Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 30 January 2018 [1]

Case C-83/17

KP, represented by her mother
v
LO

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Maintenance obligations — Inability to obtain maintenance payments from the debtor — Change of State in which the creditor is habitually resident — Application of *lex fori*)

I. Introduction

1. In these proceedings the referring court is asking the Court for an interpretation of the provisions of the 2007 Hague Protocol [2] against the background of a case in which that court is uncertain as to the law applicable to maintenance obligations.

2. Recently the Court has given answers on several occasions to questions referred by national courts in connection with matters relating to maintenance obligations in relation to Regulation No 4/2009. [3] Those questions related either to rules of jurisdiction [4] or rules on the enforcement of decisions. [5]

3. However, the requests for preliminary rulings made thus far have not concerned either the provisions of the 2007 Hague Protocol directly or even Article 15 of Regulation No 4/2009, which — in relation to matters concerning applicable law — refers to that Protocol. The present request for a preliminary ruling is therefore the first in which a national court is asking the Court for an interpretation of the conflict-of-law rules contained in the 2007 Hague Protocol.

1 Original language: Polish.

2 The content of the Protocol forms the annex to Council Decision 2009/941/EC 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 (OJ 2009 L 331, p. 17; 'the 2007 Hague Protocol').

3 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 2009 L 7, p. 1) ('Regulation No 4/2009').

4 See judgments of 18 December 2014, *Sanders and Huber* (C-400/13 and C-408/13, EU:C:2014:2461), and of 16 July 2015, *A* (C-184/14, EU:C:2015:479). See also judgment of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118).

5 Judgment of 9 February 2017, *S.* (C-283/16, EU:C:2017:104).

II. The legal framework

A. EU law

1. Regulation No 4/2009

4. The provisions concerning international jurisdiction in matters relating to maintenance obligations were laid down in Chapter II of Regulation No 4/2009. Prominent among them is Article 3 of that regulation, which provides:

'In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

(a) the court for the place where the defendant is habitually resident, or

(b) the court for the place where the creditor is habitually resident, or

(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or

(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.'

5. Article 15 of Regulation No 4/2009, entitled 'Determination of the applicable law' and contained in Chapter III thereof, entitled 'Applicable Law', provides:

'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 … in the Member States bound by that instrument.'

2. 2007 Hague Protocol

6. Articles 3 and 4(1)(a) and (2) of the 2007 Hague Protocol 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;

…;

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.'

B. German law

7. In German law, claiming maintenance for the past is governed by Paragraph 1613 of the Bürgerliches Gesetzbuch (BGB, German Civil Code). Subparagraph 1 of that provision states that:

'For the past, the person entitled may claim performance or damages for non-performance only from the date on which the person obliged, for the purpose of asserting the maintenance claim, was requested to provide information on his income and his assets, on which the person obliged was in default or on which the maintenance claim became pending at court.'

C. Austrian law

8. In its request for a preliminary ruling the referring court clarifies that under Austrian law maintenance can be recovered retroactively in respect of the previous three years. According to settled Austrian case-law, requesting the debtor to pay is not a condition for claiming retroactive child maintenance.

III. The facts of the dispute in the main proceedings

9. KP, a minor who is the applicant in the main proceedings, lived in Germany with her parents until 27 May 2015. On 28 May 2015 the minor resettled in Austria with her mother. They have been habitually resident in that Member State ever since.

10. By application of 18 May 2015 the minor applied to an Austrian court for maintenance payments from her father, LO. By application of 18 May 2016 she subsequently extended the scope of that application to the effect that she also claimed from her father payment of retroactive maintenance for a period before the application was lodged, namely from 1 June 2013 to 31 May 2015.

11. In the main proceedings before the national court the minor maintains that, in accordance with Article 3(1) of the 2007 Hague Protocol, German law applies to the maintenance obligations due to her for the period during which she was habitually resident in Germany. However, the minor is unable to obtain maintenance from her father because the conditions for asserting a right to retroactive maintenance are not satisfied under Paragraph 1613 of the BGB. Therefore, in accordance with Article 4(2) of the 2007 Hague Protocol Austrian law — which does not lay down such conditions in relation to the minor — must apply to the assessment of the maintenance obligations for that period.

12. The minor's father points out in particular that regard may be had to the subsidiary application of the law of the forum under Article 4(2) of the 2007 Hague Protocol where the proceedings have been initiated by the debtor or where neither of the creditor nor the debtor is habitually resident in the State of the authority seised. Moreover, Article 4(2) of the 2007 Hague Protocol does not apply where a creditor, who has changed his habitual residence, claims retroactive maintenance payments.

13. The court of first instance dismissed the claim for retroactive maintenance payments. It found that — under Article 3 of the 2007 Hague Protocol — German law was the law applicable to the father's maintenance obligations to the minor during the period preceding the minor's change of residence. However, Article 4(2) of the 2007 Hague Protocol could not apply to retroactive maintenance payments. Maintenance payments relating to the period prior to the creditor changing his habitual residence continue to be governed by Article 3(1) of the 2007 Hague Protocol in so far as any international jurisdiction lies within the meaning of Article 3 of Regulation No 4/2009.

14. The appellate court upheld that decision and adopted the same grounds as the court of first instance.

15. The Oberster Gerichtshof (Supreme Court, Austria) has now to consider the appeal brought by the minor against the decision on retroactive maintenance payments.

IV. The questions referred for a preliminary ruling and the proceedings before the Court of Justice

16. In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Is the rule of subsidiarity set out in Article 4(2) of the 2007 Hague Protocol on the law applicable to maintenance obligations to be interpreted as meaning that that rule is applicable only where an application initiating maintenance proceedings is lodged in a State other than the State where the maintenance creditor is habitually resident?

