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Conflicting Rules in Matters Relating to Maintenance Obligations where the Connecting Factor is the will of the Parties Under Articles 7 and 8 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

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Abstract: *Article 2.612 of the Civil Code provides: "The law applicable to the maintenance obligation shall be determined in accordance with the rules of European Union law."*
The law governing the maintenance obligation is found in the European regulations (European Commission, 2008).
Romania has concluded Conventions (e.g. the Convention between Romania and the Kingdom of Belgium on the recognition and enforcement of judgments in matters relating to maintenance obligations) and Legal Assistance Treaties (Government of Romania, 1999; International Act, 1995; Parliament of Romania, 1995; 1997).
The legal framework for the application in Romania of European Union regulations and various instruments of private international law in the field of maintenance obligations is Law No 36/2012 on certain measures necessary for the implementation of certain regulations and decisions of the Council of the European Union (2009) and instruments of private international law in the field of maintenance obligations (Parliament of Romania, 2012).
Among the European regulations in this field, we have proposed to dedicate our study to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations.
The Protocol comprises two categories of rules which differ in the nature of the point of connection:
- The first category is made up of rules which provide an objective location of the obligatory relationship (Art. 3 - Art. 6);
- The second category consists of rules whose point of connection is the will of the parties (Art. 7 to Art. 8).
This article is devoted to the presentation of the law applicable to maintenance obligations in the case of conflicting rules whose point of connection is the will of the parties as provided for in Articles 7 and 8 of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations.

Keywords: *law applicable to maintenance obligations, habitual residence, parties, creditor, debtor, children, spouses, ex-spouses, Romanian private international law, Romanian Civil Code.*

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1. Designation of the law applicable to maintenance obligations by will of the parties (Articles 7 and 8 of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations)

1.1. Place of jurisdiction

Article 7 of the Protocol with the marginal heading "Designation of applicable law for the purposes of a special procedure" provides: "Notwithstanding Articles 3 to 6, for the purposes of a special procedure in a particular State only, the maintenance creditor and debtor may expressly designate the law of that State as the law applicable to a maintenance obligation. (para. 1) A designation prior to the commencement of such a procedure shall take the form of an agreement signed by both parties, in writing or recorded on any medium, the contents of which shall be accessible so as to be usable for subsequent reference. " (para. 2).

Article 8 of the Protocol with the marginal heading "Designation of applicable law" provides: "Notwithstanding Articles 3 to 6, the maintenance creditor and debtor may at any time designate one of the following laws as the law applicable to a maintenance obligation: (para. 1)

(a) the law of any State of which a party is a national at the time of designation.

(b) the law of the State of the habitual residence of one of the parties at the time of designation.

(c) the law designated by the parties as applicable or the law which in fact applies to the ownership of their property.

(d) the law designated by the parties as applicable or the law which in fact applies to their divorce or legal separation.

Such an agreement shall be in writing or recorded in any medium, the information contained in the agreement being accessible so as to be usable for subsequent reference and shall be signed by both parties. (para. 2) Paragraph 1 does not apply to maintenance obligations in respect of a person under the age of eighteen years or an adult who, by reason of an impairment or insufficiency of personal capacity, is unable to protect his or her interests. (para. 3) Without prejudice to the law designated by the parties in accordance with paragraph 1, whether the creditor may waive his or her right to maintenance shall be determined by the law of the State in which the creditor has his or her habitual residence at the time of designation. (para. 4) Except where at the time of designation the parties were fully informed and aware of the consequences of the designation made by them, the law designated by the

parties shall not apply where the application of that law would have manifestly unfair or inequitable consequences for either party."(para. 5)

1.2. Preliminary clarification

The Protocol in Articles 7 and 8 allows the parties (maintenance creditor and debtor) to designate the law applicable to the maintenance obligation (lex voluntatis), applying the principle of party autonomy in matters relating to maintenance.

The object of the choice distinguishes between the two articles as follows:

- Article 7 of the Protocol requires that the parties' choice of applicable law be made pursuant to a special procedure;

- Article 8 of the Protocol requires that the choice of applicable law is to be made by the parties in any matter relating to maintenance (European Commission, 2009; 2011).

