Applicable law in matters relating to maintenance obligations – The 2007 Hague Protocol

by Nikolay Natov

I. Legal base for the application of the Protocol on the Law Applicable to Maintenance Obligations (Concluded at The Hague on 23rd November 2007)

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

CHAPTER III

APPLICABLE LAW

Article 15

Determination of the applicable law

“The law applicable to maintenance obligations 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.”

This Chapter of the Regulation 4/2009 is inserted to grant “law certainty” notwithstanding the State where the application of Regulation 4/2009 is required.


Recital (11) of the COUNCIL DECISION of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC – OJ, L 331/17, 16.12.2009): “In accordance with 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, the United Kingdom is not taking part in the adoption of this Decision and is not bound by it or subject to its application.”
Recital (12) of the COUNCIL DECISION of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC – OJ, L 331/17, 16.12.2009): “In accordance with 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, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.”

Since 2000, the EC (and now the EU) has adopted measures of EU law (predominantly regulations) on the basis of Art. 65 ECT stating the EC’s competence to adopt “measures in the field of judicial cooperation in civil matters having cross-border implications, …in so far as necessary for the proper functioning of the internal market”

The idea of the EU institutions is that the unification of PIL is an alternative to the harmonization of substantive law for which the EU lacks competence.

The unification of Private International Law rules is intended to make people’s ordinary life easier. The unification is limited as follows: first – the EU has the power to adopt measures in the field of judicial cooperation in civil matters with cross-border implications only. Since the EU’s activity in this field is primarily aimed at enhancing the principle of mutual recognition of judicial and extra-judicial decisions, conflict-of-law rules shall be adopted only to this goal (see Art. 81, par.1 TFEU). Second – the EU’s action in this field shall respect fundamental rights, the differences among national legal systems and the traditions of Member States in an area of freedom, security and justice (Art.67, par.1 TFEU). Third – the establishment of the above area of freedom, security and justice shall be classified as a concurrent competence between the EU and its Member States and as a consequence the EU shall respect the principle of subsidiarity and proportionality. Fourth – the EU shall adhere to the principle of the unanimity vote as a consequence of the judicial cooperation in civil matters in the very specific field, i.e. the family law (Art.81, par.3 TFEU)

II. The Road of the EU to the 2007 Hague Protocol


2. Under the Preamble of the Protocol the States signatory to this Protocol, desiring to establish common provisions concerning the law applicable to maintenance obligations, wishing to modernize the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children and the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, wishing to develop general rules on applicable law that may supplement the Hague Convention of
23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, have resolved to conclude a Protocol for this purpose and have agreed upon its provisions.


5. On 8 April 2010 the Protocol was approved by the European Union in accordance with Article 24, par. 1 of the Protocol, under which “a Regional Economic Integration Organization which is constituted solely by sovereign States and has competence over some or all of the matters governed by the Protocol may equally sign, accept, approve or accede to the Protocol. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that the Organization has competence over matters governed by the Protocol.”

6. The EU made a Declaration in accordance with Article 24 of the Protocol as follows: “The European Community declares, in accordance with Article 24 of the Protocol, that it exercises competence over all the matters governed by the Protocol, that it exercises competence over all the matters governed by the Protocol. Its Member States shall be bound by the Protocol by virtue of its conclusion by the European Community.

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.

The European Community declares that it will apply the rules of the Protocol provisionally from 18 June 2011, the date of application of 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 (OJ L 7, 10.1.2009, p. 1.), if the Protocol has not entered into force on that date in accordance with Article 25, par.1 thereof.

The European Community declares that it will apply the rules of the Protocol also to maintenance claimed in one of its Member States relating to a period prior to the entry into force or the provisional application of the Protocol in the Community in situations where, under 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 (OJ L 7, 10.1.2009, p. 1.), proceedings are instituted, court settlements are approved or concluded and authentic instruments are established as from 18 June 2011, the date of application of the said Regulation.”

7. A notification under Article 9 of the Protocol was made as follows:
“Ireland, through the European Commission, has informed the Permanent Bureau in accordance with Article 9 that for the purpose of cases which come before its authorities, the word "nationality" in Articles 4 and 6 is replaced by "domicile" as defined in that State.”