If that question is answered in the negative:

(2) Is Article 4(2) of the 2007 Hague Protocol on the law applicable to maintenance obligations to be interpreted as meaning that the expression "unable … to obtain maintenance" also refers to cases in which, on the ground of mere failure to comply with certain formal legislative conditions, the law of the previous place of residence does not provide for a right to retroactive maintenance?'

17. The request for a preliminary ruling was received at the Court on 15 February 2017.

18. The German Government and the European Commission have submitted written observations.

V. Analysis

A. Preliminary remarks on the 2007 Hague Protocol

19. During the period prior to the start date for the application of Regulation No 4/2009 the international jurisdiction of the courts in matters relating to maintenance obligations was governed by the rules on jurisdiction contained in the Brussels Convention[6] and the Brussels I Regulation.[7]

20. The scope of Regulation No 4/2009 extended to rules on jurisdiction in matters relating to maintenance obligations, other than matters relating to the category of obligations arising from the Brussels regime.[8]

6 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36).

7 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; 'the Brussels I Regulation').

8 See Article 68(1) of Regulation No 4/2009 and recital 44 thereof.

21. However, Regulation No 4/2009 contains no provisions which directly determine the law applicable to maintenance obligations. Nor has that matter yet been covered by other acts of EU private international law, which expressly exclude this category of obligations from their scope.[9]

22. The original intention was for the conflict-of-law rules indicating the law applicable to maintenance obligations to be contained in Regulation No 4/2009 itself.[10] However, that could have made it difficult to adopt the regulation since some Member States were not inclined to adopt a regulation entailing conflict-of-law rules. For those reasons, inter alia, when the directive was being worked on it was considered that the conflict-of-law rules could be harmonised using a convention instrument in the form of the 2007 Hague Protocol.[11] An expression of coherent legislative action was, on the one hand, the Community's accession to the 2007 Hague Protocol,[12] and, other the other, the inclusion in Regulation No 4/2009 of a provision under which the law applicable to maintenance obligations is to be determined in accordance with that Protocol.[13]

B. The jurisdiction of the Court to interpret the provisions of the 2007 Hague Protocol

23. The main part of the grounds for the request for a preliminary ruling is preceded by the referring court's remarks on the competence of the Court to interpret the provisions of the 2007 Hague Protocol. The referring court points out that Article 15 of Regulation No 4/2009 expressly refers to the 2007 Hague Protocol, which allows the Court to interpret the provisions of that protocol. Furthermore, the referring court states, like the Commission, that the Community ratified the 2007 Hague Protocol, which also establishes the Court's jurisdiction to answer questions concerning that legal act.

24. In this context it should first be recalled that — under the first paragraph of Article 267(b) TFEU — the Court has jurisdiction to give preliminary rulings concerning, inter alia, interpretation of acts of the institutions, bodies, offices or agencies of the Union.

25. By decision of 30 November 2009,[14] adopted inter alia on the basis of the first subparagraph of Article 300(2) EC and the first subparagraph of Article 300(3) EC, the Council approved the 2007 Hague Protocol on behalf of the Community.

9 See Article 1(2)(b) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) and Article 1(2)(a) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40), which exclude from their scope respectively contractual and non-contractual obligations 'arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations'. The Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (Rome Convention) (OJ 1980 L 266, p. 1), whose scope *ratione materiae* basically overlapped with the Rome I Regulation, also expressly excluded from its scope contractual obligations concerning 'rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate' (third indent of Article 1(2)(b) of the Rome Convention).

10 The Proposal of 15 December 2005 for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (COM(2005) 649 final, 2005/0259 (CNS); 'proposal for Regulation No 4/2009') included a Chapter III, entitled 'Applicable Law', which contained a number of provisions on establishing the law applicable to maintenance obligations (Articles 12 to 21 of the proposal for Regulation No 4/2009).

11 M. Župan, 'Innovations of the 2007 Hague Maintenance Protocol', P. Beaumont, B. Hess, L. Walker, S. Spancken (editor), *The Recovery of Maintenance in the EU and Worldwide*, Oxford — Portland, Hart Publishing, 2014, p. 313. Placing rules on jurisdiction and conflict-of-law rules in two separate legal acts allows certain Member States to accede to Regulation No 4/2009 without having to undertake to apply the conflict-of-law rules in the 2007 Hague Protocol (see P. Beaumont, 'International Family Law in Europe — the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2009, Vol. 73, Heft 3, p. 514). This was so in the case of the United Kingdom which has finally acceded to Regulation No 4/2009, but is still not a party to the 2007 Hague Protocol.

12 See point 25 of this Opinion.

13 See Article 15 of Regulation No 4/2009. As regards the inclusion of convention provisions in the EU-law system of conflict-of-law rules, see more broadly P.A. de Miguel Asensio, J.S. Bergé, 'The Place of International Agreements and European Law in a European Code of Private International Law', in: M. Fallon, P. Lagade, S.Poillot Peruzzetto (editor), *Quelle architecture pour un code européen de droit international privé*?, Frankfurt am Mein, Peter Lang, 2011, pp. 187 et seq.

14 See footnote 2 to the present Opinion.

26. According to settled case-law, an agreement concluded by the Council, in accordance with Article 300 EC, is, as far as the Community is concerned, an act of one of the institutions of the Community, within the meaning of the Treaty provisions which define the jurisdiction of the Court in considering requests for a preliminary ruling.[15]

27. At present the conclusion of international agreements on behalf of the Union is governed by Article 218 TFEU. The procedure leading to the conclusion of an international agreement by the Union and the effects thereof has not undergone any changes which would have meant that the Court's previous case-law on those matters was rendered redundant. Furthermore, Article 216(2) TFEU — which corresponds to Article 300(7) EU — determines that international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. This means that as from its entry into force, the provisions of such an agreement form an integral part of the EU legal system and within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation thereof.