Between the two articles we also have distinctions relating to: when the choice of law applicable to the maintenance obligation can take place, the conditions for the choice of law applicable to the maintenance obligation, the effects of the choice of law applicable to the maintenance obligation. (Sitaru, 2013, p. 261).

Both articles provide, by way of preamble, that they apply "without prejudice to Art. 3, Art. 3, Art. 3 and Art. 4". 6 of the Protocol.~ Thus, the objective location of the maintenance obligation constitutes the rule and remains applicable whenever the conditions for voluntary designation are not met.

2. Designation of applicable law for the purposes of a special procedure (Article 7 of the Protocol)

From the provisions of Article 7 para. (1) of the Protocol we note that only for the purpose of a special procedure in a particular State, without prejudice to Art. 3 Art. 6 of the Protocol, the maintenance creditor and debtor may expressly designate the law of the State concerned as the law applicable to a maintenance obligation.

Under paragraph (2) of Article 7 of the Protocol, where there is a question of a prior designation of the commencement of such proceedings for the purpose of effecting such proceedings, an agreement signed by both parties shall be concluded between them, in writing or recorded on any medium, the contents of which shall be accessible so as to be usable for subsequent reference.

We note that the scope of Article 7 of the Protocol is not restricted and can thus be used for any category of maintenance obligations, i.e. it does not take into account the status of the debtor or creditor.

The scope of the designation of the applicable law is limited. Thus, the parties may designate the applicable law only "for the purposes" or "for the purposes" of a particular procedure in a particular State.

In the absence of a new agreement of the parties under Art. 7 or Art. 8 of the Protocol, the new proceedings will be subject to the law applicable according to the objective location in Art. 6 of the Protocol.

The parties' freedom of will is limited to a single law, so they may designate as applicable to the maintenance obligation only the law of the State of the authority conducting the particular proceedings (*lex fori or lex auctoris*) (Jugastru*,* 2017; Lupşan, 2014, pp. 9-13; 21-23; 109-115; Onaca & Burduf, 2011a, pp. 291-344; 268-296; Onaca & Burduf, 2011b, pp. 223-240; Onaca & Burduf, 2012, pp. 283-310; 298-314).

In temporal terms, the designation of the law of the authority may take place as follows (Sitaru., 2013, pp. 262-263).

- after the authority has been seised, as referred to in Article 7(1) of the Protocol. In this case, there is only one requirement, namely that the designation must be made "expressly". The Protocol's imposition of this single condition is justified because the designation of the law applicable to the maintenance obligation is made before an authority which has already been seised, it is assumed that the parties have been or can be informed of the consequences of doing so, and the risk of acting in ignorance is reduced. It is left to the law of the competent authority to determine the procedural moment up to which the designation can take place before the authority, the manner in which it must be expressed (in writing or only orally and recorded in a document of the authority concerned, etc.);

- prior to the referral to the authority, under the conditions set out in paragraph 1. (2) of Article 7 of the Protocol. In this case, paragraph 2 of Article 7 of the Protocol lays down stricter formal requirements. Thus, the designation must take the form of an agreement signed by both parties, in writing or recorded on any medium, the content of which is accessible so as to be usable for subsequent receipts.

The rationale for these formal requirements is at least twofold:

1. the parties must be aware of the consequences that the designation of the law applicable to the maintenance obligation may have on the existence and extent of their rights and obligations;

2. to create a means of proof that can be used for possible future references (Bonomi, 2007; Sitaru, 2013, p. 262).

It follows from the wording of the text requiring the parties to "unpack" the law of the authority to be applied that the parties must explicitly state in the agreement the law or at least which state authority is referred to.

3. Designation of generally applicable law (Article 8 of the Protocol)

3.1. Scope of application (Art. 8 para. (3) of the Protocol)

Article 8(1) of the Protocol gives the maintenance creditor and debtor the possibility, without prejudice to Articles 3 to 6, to designate at any time one of the laws listed in this paragraph as the law applicable to a maintenance obligation.

