

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)

THE COUNCIL OF THE EUROPEAN UNION,

by this Decision or subject to its application as referred to in Recitals 11 and 12.

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) in conjunction with the second sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

(6) The Community should therefore approve the Protocol.

Having regard to the proposal from the Commission,

(7) The Protocol should apply between the Member States at the latest on 18 June 2011, the date of application of Regulation (EC) No 4/2009.

Having regard to the Opinion of the European Parliament ⁽¹⁾,

(8) In view of the close link between the Protocol and Regulation (EC) No 4/2009, the rules of the Protocol should be applied in the Community on a provisional basis if the Protocol has not entered into force on 18 June 2011, the date of application of Regulation (EC) No 4/2009. A unilateral declaration to this effect should be made upon conclusion of the Protocol.

Whereas:

(1) The Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of decisions.

(2) 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 ⁽²⁾ provides that 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 Protocol) in the Member States bound by that Protocol.

(9) The rules of the Protocol should determine the law applicable to a maintenance obligation if a decision on that obligation is to be recognised and enforceable under the rules concerning the abolition of *exequatur* laid down in Regulation (EC) No 4/2009. In order to ensure that the same conflict of laws rules will be applied in the Community to maintenance claims relating to a period prior to as well as posterior to the entry into force or the provisional application of the Protocol in the Community, the rules of the Protocol should also apply to claims relating to a period prior to this event, notwithstanding Article 22 thereof. A unilateral declaration to this effect should be made upon conclusion of the Protocol.

(3) The Protocol makes a valuable contribution to ensuring greater legal certainty and predictability to maintenance creditors and debtors. Application of uniform rules to determine the applicable law will allow free circulation of decisions on maintenance obligations in the Community, without any form of control in the Member State where enforcement is sought.

(10) In accordance with Article 3 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, Ireland is taking part in the adoption and application of this Decision.

(4) Article 24 of the Protocol allows Regional Economic Integration Organisations such as the Community to sign, accept, approve or accede to the Protocol.

(5) The Community has exclusive competence over all matters governed by the Protocol. This does not affect the positions of the Member States which are not bound

(11) 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.

⁽¹⁾ Opinion of 24 November 2009 (not yet published in the Official Journal).

⁽²⁾ OJ L 7, 10.1.2009, p. 1.

(12) 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,

HAS DECIDED AS FOLLOWS:

Article 1

The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations is hereby approved on behalf of the European Community.

The text of the Protocol is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol in order to bind the Community.

Article 3

When concluding the Protocol, the Community shall make the following declaration in accordance with Article 24 thereof:

‘The European Community declares, in accordance with Article 24 of 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.’.

Article 4

1. Within the Community, the rules of the Protocol shall apply provisionally, without prejudice to Article 5 of this Decision, from 18 June 2011, the date of application of Regulation (EC) No 4/2009, if the Protocol has not yet entered into force on that date.

2. When concluding the Protocol, the Community shall make the following declaration to take into account the possible provisional application referred to in paragraph 1:

‘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 ⁽¹⁾, if the Protocol has not entered into force on that date in accordance with Article 25(1) thereof.’.

Article 5

1. Notwithstanding Article 22 of the Protocol, the rules of the Protocol shall also determine the law applicable to maintenance claimed in a Member State relating to a period prior to the entry into force or the provisional application of the Protocol in the Community in situations where, under Regulation (EC) No 4/2009, proceedings are instituted, court settlements are approved or concluded and authentic instruments are established as from 18 June 2011, the date of application of Regulation (EC) No 4/2009.

2. When concluding the Protocol, the Community shall make the following declaration:

‘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 ⁽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.’.

Done at Brussels, 30 November 2009.

For the Council

The President

B. ASK

⁽¹⁾ OJ L 7, 10.1.2009, p. 1.

ANNEX

PROTOCOL

on the law applicable to maintenance obligations

The States signatory to this Protocol,

Desiring to establish common provisions concerning the law applicable to maintenance obligations,

Wishing to modernise 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 the following provisions:

*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.

*Article 2***Universal application**

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

*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.

*Article 4***Special rules favouring 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. 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.

*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.

*Article 6***Special rule on defence**

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.

*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.

*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.

*Article 9***'Domicile' instead of 'nationality'**

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.

*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.

*Article 11***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.

*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.

*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.

*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.