C. The first question

1. Preliminary remarks

28. By its first question the referring court seeks to clarify whether Article 4(2) of the 2007 Hague Protocol can apply in proceedings before courts of the Member State where the maintenance creditor is habitually resident.

29. The referring court points out that — according to paragraph 63 of the report by A. Bonomi[16] — the subsidiary application of the law of the forum pursuant to Article 4(2) of the 2007 Hague Protocol is of use if the proceedings concerning maintenance payments are instituted before the court of a State other than that in which the maintenance creditor is habitually resident. Otherwise, the law of the State where the creditor is habitually resident, and therefore — under Article 3(1) of the 2007 Hague Protocol — the law in principle applicable to maintenance obligations, is the law of the forum. Consequently, Article 4(2) of the Protocol can apply where proceedings concerning a maintenance obligation are instituted by the debtor or are instituted before authorities of a State other than that in which the creditor is habitually resident.

30. However, with regard to the cited sections of the explanatory report the referring court notes that — in its view — they were drawn up on the assumption that the creditor had not changed his habitual residence. Therefore, there is no certainty as to whether Article 4(2) of the 2007 Hague Protocol applies where the creditor moves his habitual residence to a different State and applies to a court of that State for retroactive maintenance payments for a period before he changed his habitual residence.

31. By the first question the referring court essentially seeks to establish what the conditions for applying Article 4(2) of the 2007 Hague Protocol are in circumstances such as those in the main proceedings. I therefore propose that in answering the first question the Court clarifies what the conditions for applying that provision are in a situation where the creditor changes his habitual residence and then claims retroactive maintenance payments from the debtor.

15 See judgment of 22 October 2009, *Bogiatzi* (C-301/08, EU:C:2009:649, paragraph 23 and the case-law cited therein).

16 Explanatory Report by A. Bonomi on the 2007 Hague Protocol on the Law Applicable to Maintenance Payments, Actes et documents de la Vingt et unième session de la Conférence de La Haye (2007), also available in electronic form: https://www.hcch.net/fr/publications-and-studies/details4/?pid= 4898&dtid= 3.

2. Position of the German Government

32. The German Government considers that in answering the first question it is possible to go beyond a literal interpretation of Articles 3(2) and 4(2) of the 2007 Hague Protocol. The scheme and purpose of that legal act lead to the conclusion that Article 4(2) of the 2007 Hague Protocol can apply only where the court before which the creditor applies for retroactive maintenance payments had jurisdiction for the matter relating to maintenance payments during that period.

33. The German Government points out that the conflict-of-law rules contained in the 2007 Hague Protocol are based on the assumption that there must be a connection between the factual situation from which the creditor derives his right to claim maintenance payments and the law applicable to the assessment thereof. The rules on jurisdiction are based on a similar assumption. Therefore, there must also be a specific connection between the State whose courts have jurisdiction for the matter relating to maintenance payments and the factual situation from which the creditor derives his right to those payments.

3. Position of the Commission

34. The Commission takes the view that Article 4(2) of the 2007 Hague Protocol can apply in any proceedings, including proceedings entertained by a court of the State where the creditor is habitually resident. That also applies to situations where the creditor claims retroactive maintenance.

35. In the view of the Commission, paragraph 63 of the report by A. Bonomi — to which the national court referred in the request for a preliminary ruling — does not determine the scope of Article 4(2) of the 2007 Hague Protocol, but lists the cases in which that provision may be of use to the maintenance creditor.

36. The Commission points out in particular that the inability to obtain maintenance payments 'by virtue of the law referred to in Article 3 [of the protocol]' is the condition which allows the law of the forum to be applied pursuant to Article 4(2) of the 2007 Hague Protocol. This means, in the view of the Commission, that Article 4(2) of the 2007 Hague Protocol concerns the law identified as being applicable not only under Article 3(1) of that protocol but also under Article 3(2) thereof. The Commission considers that a teleological interpretation of that provision leads to identical conclusions. The purpose of Article 4(2) of the 2007 Hague Protocol is to favour certain categories of creditor in relation to the solutions provided for in Article 3 of that protocol which relate to all maintenance creditors.

4. Analysis of the first question

(a) Literal interpretation

37. First of all, I would like to point out that it is possible, on the basis of a literal interpretation of Article 4(2) of the 2007 Hague Protocol, to give, with relatively little difficulty, an answer to the first question which is compatible with the Commission's position and find that Article 4(2) of the 2007 Hague Protocol can apply in any proceedings, including proceedings before the courts of the State where the creditor is habitually resident. That answer is claimed to be all the more obvious if it were assumed that it is necessary to look after only the interests of the maintenance creditor. However, I consider that that position appears to be based on an excessively cursory reading of the 2007 Hague Protocol and an understanding which fails to take account of the conclusion arising from a systematic and teleological interpretation.

38. On the basis of the wording of Article 4(2) of the 2007 Hague Protocol the Commission concludes that the law of the forum may apply in place of the law of the State of the creditor's current habitual residence and the law of the State of the creditor's previous habitual residence since the expression 'by virtue of the law referred to in Article 3 [of the Hague Protocol]' must be construed in this way.

39. I am not entirely convinced as to whether this argument actually confirms that Article 4(2) of the 2007 Hague Protocol determines how to proceed where the creditor changes his place of habitual residence and then claims retroactive maintenance payments for a period preceding his change of residence. In so far as Article 4(2) of the 2007 Hague Protocol itself contains no indication as to the clear position to be adopted on this matter, an analysis of the other points of Article 4 thereof give rise to certain doubts in this regard.

40. For example, if a creditor brings proceeding against a debtor before an authority of the State where that debtor is habitually resident, Article 4(3) of the 2007 Hague Protocol requires the application in the first instance of the *lex fori*. 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', and not the law referred to in Article 3 of the protocol, as stipulated in Article 4(2) thereof. I am uncertain as to whether — on the basis of the literal interpretation on which the Commission's understanding is based — it is necessary in this case to overlook Article 3(2) of the 2007 Hague Protocol and apply — even if the creditor has changed his habitual residence — only the law of the State where the creditor is currently habitually resident.

