **Art. 69 Reg. 4/2009**
  - Regulation **shall not affect the application of** bilateral or multilateral conventions and agreements to which **one or more Member States are party** at the time of adoption of this Regulation **and which concern matters governed by this Regulation**, without prejudice to the obligations of Member States under Article 307 of the TEC – now Art. 351 TFEU
Plurality of Instruments:
- Bilateral Treaties
- Multilateral Treaties
- Domestic Law – Private International Law Acts/Provisions...

Methodology??
- Provisional / final provisions...replacements...
- Specific instrument/provision over General
- More effective instrument/provision over less effective
Third States...

How to review applicability of international Treaties?

**TEST:**

- **Material scope** *(what kind of claim / Maintenance)*
  - Art. 2 (1) Hague Convention 2007: ...maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years...

- **Temporal scope**

- **Personal Scope** *(e.g. creditor-debtor in both contracting parties...or just one)*

- **Teritorial Scope** *(treaties conculed by non existing States (Soviet Union, Czechoslovakia...)*
Third States...

  - [https://www.hcch.net/en/instruments/conventions/full-text/?cid=131](https://www.hcch.net/en/instruments/conventions/full-text/?cid=131)
- ADMINISTRATIVE CO-OPERATION
- APPLICATIONS THROUGH CENTRAL AUTHORITIES
- ART. 14: Effective access to procedures
- RECOGNITION AND ENFORCEMENT !!
Third States...

- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956
- 64 parties
- [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&clang=_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&clang=_en)
- Model forms: [https://assets.hcch.net/docs/71bfb379-e103-4dbf-a257-71fe0f138ad2.pdf](https://assets.hcch.net/docs/71bfb379-e103-4dbf-a257-71fe0f138ad2.pdf)
- cooperation between agencies
Third States...

- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956
- Art. 1: (personal) scope...purpose of this Convention is to facilitate the recovery of maintenance to which a person, hereinafter referred to as claimant, who is in the territory of one of the Contracting Parties, claims to be entitled from another person, hereinafter referred to as respondent, who is subject to the jurisdiction of another Contracting Party.
Third States...

- **Art. 69 Reg. 4/2009**
  - Regulation shall, in relations between Member States, take precedence over the conventions and agreements which concern matters governed by this Regulation and to which Member States are party.
BUT - Art. 69 Reg. 4/2009

Regulation shall not preclude the application of the Convention of 23 March 1962 between Sweden, Denmark, Finland, Iceland and Norway on the recovery of maintenance by the Member States which are party thereto, since, with regard to the recognition, enforceability and enforcement of decisions....
Third States...Denmark

- Brussels Convention (1968) – yes and replaced....
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels B I) – no Denmark...
Denmark has by letter of 14 January 2009 notified the Commission of its decision to implement the contents of Regulation No 4/2009 to the extent that this Regulation amends Regulation (No 44/2001). Provisions of 4/2009 will be applied to relations between the EU and Denmark with the exception of the provisions in Chapters III (APPLICABLE LAW) and VII (PUBLIC BODIES). OJ, 12.6.2009 L 149, p. 80.