Under Article 8(3) of the Protocol the right of choice provided for in paragraph 1(1) does not apply to maintenance obligations in respect of a person under the age of eighteen years or an adult who, by reason of an impairment or insufficiency of personal capacity, is unable to protect his or her interests.

We infer from these provisions of para. (3) that the Protocol does not recognize the possibility for the parties to designate the law applicable to the maintenance obligation in cases where: (Sitaru, 2013, p. 263).

a. The maintenance creditor is a person under the age of eighteen, i.e. in the case of maintenance without children. The limitation is justified because if the choice of law agreement (electio juris clause) were allowed, it would have to be concluded between the minor and his or her parent, who is in principle the debtor of the maintenance obligation, which would give rise to several cases of conflict of interest;

b. The maintenance creditor is an adult who, because of an impairment or insufficiency of personal capacity, is unable to defend his or her interests. Under Romanian law, such an adult can only be a person placed under interdiction or under guardianship, as well as an adult for whom, although such institutional measures of protection have not yet been taken, meets the conditions to fall within their scope. The rationale for exclusion is similar to that for minors mentioned above.

Per a contrario, the parties to all other categories of maintenance obligations have the right to designate the law applicable to the matter. So, the regulation concerns adults but is specifically dedicated to spouses.

The scope of the designation of the applicable law is unlimited, the parties being able to choose the law applicable to the maintenance obligation for any procedure and aspect which the legal relationship of maintenance involves or which may be possible in the future. Thus, the effect of the law applicable to the maintenance obligation is not materially or temporally

limited and may last until the parties modify or terminate the original agreement.

The designation of the law applicable to the maintenance obligation is not limited in time either, as the parties can make such a choice "at any time". As such, the designation of the law applicable to the maintenance obligation may take place after or before the competent authority has been seised of any problem in the matter.

3.2. The importance of regulating the parties' autonomy of will

The advantage of recognizing the possibility for the parties to choose the law applicable to the maintenance obligation, even with its limits, is to ensure the stability and predictability of the private international law regime of maintenance more than objective localization can. This advantage arises from the fact that the law chosen by the parties is, in principle, not influenced by changes that may occur, subsequent to the choice, in the personal situation of the maintenance creditor or debtor (such as a change in his habitual residence or nationality) or by the identity of the authority called upon to settle a dispute in the matter (Sitaru., 2013, p. 264).

4. Extent of party autonomy

4.1. Preliminary clarifications

The freedom of the maintenance creditor and debtor to choose the law applicable to a maintenance obligation is limited in three respects (Sitaru, 2013, pp. 264-265).

a. The first limitation concerns the choice of the parties, which is limited to "one" of the laws referred to in Article 8(2)(a) and (b). (1) of the Protocol. It is noted that the list of laws is limitative, the parties' choice may be alternative to any of them. In the context of the right of the parties to designate the law applicable to the maintenance obligation, the question arises as to the formal requirements for such designation provided for in Article 8(2) of the Protocol;

b. The second limitation is that the parties' right of option does not relate to the creditor's possibility of waiving or not waiving his right of maintenance, for which the conflict rule in Article 8(4) of the Protocol is applicable;

c. The third limitation is that the competent authority is given the right to set aside the chosen law if it has unfair or inequitable consequences for either party (Article 8(5) of the Protocol).

The rationale of these limitations is to protect the maintenance creditor who, although he has the right to choose the applicable law with the debtor, cannot be subject to the risk that his choice will be totally unfavorable to him.

The reason for these limitations is to protect the maintenance creditor who, although he has the right to choose the applicable law together with the debtor, cannot be subject to the risk that his choice will be totally unfavorable ((Sitaru, 2013, p. 265).

4.2. The scope of the laws which the parties may designate (Art. 8 para. (1) of the Protocol)

From the provisions of Article 8(1) of the Protocol we note that both the maintenance creditor and the debtor may designate one of the following laws as the law applicable to a maintenance obligation (Sitaru, 2013, pp. 265-266).