41. Incidentally, I note that — if the creditor is unable to obtain maintenance by virtue of the law referred to in Articles 3 and 4(2) and (3) of the 2007 Hague Protocol — Article 4(4) thereof allows the law of the State of common nationality of the parties to the maintenance obligation to be applied. That provision does not determine how it is necessary to proceed where the creditor claims maintenance for a period during which the debtor only just obtained the nationality which the creditor held earlier. Still less is there any answer to whether loss of nationality by the debtor also produces retroactive effects, which means that the creditor cannot rely on Article 4(4) of the 2007 Hague Protocol even in relation to the period during which the creditor and the debtor had common nationality. [17]

42. I am not convinced that this kind of issue can be resolved by reference to a literal interpretation alone.

43. The uncertainties as to the Commission's arguments referring to the literal interpretation are all the more well founded when account is taken of the fact that accepting the Commission's position could lead to a situation where retroactive maintenance payments are assessed on the basis of law which — during that period — could not in principle apply as the law applicable to those payments under the conflict-of-law rules contained in the 2007 Hague Protocol. That might be a law entirely unconnected with the family situation of the parties to the maintenance obligation during that period. It would therefore be a law whose application neither party to that obligation could have expected at that time.

17 It should be borne in mind in this respect that accepting that the acquisition or loss of nationality by the debtor or the creditor produces retroactive effects could lead to decisions which are unfavourable to the creditor. Article 6 of the 2007 Hague Protocol allows the debtor to contest a claim from the creditor where 'there is no' maintenance obligation under both the law of the State of the habitual residence of the debtor and — where the debtor and the creditor have common nationality — the law of the State of their nationality. If a change of circumstances on the basis of which one of the applicable laws referred to in that provision were identified were also intended to produce retroactive effects, a debtor changing his habitual residence or nationality could block the creditor's claims also in relation to the period preceding that change.

44. I should note that the circumstances of the main proceedings would appear to illustrate that situation. There is no indication to suggest that — if there had been no change of habitual residence by the minor and the Austrian authorities had not acquired jurisdiction as result of that event [18] — Austrian law could have applied to the assessment of the maintenance obligations due to that minor from her father in the period from 1 June 2013 to 27 May 2015. [19] Nor would it appear that Austrian law could have been designated by the parties as the law applicable to the maintenance payments at issue. [20]

45. I therefore consider that in the light of the above considerations it is necessary to examine the first question using methods of interpretation other than the method of literal interpretation.

46. In this regard I do not believe it is possible simply to analyse the conflict-of-law rules in the 2007 Hague Protocol in isolation from the rules on jurisdiction in Regulation No 4/2009. They specify the court or courts of which State have jurisdiction for a particular matter. Therefore, the rules on jurisdiction indirectly identify the law of the forum within the meaning of Article 4(2) of the 2007 Hague Protocol.

(b) A systematic interpretation

(1) The scope of Article 4(2) of the 2007 Hague Protocol in the context of the other rules thereof

47. In the light of the remarks set out at points 39 to 42 of this Opinion, Article 4(2) of the 2007 Hague Protocol contains no clear indication of the situations in which that provision can apply. Such indications are provided solely by an analysis of Article 4(2) of the 2007 Hague Protocol in the light of the other provisions thereof and of Regulation No 4/2009.

48. On the one hand, Article 4(2) of the 2007 Hague Protocol does not apply if the creditor claims maintenance payments before a court of the State where the debtor is habitually resident. Such situations are covered by Article 4(3) of the 2007 Hague Protocol. On the other hand, where the maintenance proceedings are held before courts of the creditor's habitual residence, the law of the State where the creditor is habitually resident, and thus — under Article 3(1) of the 2007 Hague Protocol — the law in principle applicable to the maintenance payments, is the law of the forum. Therefore, in those cases the subsidiary application of the law of the forum pursuant to Article 4(2) of the 2007 Hague Protocol does not apply.

49. This means that Article 4(2) of the 2007 Hague Protocol has a relatively narrow scope. That provision can operate where a matter relating to a maintenance obligation is determined by the court of a State other than that of the habitual residence of either the debtor (since then Article 4(3) of the 2007 Hague Protocol applies) or the creditor (since then the application of Article 4(2) of the protocol would be ineffective as the law of the forum is the law of the State where the creditor is habitually resident).

18 In passing, I also note that the referring court points out that the creditor reputedly brought maintenance proceedings before an Austria court by application of 18 May 2015, even though that creditor had been habitually resident in that State since 28 May 2015. Therefore, there is uncertainty as to the basis on which the Austrian court considered itself to have international jurisdiction to entertain those proceedings. However, that fact is of limited relevance to the present proceedings since it is only by the application of 18 May 2016 — and thus after the change of habitual residence — that the creditor extended her claim for the retroactive maintenance payments to which the two questions relate. Therefore, if the creditor instituted separate proceedings for retroactive maintenance payments, the Austrian courts — as the courts of the State of the creditor's habitual residence — would certainly have jurisdiction to entertain the case under Article 3(a) of Regulation No 4/2009.

19 See points 58 and 59 of this Opinion, in which there is brief discussion of the linking factors of the conflict-of-law rules contained in the 2007 Hague Protocol which are used to identify the law applicable to maintenance obligations.

20 See point 60 of this Opinion, in which there is discussion of the conflict-of-law rules in the 2007 Hague Protocol which allow the law applicable to a maintenance obligation to be designated.

(2) The linking factors of the rules on jurisdiction in Regulation No 4/2009

50. In matters relating to a maintenance obligation the international jurisdiction of the courts is determined by the rules on jurisdiction contained in Regulation No 4/2009.

