The EU Maintenance Regulation

Carlos M. G. de Melo Marinho – Court of Appeal Judge
INTRODUCTION

- Maintenance collection **difficulties**: aggravated by the cross-border dimension.
- **Reasons**: (a). diversity; (b). ignorance; (c). distance.
- Underlying **changes**: (a). increase in international divorces; (b). families dispersed; (c). internationalization; (d). expansion of spaces; (e). new notion of creditor.
- **Need for**: improvement of judicial cooperation.
- **Areas** to cover: (a). jurisdiction; (b). choice of law; (c). recognition; (d). enforcement.
HISTORY

Before

(a). 1968 Brussels Convention;
(b). Regulation (EC) No 44/2001 (Brussels I Regulation);

- Previous **case-law**: still important.
- Brussels I **shortcomings**: (a). shortly effective; (b). lack of ability to fight delays, complexities and difficulties; (c). particularly inefficient: recognition and coercive collection.
Objectives

- (a) compatibility;
- (b) simplicity;
- (c) swiftness;
- (d) abolition of the exequatur.

Method

- Form: «Regulation»;
- Provisions on: (a) jurisdiction; (b) choice of law; (c) recognition and enforceability; (d) enforcement; (e) legal aid and (f) cooperation between Central Authorities.
OBJECT

- **Incidence**: (a) family relationship; (b) parentage; (c) marriage; (d) affinity;

- Maintenance obligation **definition**: EU law dimension;

- **Need for**: autonomous interpretation;

- **Contents**: (a) broader; (b) name is irrelevant; (c) way of provision is irrelevant; (d) criteria do not matter;

- **Maintenance**: may arise as part of an ancillary request – proceedings on (1). status of a person; (2). parental responsibility;

- **Family relations**: defined by the law of the forum;

- **Eventually**: (a) children of parents not bound by marriage; (b) children of spouses who have seen their marriage declared null or void; (c) non-marital partnerships and couples of the same sex;

- **Outside**: (a). **contractual** source; (b) reason of **death**;

- **Covers**: (a). determining the amount; (b). modification of defined obligations.

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Relations with other EU legal instruments

- Except: Member States not bound by the 2007 Hague Protocol.

Forms

- Objectives: (a) surpass linguistic difficulties; (b) uniformity; (c) simplicity; (d) swiftness.
- Sometimes: interpretative relief.
- Elements: (a) 9 forms annexed: (b) a non-compulsory standard form on the statement of maintenance arrears.

Geographical incidence

- Regulation: all Member States – including the United Kingdom and Denmark.
JURISDICTION – GENERAL RULES

- Notion of **court** – is not technically rigorous.

- It's **only demanded**: (a) to be heard; (b). impartial body; (c) similar force and effect; (d). appeal or review by a judicial authority.

- Intervention: **Ex officio**

- **Default**: (a) mandatory stay of proceedings; (b) suspension lifted – accomplishment of the service of documents and full course of the opposition period.

- **Habitual residence**: (a). **EU Law** concept; (b). exclude mere presence – recital (32).
JURISDICTION – GENERAL RULES

Subrogation on a legal person

- Impossible before – Case C-433/01;
- Possible after – Article 64(1).

Limit on proceedings

- The **unchanged habitual residence** of the creditor **freezes** the jurisdiction: (a). to modify the decision (b). to have a new decision given – Article 8(1);
- It is irrelevant if decision was given: (a) in a Member State; (b). in a State bound by the Hague Convention of 23 November 2007;
- Exceptions: (a). express agreement on jurisdiction; (b). choice by the creditor; (c). refusal or impossibility to exercise jurisdiction; (d) where the decision given in the 2007 Hague Convention Contracting State of origin cannot be recognised or declared enforceable.
Lis pendens and Related actions

- Elements: (a). same cause of action (b). same parties;
- Jurisdiction: court first seized;
- Other courts: stay its proceedings – Article 12(1);
- Without: the need of an application from the parties;
- After: all other must decline jurisdiction;
- Pending cases only related: the stay is merely optional – Article 13.

Provisional and protective measures

- Before a court of any Member State;
- No bounds coming from the rules on jurisdiction – Article 14.
RULES ON JURISDICTION / ARTICLE 3

Rules

- **Central** rules – Articles 3, 4 and 5;
- **Residual** rules – Articles 6 and 7;
- Provisional and precautionary measures: without limitations – Article 14.

Article 3

- **Alternative indexes** – can be used without any precedence;
- **Different benchmarks:**
  
  (a). **habitual residence** of the: (a.1.) **defendant**; (a.2.) **creditor**;
  
  (b). **power to examine an action relating to**: (b.1.) the status of persons; (b.2.). parental responsibility.
ARTICLE 4

Article 4 – choice of court performed by the parties; requisites must be filled at the time of the agreement; jurisdiction must be given to a court of a Member State.