(a) the law of any State of which one of the parties is a national at the time of designation. Thus, the law of the nationality (lex patriae) of either party (creditor or debtor) may govern the law of a maintenance obligation. In the case of multiple nationality, the parties may claim as the applicable law the law of any of their nationalities. The provisions of Article 16 para. (1) of the Protocol are applicable where the maintenance creditor or debtor is a national of a State in which more than one legal system coexists.

(b) the law of the State of habitual residence of one of the parties at the time of the designation. For the concept of habitual residence, we refer both to Article 3 of this Protocol and to the chapter where we have dealt with this subject. The phrase found in Article 8(1)(a) and (b) "at the date of designation" is intended to resolve the conflict of laws, with priority being given to the old law, which remains applicable irrespective of whether the party whose nationality or habitual residence was chosen to determine the applicable law has subsequently changed nationality or residence. Indeed, while under Article 3 para. (2) of the Protocol in the case of objective localization, a change in the creditor's habitual residence leads to the application, even if only ex nunc, of the law of the new habitual residence which the parties had at the time of the designation, and any subsequent change of nationality or residence by either party is thus irrelevant.

(c) the law designated by the parties as applicable or the law which in fact applies to the property regime of their property. Although, the possibility of choosing this law applicable to the maintenance obligation is offered to any person falling under Article 8, since the provisions of the Protocol do not distinguish, in practice it is intended for spouses and former spouses. The

Protocol gives the parties the possibility to choose one of the following laws as the law applicable to the maintenance obligation:

- Either the law which the parties have designated as applicable to the property regime of their property. In this situation, the law applicable to the maintenance obligation is identified (confused) with the law chosen by the parties, and the choice of the two laws is in principle simultaneous;

- Either the law which in fact applies to this property regime. In this situation the choice of the parties leads to a law, which in fact already applies to the property regime of the property because it was previously determined by the competent authority, in principle following a process of objective localization. The reason for allowing the parties to designate as applicable to the maintenance obligation the same law governing the property regime of their property is to respond to the wish that the parties often express to subject both matters to one and the same law. The fact that the parties graft the law applicable to the maintenance obligation onto the law governing the property regime of their property makes the former law ancillary to the latter. The consequence is that if the parties' choice of the law governing the ownership of their property is invalid for whatever reason, the choice of the law applicable to the maintenance obligation will also be invalid.

(d) the law designated by the parties as applicable or the law which in fact applies to their divorce or legal separation.[1] The right to choose one of these laws to govern the maintenance obligation is explicitly conferred only on spouses and ex-spouses. The above clarifications also apply to this situation. The Protocol gives spouses or ex-spouses the possibility to choose one of the following laws as the law applicable to the maintenance obligation:

- Either the law which the parties have designated as applicable to the divorce or legal separation. In this situation the law applicable to the maintenance obligation is identified (confused) with the law chosen by the parties, and the choice of the two laws is in principle simultaneous;

- Either the law which actually applies to the divorce or legal separation. In this situation, the choice of the spouses or ex-spouses leads to a law which already applies in fact to the divorce or legal separation because it was previously determined by the competent authority, in principle following a process of objective localization. The reason for allowing spouses or ex-spouses to designate as applicable to the maintenance obligation the same law governing divorce or legal separation is to respond to the wish that spouses or ex-spouses often express to subject both matters to one and the same law. The fact that spouses or ex-spouses graft the law applicable to the

[1] The term "legal separation" is similar to that of separation from bed and board.

maintenance obligation onto the law governing divorce or legal separation makes the former law ancillary to the latter. The consequence is that if the spouses' or former spouses' choice of law governing divorce or legal separation is invalid for whatever reason, the choice of law applicable to the maintenance obligation will also be invalid.

4.3. Formal requirements of the choice agreement (Article 8(1)(b)) (2) of the Protocol)

The choice of law agreement (electio juris) must satisfy the formal requirements of Art. 8 para. (2) of the Protocol. Thus, the conditions laid down for the choice agreement are: it must be concluded in writing or recorded on any medium, the information contained in the agreement must be accessible so as to be usable for subsequent reference, the agreement must be signed by both parties. These conditions are similar to those in Article 7(2) of the Protocol.