51. Article 3(a) and (b) of Regulation No 4/2009 provides that the court or courts for the place where the defendant is habitually resident — regardless of whether the defendant is the creditor or the debtor — and the courts for the place where the creditor is habitually resident are to have jurisdiction. The judicial authorities of those States are best placed to assess the needs of the creditor and the resources of the debtor, as they are required by Article 14 of the 2007 Hague Protocol.

52. In addition to the courts of the States where one of the parties to the maintenance obligation is habitually resident, Article 3(c) and (d) provides that jurisdiction for matters relating to maintenance obligations may lie with the courts which, according to the law in force in their place of establishment, have jurisdiction to entertain proceedings concerning the status of a person or parental responsibility respectively, 'if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties'. [21]

53. Article 7 of Regulation No 4/2009 provides for the *forum necessitatis* of the State with which the dispute has a 'sufficient connection', where no other court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6 thereof. Recital 16 of Regulation No 4/2009 clarifies that the connection required under Article 7 of the regulation may exist if one of the parties has the nationality of a State of that court. Article 6 of Regulation No 4/2009 provides for similar solution. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 of that regulation and no court of a State party to the Lugano Convention which is not a Member State has jurisdiction pursuant to the provisions of that Convention, the courts of the Member State of the common nationality of the parties is to have jurisdiction.

54. Under Regulation No 4/2009 the parties have the possibility of designating the court with jurisdiction in matters relating to a maintenance obligation. However, under Article 4(1) of Regulation No 4/2009 that designation is limited in nature and in principle concerns the court or courts of the Member States which have a specific connection with the person of the creditor or the debtor.

55. Moreover, where the parties designate the court there is no concern that — pursuant to the conflict-of-law rules in force in the State of the court seized — a law will operate whose application neither party could have expected. Since the creditor and the debtor agree on entrusting consideration of matters relating to a maintenance obligation to a specific court, they thus accept the possibility that the law identified as applicable by the conflict-of-law rules in force in the State of the court seized will be applied. The same argument can apply to Article 5 of Regulation No 4/2009, which concerns jurisdiction based on the appearance of the defendant.

21 Jurisdiction in those matters is determined pursuant to Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1). Jurisdiction for the status of a person (divorce, legal separation and marriage annulment) is attributed, in accordance with Article 3(1)(a) of Regulation No 2201/2003, on the basis of criteria which primarily take into account the current or former residence of the spouses or of one of them, whereas in matters of parental responsibility, the rules on jurisdiction are, according to recital 12 of that regulation, shaped in the light of the best interest of the child and, in particular, the criterion of proximity. See judgment of 16 July 2015, *A* (C-184/14, EU:C:2015:479, paragraph 37). The linking factors capable of establishing jurisdiction on which the international jurisdiction of the courts is based in matters of divorce, legal separation and marriage annulment and in matters concerning parental responsibility therefore also reflect the assumption that the courts having jurisdiction are the courts of the State which is connected in some way with the personal situation of the parties.

56. I therefore consider that the rules on jurisdiction in Regulation No 4/2009 are based on the assumption that there is a connection between the maintenance payments to which a particular matter relates and the State whose court has jurisdiction to resolve it. That connection must be at least close enough to allow both parties to the maintenance obligation to predict in which courts of which State the matters concerning those payments could be brought. [22]

57. This means that on account of the rules on jurisdiction in Regulation No 4/2009, the law of the State which has a specific connection with the maintenance payment claimed in the proceedings concerned is the law of the forum, which can apply under Article 4(2) of the 2007 Hague Protocol.

(3) Linking factors of the conflict-of-law rules in the 2007 Hague Protocol

58. Under Article 3(1) of the 2007 Hague Protocol, the law of the State of the habitual residence of the creditor is in principle the law applicable to a maintenance obligation. That is the law of the State closely connected with the maintenance obligation since it takes particular account of the creditor's personal conditions at the place where the maintenance payments serve to meet his needs. In this regard I concur with the German Government's view that Article 3(2) of the 2007 Hague Protocol also indicates that a connection exists between the law applicable and the situation from which the creditor's right to maintenance payments arises. Since the creditor changes his habitual residence, the factors affecting his needs, which the maintenance payments are intended to meet, also undergo change. On account of Article 3(2) of the 2007 Hague Protocol the change in those factors is reflected in the identification of the law applicable to the maintenance obligation.

59. An analysis of Article 4(3) and (4) of the 2007 Hague Protocol, which provides respectively for the applicability of the law of the State of habitual residence of the creditor and the applicability of the common personal law of the creditor and the debtor (the linking factor of nationality), leads to similar conclusions. The State where the debtor is habitually resident is connected with the personal situation of the parties to the maintenance obligation at least in so far as the debtor's ability to meet the creditor's needs is concerned. The law of the State of the parties' common nationality, as referred to in Article 4(4) of the 2007 Hague Protocol, does not have to be connected with the current personal situation of the parties. However, it is still identified as applicable on the basis of a specific ongoing circumstance which is normally known to both parties to the maintenance obligation and which has a connection with their family situation.

22 Paragraph 60 of the report by A. Bonomi clarifies that the application of *lex fori* allows the court seized to apply the law of which it has the best knowledge, which, from the point of view of the creditor, means the possibility of obtaining judgments swiftly and at low cost. However, these remarks do not — as the Commission also noted — apply to the actual grounds for the application of *lex fori* as such, but to the precedence of the linking factor of habitual residence over that of common nationality. The law of the State of the court seized also has such precedence over the law of the State of common nationality, so that — as is noted in academic legal writings — it closely reflects the personal conditions of the parties to the maintenance obligation. See L. Walker, *Maintenance and Child Support in Private International Law*, Oxford — Portland, Hart Publishing, 2015, p. 81.