Ruling

(a) Existing disputes or future and potential conflicts;
(b) All types of litigation – except persons under the age of 18 years;
(c) Not required to be domiciled or resident in a Member State of the Union;
(d) Included: courts of a State Party to the Lugano II Convention, of 2007; excluded: persons under the age of 18;
(e) Jurisdiction: (e.1) particular court (e.2) courts of a specific Member State;
(f) Only certain courts – paragraphs a), b) and c) of Article 4(1);
(g) Excludes: the jurisdiction of any other court;
(h) Agreements in a written document or electronic means – durable record.
## ARTICLES 5, 6 AND 7

<table>
<thead>
<tr>
<th>Article 5</th>
<th>Tacit prorogation of jurisdiction: Defendant’s intervention in the proceedings without alleging lack of jurisdiction;</th>
<th>Strong criteria: superimposes itself to any other formulas;</th>
<th>Functions in silence: works even if the Defendant doesn’t evoke the incompetence of the court;</th>
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<tbody>
<tr>
<td>Nationality and residence are irrelevant.</td>
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<td>United Kingdom and Ireland – concept of ‘domicile’ is the relevant.</td>
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<th>Article 6</th>
<th>Subsidiary criteria;</th>
<th>Aims to avoid the need for the application of internal rules;</th>
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<th>Article 7</th>
<th>Functions where no other rules can point out a solution – ‘Forum necessitatis’;</th>
<th>Stands on ‘a sufficient connection’ (to be defined by the courts).</th>
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THE JURISDICTION ‘CASCADE’

➢ **1st. Court of tacit prorogation of jurisdiction** – Article 5;

➢ **2nd. Court chosen** – Article 4 (except: maintenance obligation towards a child under the age of 18);

➢ **3rd. Alternative or parallel fora** – Article 3
  
  3.1. Court of habitual residence of the defendant
  
  3.2. Court of the habitual residence of the creditor (forum actoris);
  
  3.3. Court responsible for the proceedings concerning the status of persons if the matter is ancillary;
  
  3.4. Court for the regulation of parental responsibility, if the matter is ancillary.

➢ **4th. Subsidiary forum** – Article 6;

➢ **5th. Necessary forum** – Article 7.

❑ Out of this cascade (but over it): **provisional** and **protective** measures may be sought before any State of the Union – Article 14.
APPLICABLE LAW – GENERAL RULES


**Restriction:** only points out law applicable to maintenance obligations.

**Scope:** Article 11;

**Excluded:** Member State that did not subscribe to the 2007 Hague Protocol – will apply only its internal rules and the international conventions.

**Allowed:** the refusal of the application of the law determined – effects manifestly contrary to the public policy of the forum – Article 13.

**Allowed:** the use of a special means of defense – Article 6.
APPLICABLE LAW – REGIME

- **Transversal** character – even point the law of a non contracting State;
- **Independence** – from elements as nationality, residence or domicile of the parties;
- **Wide** extent of the **obligation** – all ties; all types of maintenance; included: provisional and definitive maintenance;
- **Wide** extent of the **concept** of maintenance **creditor**;
- Submission to the **judicial mechanisms of the European Union**;
- Strong solution: *Lex materialis fori.*
**General rule** – law of State of the residence of the creditor – Article 3(1).

**Special rules** – Articles 4, 5 and 6.

**Legal Preference** – choice of law.

**How?**
• (a). Any proceeding;
• (b). Menu of laws – Article 8;
• (c). Or selection of the law by reference to a specific procedure – Article 7;
• (d). At any time (during pending proceedings or prior to the commencement of it – where there is as reference to a specific procedure);
• (e) In writing or by recording.
FUNCTIONING

Sequential rules

(1). A law chosen by the creditor and the debtor pursuant to Articles 8 and 7;

(2). Law of the State of the habitual residence of the creditor (save where the Protocol provides otherwise) – Article 3;

(3). Law defined according to the interests of certain creditors (namely parents and children) – Article 4;

(4). Law on maintenance due between spouses, ex-spouses or parties to a marriage which has been annulled – Article 5;

(5). Law on the allegation of the non-existence of a maintenance obligation – Article 6;

(6). Law to which public bodies that seek reimbursement are submitted – Article 10.
### Objectives

- (a). absolute **suppression** of the exequatur;
- (b). free **circulation** of decisions;
- (c). mutual **trust** between judicial systems.

### Suppression of exequatur

- Member State **bound** by the 2007 Hague Protocol – the creditor just needs to provide the documents referred in Article 20;

### Classical Recognition

- Member State **not bound** by the 2007 Hague Protocol (Denmark and United Kingdom);

### Recognition and Enforcement

- The recognition is **limited to the recovery** of the maintenance claim;
- The enforceability includes **protective measures** – Article 18.

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<th>Even a public body can present this application – Article 64(1);</th>
<th>No other special procedure;</th>
<th>Without any review as to the substance – see Article 42;</th>
<th>The decision may be <strong>appealed</strong> by either party;</th>
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<td>Refusal – exclusively on the grounds of manifest contrariety to public policy, default of appearance and irreconcilability;</td>
<td>Admitted – compatible national grounds of refusal.</td>
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RECOGNITION AND ENFORCEMENT

Rules

• **No charge**, duty or fee – Article 38;
• Can be declared **provisionally enforceable** (notwithstanding any appeal) – Article 39;
• The **staying** of proceedings is **admitted**;
• The **local jurisdiction** is determined attending to: (a). place of habitual residence or (b). the place of enforcement’ – Article 27(2);
• Application submitted to the court or competent **authority notified** by the Member State – Article 27(1);
• It is **not** necessary: **postal** address or authorised **representative** – Article 41(2) nor translation;
• **Law** applicable: that of the State of **enforcement**; under the same terms as the enforcement of an **internal** decision – Article 41(1);
• Provisions applicable, as necessary, to court **settlements** and authentic **instruments** – Article 48(1).
LEGAL AID / CENTRAL AUTHORITIES

**Legal Aid**
- **Goals:**
  - (a). effective access to justice;
  - (b). common ruling;

**Wide concept** – Article 45;

**Central Authorities**
- **Tasks:**
  - (a). cooperation;
  - (b). permanent communication;
  - (c). regular meetings;

**Public bodies** are entitled to the legal aid granted to the creditor.

**Reversal of strategy:** increase of the role the central authorities;

**Alternative:** can be channels for the applications presented by the parties – Articles 56 and 59.