4.4. The law applicable to the creditor's option to waive or not to waive his or her right to maintenance (Art. 8 para. (4) of the Protocol)

For example. (4) of Art. 8 of the Protocol it follows that the creditor is given the possibility of waiving or not waiving his or her right to maintenance under the law of the State in which the creditor is habitually resident at the time of the designation[2], but without prejudice to the law designated by the parties in accordance with para. (1). So, the question that arises is whether or not a maintenance creditor can waive his right to be governed by the law of habitual residence. This issue arises in the following situations:

- In the context of the law generally applicable to the maintenance obligation. Thus, Art. 8 para. (1) of the Regulation stipulates that the parties remain free to designate the law applicable to the maintenance obligation, and if the law of the habitual residence of the maintenance creditor is denied to the maintenance creditor, the law of the habitual residence of the maintenance creditor shall apply;

- In the context where the creditor himself waives his right to maintenance and at the same time subjects this waiver to a system of law which offers him this possibility. In this situation, the chosen law will be set aside and the question of the right to waiver will be subject to the law of the

[2] This phrase is intended to resolve the mobile conflict of laws in favour of the old law, as in similar cases in Art. 8 para. (1), li. (a) and (b) of the Protocol

creditor's habitual residence. In this situation, the scope of the autonomy of will permitted by Art. 8 para. (1).

Studying para. (4) of Art. 8 of the Protocol we see that only the "extreme" issues, i.e. whether the creditor can "opt out or not", will be governed by the law of the creditor's habitual residence. Therefore, the law of the creditor's habitual residence cannot govern matters relating to the amount of maintenance, the method of payment of maintenance, etc., which are governed by the law chosen by the parties. Thus, for example, if the law chosen by the parties provides the creditor with a lump sum (flat-rate) by way of maintenance[3], the law of habitual residence cannot be applied (Sitaru, 2013, pp. 264-265).

5. Possibility conferred on the authority to set aside the chosen law if it has unfair or inequitable consequences for either party (Art. 8 para. (5) of the Protocol)

From the provisions of Art. 8 para. (5) of the Protocol we find that the law designated by the parties shall not apply unless the parties were fully informed and aware at the time of designation of the law chosen by them of the consequences of its application if the application of that law would manifestly have unfair or inequitable consequences for either party.

The Protocol thus establishes an escape clause giving the competent authority the possibility to set aside the law chosen by the parties if the following conditions are met:

1. the application of that law would have manifestly unfair or inequitable consequences for either party;

2. the consequences would "manifestly" arise.

The literature (Sitaru, 2013, p. 268) states that the expression "the law designated by the parties does not apply" should be understood to mean that the competent authority may only partially remove or modify the effects of the law chosen by the parties to the extent necessary to avoid its unfair or inequitable consequences for either party.

The Protocol does not tell us in those or other provisions which law the competent authority will apply instead of the law chosen by the parties to govern the maintenance obligation, but it will certainly apply the law resulting from the objective location of the maintenance obligation, as provided for in Art. 3, para. 5 of this Protocol.

[3] See Article 3 of the Protocol already discussed in this chapter

However, in order not to undermine the parties' autonomy of will, the removal of the law chosen by the parties to be applicable to the maintenance obligation by the competent authority will not take place even if it has produced unfair or inequitable consequences where the parties have been fully informed and are aware of the consequences of the choice made (for example, the application of the law chosen by the parties is not removed where they have sought expert legal advice in the matter).

We deduce from Article 8(5) of the Protocol that the parties must have been "fully informed" and "aware of the consequences of the choice they have made", i.e. that these requirements must be met in order for the competent authority (Lupşan, 2014, pp. 13-15; 91-98; 109-115) to be able to intervene if it appears that any of the parties, although informed, was not fully aware of the consequences of the choice it had made.

Whether the parties were informed and aware is to be assessed "at the time of designation" by them of the applicable law. Thus, if either party was not informed and aware at that time, the authority will be able to intervene, even if the party became informed and aware later (Sitaru., 2013, p. 269).

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