III. Entry into Force of the 2007 Hague Protocol

In accordance with its Article 25, par.1, the Protocol shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 23. The second paragraph of this Article reads that the Protocol shall enter into force “a) for each State or each Regional Economic Integration Organization referred to in Article 24 subsequently ratifying, accepting or approving the Protocol or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;”

In accordance with its Article 24, par.1, the Protocol was approved by the European Union on 8th April 2010. Serbia ratified the Protocol on 10th April 2013. The Protocol entered into force on 1st August 2013.¹

IV. Structure of the Protocol

The Protocol has 30 Articles. It is not divided into Chapters, but its provisions may be classified into three groups:

1) Articles 1 and 2 define its scope ratione materiae and ratione loci;
2) Articles 3 to 14 determine the law applicable to maintenance obligations, also specifying its scope;
3) Articles 15 to 30 are general and final provisions, which are now customary in most of the instruments developed by the Hague Conference on Private International Law.

V. General Characteristics

The primary purpose of the Protocol is to introduce uniform international rules for the determination of the law applicable to maintenance obligations. It replaces the previous two Hague Conventions in this field, i.e. the 1956 and 1973 Conventions on law applicable to maintenance obligations. The Protocol makes important reforms to these existing international instruments but retains some of their still very relevant features. Comparing it with the prior Hague Conventions, the Protocol provides three main innovations.

¹ See http://www.hcch.net/index_en.php?act=conventions.text&cid=133
First, it maintains the law of habitual residence (Lex habitationis) of the creditor as the main connecting factor and extends it to maintenance obligations between spouses and ex-spouses, reinforcing in the same time the role of the law of forum (Lex fori), which is promoted, for claims made by certain “privileged” classes of creditors, to the rank of principal criterion, with the law of habitual residence of the creditor in such cases playing only a subsidiary role. Second, an escape clause based on the idea of close connection (Lex proximus) is introduced for obligations between spouses and ex-spouses. Third, a party autonomy (leading to application of Lex voluntatis) is introduced in two aspects: 1) as a possibility within procedural agreements enabling the parties, with respect to any maintenance obligation, to choose the law of the forum for the purposes of a specific proceeding; and, 2) as an option regarding the applicable law that may be exercised at any time, subject to some conditions and restrictions.

VI. Scope of the Protocol

1. Rationae materiae – substantive scope

Article 1

Scope

(1) This 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.

(2) Decisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1.

Paragraph 1 defines the substantive scope of the Protocol. According to it any maintenance obligation arising from a family relationship, parentage, marriage or affinity falls under the scope of the Protocol.

Second paragraph clarifies that the Protocol only concerns the law applicable to the maintenance obligation itself and is not devoted to determine the law that is to apply to any family relationships from which a given maintenance obligation arises. So the law applicable to these relationships is to be determined on the basis of the conflict of laws rules in force in each Contracting State. In the same way, maintenance decisions made on the basis of the Protocol shall be without prejudice to the existence of any of these family relationships; a decision that orders the debtor to pay maintenance to the creditor on the basis of the law determined by the Protocol cannot be used in order to prove the existence of any family relationship listed in Article 1, paragraph 1.
2. **Rationae loci – universal application**

**Article 2**

*Universal application*

*This Protocol applies even if the applicable law is that of a non-Contracting State.*

The Protocol has an *erga omnes* effect, i.e. its rules will apply in a Contracting State to the Protocol even if the applicable law is that of a non-Contracting State. For instance, a creditor resident in a non-Contracting State who initiates proceedings in a Contracting State (say in the State of the debtor’s domicile) will benefit from the application of uniform rules provided in this Protocol and favorable to the creditor. The Article at hand serves only to specify the *universal nature* of the Protocol, which shall be applicable in the Contracting States even if the law determined by its conflict of laws rules is that of a third State (a non-contracting State).

VII. **Objective connecting factors for determination of the law applicable to maintenance obligations**

**Article 3**

*General rule on applicable law*

(1) *Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise.*

(2) *In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs.*

This provision establishes the principle of connecting the maintenance obligations to the *law of the State where the creditor has his/her habitual residence* (*Lex habitationis*). The said connecting factor offers obvious *advantages* as follows: *first* – it allows a determination of the existence and amount of the maintenance obligation taking into consideration the legal and factual circumstances of the social environment in the State where the creditor lives and engages in most of his/her activities. *Second* – it also assures equal treatment of the creditors who live in the same country regardless their nationality.