60. Furthermore, designation of the applicable law pursuant to Article 8 of the 2007 Hague Protocol is limited to the laws of the States in some way connected with the family situation of the parties to the maintenance obligation.[23] However, where the law is designated there is no concern that a law whose application the parties could not predict will be the applicable law. Therefore, where the applicable law is designated that connection does not have to be as strong as that on which the conflict-of-law rules in Articles 3 and 4 of the 2007 Hague Protocol are based.

61. Therefore, a systematic interpretation of the conflict-of-law rules contained in the 2007 Hague Protocol leads to the conclusion that they — like the rules on jurisdiction in Regulation No 4/2009 — are based on the assumption that the law applicable to a maintenance obligation must be identified as applicable on the basis of circumstances which have a certain connection with the factual situation to which the payments concerned relate so that the application of that law can be predicted by the parties to the maintenance obligation.

(c) Teleological interpretation

62. Therefore, it is then necessary to answer the question as to whether or not the application of the law of a State essentially unconnected with the factual situation to which the maintenance payments relate is contrary to the objective of the rules on jurisdiction and the conflict-of-law rules applicable to the maintenance payments.

(1) Promotion of the proper administration of justice as an objective of the rules on jurisdiction in Regulation No 4/2009

63. According to recital 15 of Regulation No 4/2009, the objective of the rules on jurisdiction in that regulation was to adapt the rules of the Brussels regime in order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union.

64. In its judgment in *Sanders and Huber*[24] the Court had an opportunity to clarify that the objective of the proper administration of justice must be seen not only from the point of view of optimising the organisation of courts, but also from that of the interests of the litigant, whether claimant or defendant, who must be able to benefit, inter alia, from easier access to justice and predictable rules on jurisdiction.

65. Even clearer in that regard was the view expressed by Advocate General Jääskinen in the section of his Opinion to which the Court referred in the section of the judgment cited above. The Advocate General pointed out that the interests of the litigant require foreseeability of jurisdiction, owing to a close link between the court and the dispute.[25]

23 In circumstances such as those at issue in the main proceedings, designation of the applicable law would probably be precluded in any event by Article 8(3) of the 2007 Hague Protocol which excludes the designation of the law in respect of 'maintenance obligations in respect of a person under the age of 18 years'. The possibility of designating the law of the forum as the law applicable for the purposes a specific proceedings, as provided for in Article 7 of the 2007 Hague Protocol, is limited by the provisions of Regulation No 4/2009, pursuant to which the authorities having jurisdiction to entertain the proceedings concerned are determined. Incidentally, I note that — under Article 5 of Regulation No 4/2009 — a court of any Member State before which a defendant enters an appearance can have jurisdiction. I am uncertain what effects in terms of conflict of law are produced by such attribution of jurisdiction to the court of a Member State if the law of that Member State has then to be applied pursuant to Article 4(2) of the 2007 Hague Protocol. I further note that — in circumstances such as those in the main proceedings — the entrance of an appearance by the defendant and the subsequent application of the law of the forum pursuant to Article 4(2) of the 2007 Hague Protocol would, in a sense, be contrary to the prohibition on designating the applicable law which was expressed in Article 8(3) of that protocol.

24 Judgment of 18 December 2014 (C-400/13 and C-408/13, EU:C:2014:2461, paragraph 29).

25 Opinion of Advocate General Jääskinen in *Sanders and Huber* (C-400/13 and C-408/13, EU:C:2014:2171, point 69).

66. The Court also pointed indirectly to the need for a link between the factual situation forming the background to a particular matter relating to a maintenance obligation and the establishment of jurisdiction in its judgment in *A*.[26] When deciding whether a claim for child maintenance should be considered by a court of a Member State which is seised of proceedings involving the separation or dissolution of a marital link between the parents of that child or a court of another Member State which is seised of proceedings in matters of parental responsibility involving the same child, the Court opted for the second possibility. Amongst the grounds for that view the Court stated that the court ruling on parental responsibility in relation to a minor has the best knowledge of the key elements for assessing his claim for maintenance payments.[27]

67. The rules on jurisdiction contained in Regulation No 4/2009 — also in the light of the conclusions arising from a teleological interpretation — appear to be based on the assumption that a matter concerning maintenance payments must be considered by the court or courts of the State with which that matter has a connection to the extent that it is possible to ensure that the international jurisdiction will be predictable to the parties to the maintenance obligation.

(2) Objective of the conflict-of-law rules in the 2007 Hague Protocol

68. One of the fundamental aims of the conflict-of-law rules is to ensure the predictability of the law applicable to the assessment of the relevant facts. Those rules can perform that task in particular where the law of a particular State is identified as applicable on the basis of the circumstances which have a specific connection with the factual situation.

69. Nonetheless, the title of Article 4 of the 2007 Hague Protocol leaves no doubt as to the role of that provision in the system of conflict-of-law rules contained in the Protocol. That provision was entitled 'Special rules favouring certain creditors'. It applies solely to certain maintenance obligations,[28] including those of parents towards their children. Therefore, the objective of Article 4 of the 2007 Hague Protocol was certainly to provide certain creditors with the possibility of obtaining maintenance payments even though the law applicable in principle to the assessment of those payments makes no provision therefor.

70. However, certain provisions of the 2007 Hague Protocol expressly point to a desire to strike a balance between the interests of the parties to a maintenance obligation. Although, those provisions in principle do not relate to maintenance payments from parents to children, they do apply to other favoured creditors referred to in Article 4(1) thereof. The interpretation which the Court will place on Article 4(2) of the 2007 Hague Protocol will also relate to those cases. Therefore, I do not consider that in interpreting Article 4(2) of the Protocol account must be taken solely of the context of the main proceedings.