*Article 15***Non-application of the Protocol to internal conflicts**

1. A Contracting State in which different systems of law or sets of rules of law apply to maintenance obligations shall not be bound to apply the rules of the Protocol to conflicts solely between such different systems or sets of rules of law.

2. This Article shall not apply to a Regional Economic Integration Organisation.

*Article 16***Non-unified legal systems – territorial**

1. In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Protocol apply in different territorial units:

- (a) any reference to the law of a State shall be construed as referring, where appropriate, to the law in force in the relevant territorial unit;
- (b) any reference to competent authorities or public bodies of that State shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;
- (c) any reference to habitual residence in that State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit;
- (d) any reference to the State of which two persons have a common nationality shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the maintenance obligation is most closely connected;
- (e) any reference to the State of which a person is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the person has the closest connection.

2. For the purpose of identifying the applicable law under the Protocol in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Protocol, the following rules apply:

- (a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

(b) in the absence of such rules, the law of the relevant territorial unit as defined in paragraph 1 applies.

3. This Article shall not apply to a Regional Economic Integration Organisation.

*Article 17***Non-unified legal systems – inter-personal conflicts**

For the purpose of identifying the applicable law under the Protocol in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Protocol, any reference to the law of such State shall be construed as referring to the legal system determined by the rules in force in that State.

*Article 18***Coordination with prior Hague Maintenance Conventions**

As between the Contracting States, this Protocol replaces the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations and the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.

*Article 19***Coordination with other instruments**

1. This Protocol does not affect any other international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Protocol, unless a contrary declaration is made by the States Parties to such instrument.

2. Paragraph 1 also applies to uniform laws based on special ties of a regional or other nature between the States concerned.

*Article 20***Uniform interpretation**

In the interpretation of this Protocol, regard shall be had to its international character and to the need to promote uniformity in its application.

*Article 21***Review of the practical operation of the Protocol**

1. The Secretary General of the Hague Conference on Private International Law shall as necessary convene a Special Commission in order to review the practical operation of the Protocol.

2. For the purpose of such review Contracting States shall cooperate with the Permanent Bureau of the Hague Conference on Private International Law in the gathering of case law concerning the application of the Protocol.

*Article 22***Transitional provisions**

This Protocol shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State.

*Article 23***Signature, ratification and accession**

1. This Protocol is open for signature by all States.
2. This Protocol is subject to ratification, acceptance or approval by the signatory States.
3. This Protocol is open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Protocol.

*Article 24***Regional Economic Integration Organisations**

1. A Regional Economic Integration Organisation 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 Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Protocol.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by the Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare, in accordance with Article 28, that it exercises competence over all the matters governed by the Protocol and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by the Protocol by virtue of the signature, acceptance, approval or accession of the Organisation.
4. For the purposes of the entry into force of the Protocol, any instrument deposited by a Regional Economic Integration Organisation

shall not be counted unless the Regional Economic Integration Organisation makes a declaration under paragraph 3.

5. Any reference to a 'Contracting State' or 'State' in the Protocol applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation under paragraph 3, any reference to a 'Contracting State' or 'State' in the Protocol applies equally to the relevant Member States of the Organisation, where appropriate.

*Article 25***Entry into force**

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.
2. Thereafter the Protocol shall enter into force:
 - (a) for each State or each Regional Economic Integration Organisation 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;
 - (b) for a territorial unit to which the Protocol has been extended in accordance with Article 26, on the first day of the month following the expiration of three months after notification of the declaration referred to in that Article.

*Article 26***Declarations with respect to non-unified legal systems**

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Protocol, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 28 that the Protocol shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Protocol applies.
3. If a State makes no declaration under this Article, the Protocol is to extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 27

Reservations

No reservations may be made to this Protocol.

Article 28

Declarations

1. Declarations referred to in Articles 24(3) and 26(1) may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Protocol for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

Article 29

Denunciation

1. A Contracting State to this Protocol may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a State with a non-unified legal system to which the Protocol applies.

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the

notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 30

Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 23 and 24 of the following:

- (a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 23 and 24;
- (b) the date on which this Protocol enters into force in accordance with Article 25;
- (c) the declarations referred to in Articles 24(3) and 26(1);
- (d) the denunciations referred to in Article 29.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at The Hague, on the 23rd day of November 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session and to each of the other States which have participated in that Session.