**The notion for habitual residence is not clarified by the Protocol.** Example by the Code of PIL of Bulgaria\(^2\): Article 48, par.7 “In the meaning of this Code, as a habitual residence of a natural person shall be considered the place, where the person has settled predominately to

live, and this is not related with a necessity of registration or permit to stay or to settle. For the definition of this place, the circumstances of personal or professional nature which arise from durable relations of the person with this place or from his/her intent to establish such relations shall be considered.”

In other words simple temporary residence (or stay) is not sufficient to be considered habitual residence and thus to be used for determination of the law applicable to the maintenance obligation.

The last part of Article 3, par.1 of the Protocol adds that the law of the state of creditor’s habitual residence is not to apply if the Protocol provides otherwise. This clarification is important because the Protocol covers some exceptions provided in Articles 4 to 8.

If a change of residence takes place (Art.3, par.2) the determination of the existence and amount of the maintenance obligation is to be made according to the law of the State where the creditor actually lives. This solution adheres to the normal logics. On the other hand the application of the law of creditor’s new habitual residence assures also equal treatment of all creditors who live in the same country regardless their nationality.

It should be added here that the change of applicable law coincides with the moment of the change of residence. The change of that law has an effect only for the future (ex nunc) – it doesn’t have retroactive effect (ex tunc). Latter does mean that claims of the creditor relating to the period prior to the change remain subject to the law of the State of the former (previous) habitual residence of the creditor.³

Article 4

Special rules favoring certain creditors

(1) The following provisions shall apply in the case of maintenance obligations of –

a) parents, towards their children;

b) persons, other than parents, towards persons who have not attained the age of 21 years, except for obligations arising out of the relationships referred to in Article 5; and

c) children towards their parents.

(2) If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply.

³ “This solution is justified if one considers that the creditor’s entitlement to maintenance for the earlier period is already vested, and accordingly ought not to be called into further question owing to a subsequent change of applicable law” – quotation from the PRELIMINARY DRAFT PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, EXPLANATORY REPORT, drawn up by Andrea Bonomi, HCCH, 2007, p.8 (available at http://www.hcch.net/index_en.php?act=publications.details&pid=4140&dtid=35 )
(3) Notwithstanding Article 3, if the creditor has seized the competent authority of the State where the debtor has his habitual residence, the law of the forum shall apply. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the law of the State of the habitual residence of the creditor shall apply.

(4) If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3 of this Article, to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply.

This rule comprises some important derogations from the basic connecting factor – the maintenance creditor’s habitual residence (Lex habitationis). The reason to provide all these derogations is to introduce provisions more favorable to some categories of maintenance creditors. These provisions apply in case the application of the law of habitual residence of those creditors appears for various reasons to be not favorable for them.

Art.4, par.2 – a subsidiary application of the law of the forum (Lex fori) in case the creditor is unable to obtain maintenance under the law of the State of his/her habitual residence. Background of this solution is the principle favor creditoris. Its purpose is to make sure that it will be possible for the creditor to obtain maintenance if such is provided for by the law of the authority seized (Lex fori).

Art.4, par.3 provides for application of the law of the forum (Lex fori) when the proceedings are instituted by a claim of the creditor in the State of the habitual residence of the maintenance’s debtor. However, in this case if the maintenance creditor is unable to obtain maintenance under the law of the forum thus designated as applicable by the said rule then the law of the creditor’s habitual residence (Lex habitationis) will be applicable as a subsidiary connecting factor.

Art.4, par.4 provides for application of the law of common nationality of the parties (Lex communis nationalis). In case the creditor is unable to obtain maintenance either under the law of the State of his/her habitual residence or under the law of the forum, then the law of the common nationality of the parties is applicable as a last solution. This is also subsidiary connecting factor. It makes the protection of the maintenance creditor complete if the laws designated by the first two connecting factors (Art.4, paras 2 and 3) do not provide for any maintenance obligation. The condition is such common nationality of the parties to be presented. Here Article 9 entitled “Domicile” instead of “nationality” should also be taken into consideration. It reads “a State which has the concept of “domicile” as a connecting factor in family matters may inform the Permanent Bureau of the Hague Conference on Private International Law that, for the purpose of cases which come before its authorities, the word “nationality” in Articles 4 and 6 is replaced by “domicile” as defined in that State.” As mentioned above, by a Notification Ireland, through the European Commission, has informed the Permanent Bureau of the Hague Conference of PIL in accordance with Article 9 that for the purpose of cases which come before its authorities, the word "nationality" in Articles 4 and 6 is replaced by "domicile" as defined in that State.
Article 5
Special rule with respect to spouses and ex-spouses

In the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, Article 3 shall not apply if one of the parties objects and 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.