71. For example, Article 6 of the 2007 Hague Protocol allows the debtor to contest a claim from the creditor where 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 8(5) of the 2007 Hague Protocol provides that 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 is not to apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

26 Judgment of 16 July 2015 (C-184/14, EU:C:2015:479).

27 Judgment of 16 July 2015, *A* (C-184/14, EU:C:2015:479, paragraph 44).

28 See Article 4(1)(a) to (c) of the 2007 Hague Protocol.

72. Therefore, I do not consider that the 2007 Hague Protocol is based on the assumption that it is necessary in any event to favour the maintenance creditor at the expense of debtor, without regard to the effects of that action. Consequently, the Commission's view does not appear to be well founded in the light of a teleological interpretation.

(d) Historical interpretation

73. The arguments in favour of the need for a connection to exist between the personal situation and the law applicable to it are also confirmed by the drafting history of Regulation No 4/2009.

74. One of the objectives which motivated the drafting of Regulation No 4/2009 was — in addition to simplifying the citizen's life and ensuring the effectiveness of maintenance payment recovery — that of strengthening legal certainty. [29] It was assumed that the conflict-of-law rules should be designed in such a way that the courts give judgment on the basis of the substantive law which has 'the closest connection with the case' and not 'on the basis of a law lacking a sufficient connection with the family relationship concerned'. [30]

75. That assumption was reflected in the proposal for Regulation No 4/2009, which — almost until the end of the legislative process — contained conflict-of-law rules referring to the idea of a close connection between the factual situation concerned and the State whose law is applicable to the assessment thereof. [31]

76. It is true that in the end the conflict-of-law rules were left out of Regulation No 4/2009 itself and it was decided to harmonise them by means of a convention instrument. However, I do not consider that the Union legislature abandoned the original assumptions and decided to include the 2007 Hague Protocol in the EU system of conflict-of-law rules, even though the 2007 Hague Protocol is not based on the assumption of the need for a connection to exist between the factual situation from which the creditor derives the right to maintenance payments and the State whose law is applicable to the assessment thereof. The Union legislature instead recognised that the 2007 Hague Protocol meets those expectations. At point 22 of this Opinion I explained that the basic reason which prompted the Union legislature to use a convention instrument was the difficulties involved in negotiating and adopting a regulation including conflict-of-law rules on maintenance obligations.

(e) Conclusions on the first question

77. In the light of the arguments set out above and having regard to the unsatisfactory results from using a literal interpretation and to the unequivocal conclusions arising from the systematic interpretation (supported by the historical interpretation), which is not contradicted by the teleological interpretation, I consider that the conflict-of-law rules in the 2007 Hague Protocol are based on the assumption that the law applicable to the assessment of maintenance payments must be the law of the State which is closely connected to the factual situation to which those payments relate, at least to the extent that the creditor and the debtor can expect that law to be applied as the law applicable to the maintenance obligation.

29 Explanatory Memorandum to the proposal for Regulation No 4/2009 (cited in footnote 10), p. 5, paragraph no 1.2.2.

30 Explanatory Memorandum to Regulation No 4/2009, p. 6, paragraph 1.2.2.

31 Without referring, at this juncture, to the fate of the conflict-of-law rules which were to be contained in the regulation, I will merely recall Article 13(3) of the proposal for Regulation No 4/2009. That provision provided for the subsidiary application of the law of the State closely connected with the maintenance obligation where by virtue of the laws identified as applicable pursuant to the other conflict-of-law rules the creditor was unable to obtain maintenance payments from the debtor.

78. Since Article 4(2) of the 2007 Hague Protocol provides for the subsidiary applicability of the law of the forum, it must be the law of the State which is or — in the case of retroactive maintenance payments claimed after the creditor's change of habitual residence — was connected with the factual situation from which the creditor derives his right to maintenance payments. The law of the State whose courts had jurisdiction for matters relating maintenance payments during the period to which those payments relate may aspire to that role.

79. In so far as the mere designation of the applicable law by the definition thereof as 'the law of the forum' does not determine directly the existence of a connection between that law and a particular factual situation, the need for such connection to exist arises from the rules on jurisdiction in Regulation No 4/2009 which may apply. Those rules are based on the assumption that matters relating to maintenance payments will be considered by the courts of the State with which those maintenance payments are connected.

80. Firstly, the law which is closest to the personal situation in which the maintenance payments are to meet the creditor's needs is thus applied as the applicable law. It consequently reflects more the relevant factors in the context of the maintenance obligation, in particular the creditor's living conditions and the needs which have developed in those conditions, the possibilities of the debtor himself or — more generally — the family situation of the parties to that obligation. The assessment of the merits of the claim for retroactive maintenance payments must in principle be carried out retrospectively in relation to factors at the time the maintenance payments were to meet the needs of the creditor. However, whether or not that is so will ultimately be determined by the law applicable to the maintenance obligation and the procedural rules in force at the forum.

81. Secondly, the conflict-of-law rules consequently meet their basic objective, which is to ensure that the law applicable to the assessment of the relevant facts is predictable.

82. In the light of the foregoing, I propose — having regard to my suggestion concerned the rewording of the first question — that the Court answer it as follows: Article 4(2) of the 2007 Hague Protocol must be interpreted as meaning that the law of the forum applies where the creditor claims retroactive maintenance payments from the debtor in so far as: (1) the proceedings concerning the maintenance payments were initiated by that creditor in a State other than that in which the debtor is habitually resident; (2) the creditor is unable to obtain maintenance payments from the debtor by virtue of the law of the State of his habitual residence identified as applicable by Article 3(1) and (2) of the 2007 Hague Protocol; (3) the law of the forum is the law of the State whose courts had jurisdiction for matters relating to maintenance payments during the period to which those payments relate. That is a matter for the national court to determine.