Under this provision for maintenance obligations between spouses and ex-spouses or parties to a marriage which has been annulled, the law of the State of the habitual residence (Lex habitationis) of the creditor applies, subject to an escape clause. This basic connecting factor is to be replaced in some cases by the law of a State with which the marriage has closer connection (Lex proximus). The condition for such a replacement is one of the parties to object the application of the law of the State of the habitual residence (Lex habitationis) of the creditor and the law of another State, in particular the State of the last common habitual residence (of the spouses and ex-spouses or parties to a marriage which has been annulled), has a closer connection with the marriage. In such a situation the law of the State of the last common habitual residence applies.4

Article 6
Special rule on defense

In the case of maintenance obligations other than those arising from a parent-child relationship towards a child and those referred to in Article 5, the debtor may contest a claim from the creditor on the ground that there is no such obligation under both the law of the State of the habitual residence of the debtor and the law of the State of the common nationality of the parties, if there is one.

This rule entitles the debtor to contest a claim for maintenance between persons related collaterally or by affinity (other than claims for maintenance arising from a parent-child relationship towards a child and those referred to in Article 5) for the reason that no maintenance obligation does exist according to the law of the common nationality of the

4 As it is mentioned in the Outline: “Either party may raise an objection to the application of the law of the State of habitual residence of the creditor, after which point the court or authority seized will have to conduct an inquiry into whether the marriage has a closer connection with a law other than that of the creditor’s habitual residence (for example, inter alia the spouses’ habitual residence or domicile during the marriage, their nationalities, the location where the marriage was celebrated, and the location of the legal separation or divorce). The Protocol in particular gives a leading role to the State of the last common habitual residence to be considered in such an inquiry.” – see Outline of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, p.3-4, available at: http://www.hcch.net/upload/outline39e.pdf
debtor and the creditor or, in the absence of their common nationality, according to the internal (domestic) law of the State where is debtor’s habitual residence.\(^5\)

VIII. Choice of the applicable law by the parties – which law will be the *Lex voluntatis*?

**Article 7**

*Designation of the law applicable for the purpose of a particular proceeding*

(1) Notwithstanding Articles 3 to 6, the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation.

(2) A designation made before the institution of such proceedings shall be in an agreement, signed by both parties, in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference.

Under the first paragraph of this rule parties are allowed to make “procedural agreements” by which to choose the *law of the forum* for the purposes of a specific proceeding. This provision only applies when a maintenance creditor has brought or is about to bring a maintenance claim before a specific court or authority in a given State – then the internal (domestic) law of that State applies, i.e. the law of that State’s forum chosen by the parties.\(^6\)

\(^5\) See also the PRELIMINARY DRAFT PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, EXPLANATORY REPORT, which reads regarding the issue at hand: “This defence can therefore be invoked, inter alia, in cases where maintenance claims are made by a parent towards his or her child, as well as by a minor towards someone other than one of his or her parents (e.g., someone with whom he or she is related collaterally or by affinity). In these two cases, the rules of Articles 4 and 6 will be applicable competitively, and consequently maintenance due in accordance with one of the laws designated by the cascade of connections in Article 4 will be refused if it is not due according to the laws provided for in Article 7. This concurrent application of the system of cascading connecting factors and means of defence is very complicated and not very satisfactory from a strictly logical point of view; it does seem rather incoherent that one would wish to benefit the creditor by way of subsidiary connections and at the same time protect the debtor by way of cumulative connections. This solution is of course a compromise. Nevertheless, it should be recognised that the system is not entirely new, corresponding as it does to that currently applicable in the system of the 1973 Convention for persons related collaterally or by affinity. This defence could also be used against claims brought by an adult creditor on the basis of a family relationship other than marriage, which may be recognised by the law of the habitual residence or by the law of the forum (e.g., between homo- or heterosexual partners). In these cases, coherence is guaranteed as these categories of creditors do not benefit from the cascade of connections in Article 4.”

\(^6\) See also the PRELIMINARY DRAFT PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, EXPLANATORY REPORT, which reads that the consent of the parties has an effect only for specific proceedings. Accordingly, if a further claim or claim for modification is made subsequently to the same authority or an authority of another State, the choice of law made previously will no longer be effective and the applicable law will have to be determined according to the objective connections. This limitation on the effects of choice is justified, as the chosen law is the law of the forum – par.64, p.16.
According to second paragraph (which is a substantive rule) the choice must be explicit and in form of an agreement signed by both parties, in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference.

**Article 8**

**Designation of the applicable law**

(1) Notwithstanding Articles 3 to 6, the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation –

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.

(2) Such agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.

(3) Paragraph 1 shall not apply to maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest.

(4) Notwithstanding the law designated by the parties in accordance with paragraph 1, the question of whether the creditor can renounce his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation.

(5) Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

Under this rule parties are permitted to make agreements by which they choose the law applicable to a maintenance obligation at any time, including before a dispute arises, until such time as they choose to cancel or modify their agreement. Parties are only permitted to choose the law of any State of which either party is a national, the law of the State of the habitual residence of either party, or the law previously chosen or actually applied.
(designated by objective connecting factors) to their property regime or to their divorce or legal separation.

The substantive provision of Art.8, par.2 requires such agreement to be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and to be signed by both parties.

In order to protect the maintenance creditor, the freedom of the parties to enter the said general agreements is restricted. Choice of law agreements covering maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his/her personal faculties is not in a position to protect his/her interest, are prohibited by the substantive provision of Art.8, par.3.

The parties’ freedom to choose applicable law is also restricted as regards creditor’s ability to renounce his/her right to maintenance. The law of the State of the habitual residence of the creditor at the time of choice is applicable as to the possibility of renunciation of maintenance and the conditions of such renunciation (Art.8, par.4).

The parties to an agreement on applicable law must be “fully informed and aware” of the consequences of their choice. Otherwise a court or authority seized may set aside the application of the law chosen by the parties if its application “would lead to manifestly unfair or unreasonable consequences for any of the parties.” (Art.8, par.5). In such a case the law designated by the objective connecting factors provided for under the Protocol shall apply.  

IX. Other provisions regarding the applicable law

Article 10

Public bodies

The right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject.

The right of a public body to claim reimbursement of the sum paid to the creditor in lieu of maintenance is subject to the law which governs that body (e.g. Lex loci registrationis or more general Lex societais). This rule covers sums paid for maintenance.

Article 11

7 In the Explanatory Report the circumstances that could trigger application of this escape clause are listed as follows: “the fact that the chosen law is only very distantly related, at the time of the dispute, to the parties, or that one of the parties (especially the creditor) consented to the choice of applicable law without being sufficiently informed of its consequences.” – see PRELIMINARY DRAFT PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, EXPLANATORY REPORT, par.76, p.18.
Scope of the applicable law

The law applicable to the maintenance obligation shall determine inter alia –

a) whether, to what extent and from whom the creditor may claim maintenance;

b) the extent to which the creditor may claim retroactive maintenance;

c) the basis for calculation of the amount of maintenance, and indexation;

d) who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation in the proceedings;

e) prescription or limitation periods;

f) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in place of maintenance.

The applicable law governs in particular the existence of the maintenance obligation, the determination of the debtor, the extent of the obligation, as well as the basis for calculation of the amount payable and the extent to which the creditor can claim maintenance retroactively (arrears). It should be noted that the list numerated in Article 11, as indicated by the expression “inter alia”, is not exhaustive, and other points not mentioned may also be covered by the same law.

Article 12

Exclusion of renvoi

In the Protocol, the term “law” means the law in force in a State other than its choice of law rules.

Renvoi in its two forms as remission and transmission is excluded. This also covers the case when the law designated is that of a non-Contracting State. The law applicable designated in conformity to the Protocol is only the internal (domestic) law of a given State.

Article 13

Public policy

The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.
To clarify this rule is needed to say that not the application of the whole law designated by the Protocol shall be refused but only the application of a single rule or of some rules of that law the effects of which application would be manifestly contrary to the public policy of the forum. The criteria for public policy are to be extracted from the law of the forum.

X. Determining the amount of maintenance

Article 14

Determining the amount of maintenance

Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance.

This mandatory substantive rule must be applied by the authorities of a Contracting State regardless of whether the applicable law is foreign law or the law of the forum. The rule requires that the needs of the creditor and the resources of the debtor, as well as any compensation which the creditor was awarded in place of periodical maintenance payments (i.e., a “lump sum” payment) be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise.

Sofia, 21st November 2013