D. The second question

83. By its second question — referred in the event that the Court answers the first question in the negative — the national court seeks to establish how Article 4(2) of the 2007 Hague Protocol is to be interpreted in so far as that provision stipulates that the law of the forum is to apply if the creditor 'is unable, by virtue of the law referred to in Article 3 [of that protocol], to obtain maintenance from the debtor'.

84. The following considerations may be of relevance to the referring court if the Court answers the second question.

85. In the context of the second question the referring court points out that under German law it is not permitted in principle to claim maintenance for a period preceding a claim in a court for maintenance payments. Exceptions to that rule are laid down in Paragraph 1613 of the BGB. Under subparagraph 1 thereof, those exceptions include situations where the debtor has been requested, for

the purpose of asserting the maintenance claim, to provide information on his income and assets on which he was in default or on which the maintenance claim became pending at court. In that context the referring court clarifies that although there are maintenance claims in the main proceedings, the creditor did not submit to the debtor a request causing the debtor to default.

86. The German Government and the Commission — citing the report by A. Bonomi — concur in this regard and advocate a broad interpretation of the condition relating to the inability to obtain maintenance under Article 4(2) of the 2007 Hague Protocol.

87. Paragraph 61 of the report by A. Bonomi clarifies that the expression 'is unable … to obtain maintenance from the debtor' covers not only cases where the law applicable in principle does not provide for maintenance payments at all, but also situations where the inability to obtain such payments arises from failure to satisfy legislative conditions. The report illustrates this example by reference to a provision which provides for the cessation of the maintenance obligation when a child reaches the age of 18.

88. It should be noted that Article 4(2) of the 2007 Hague Protocol corresponds to the provisions of the 1973 Hague Convention.[32] Article 6 of the convention also allowed the application of *lex fori* where the creditor was unable to obtain maintenance from the debtor by virtue of the law of the State of habitual residence of the creditor or the law of the common nationality of the parties concerned.

89. Furthermore, the preamble to the 2007 Hague Protocol refers to the 1973 Hague Convention. To a certain extent at least the provisions of that convention must have therefore been an inspiration for the provisions of the 2007 Hague Protocol.

90. Paragraph 145 of the explanatory report on the 1973 Hague Convention, which was produced by M. Verwilghen,[33] notes that under Article 6 of the convention failure to fulfil one of the legislative conditions laid down by the applicable law allows the law of the forum to be applied. That general remark was illustrated by an example relating to the applicable law which does not provide for a maintenance obligation between the parties to an adoption where the adopted child has not broken ties with his biological family.

91. The reports by A. Bonomi and M. Verwilghen agree that failure to fulfil a legislative condition, on which the ability to claim maintenance payments effectively from the debtor depends, allows *lex fori* to be applied to the assessment of the maintenance obligation.

92. In that regard a broad interpretation of the condition relating to the 'inability to obtain maintenance payments from the debtor' reflects the objective of Article 4(2) of the 2007 Hague Protocol, which is to avoid situations where a creditor belonging to one of the categories referred to in paragraph 1 thereof is unable to obtain means of support.

93. In the main proceedings the inability to obtain maintenance payments by virtue of German law arises from the failure by the creditor to take certain action which is a legislative condition for claiming such retroactive payments. However, there is nothing to indicate that cases of creditor passivity were not covered by Article 4(2) of the 2007 Hague Protocol so as in some way to penalise the creditor's failure to take certain action in accordance with the law applicable in principle to the maintenance obligation.

32 Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (https://www.hcch.net/en/instruments/conventions/full-text/?cid= 86; 'the 1973 Hague Convention').

33 Explanatory Report by M. Verwilghen on the 1973 Hague Convention, Actes et documents de la Douzième session de la Conférence de La Haye (1972), t. IV, Obligations alimentaires, pp. 384 to 465, also available in electronic form (French and English): https://www.hcch.net/fr/publications-and-studies/details4/?pid= 2946.

94. Furthermore, it is difficult to regard a broad interpretation of the condition relating to inability to obtain maintenance payments under Article 4(2) of the 2007 Hague Protocol as a manifestation of excessive favouring of the creditor. Two arguments support that view.

95. Firstly, striking a balance between the interests of the two parties in this regard is possible on account of Article 6 of the 2007 Hague Protocol. That provision allows a claim from the creditor to be contested where there 'is no' obligation — other than that arising from a parent-child relationship towards a child [34] — 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. In spite of the categorical wording of that provision, which appears to relate exclusively to cases where there 'is no' maintenance obligation, paragraph 108 of the report by A. Bonomi makes it clear that that condition must be understood in the same way as that arising from Article 4(2) of the 2007 Hague Protocol. Since the condition laid down in Article 4(2) of the 2007 Hague Protocol will be interpreted broadly, the same interpretation must be placed on the condition laid down in Article 6 of the protocol.

96. Secondly, the possibility of abuse of a broad interpretation of the condition relating to the inability to obtain maintenance payments from the debtor is also limited by the answer which I propose to the first question. The action taken by the creditor to ensure that a court or courts of a specific State have jurisdiction so that the law of that State subsequently applies under Article 4(2) of the 2007 Hague Convention has not [had] the desired effect since thus far they have not been the courts or courts with jurisdiction for the matter concerned.

97. In the light of the foregoing considerations, I propose that — if the Court answers the second question — it should answer that question as follows: Article 4(2) of the 2007 Hague Protocol is to be interpreted as meaning that the expression 'unable … to obtain maintenance' contained in that provision also refers to cases in which, on the ground of mere failure to comply with certain formal legislative conditions, such as those laid down in Paragraph 1613(1) of the BGB, the law of the creditor's previous place of residence does not provide for a right to retroactive maintenance.

VI. Conclusion

98. In the light of the foregoing considerations, I propose that the Court give the following answer to the questions referred by the Oberster Gerichtshof (Supreme Court, Austria):

(1) Article 4(2) of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations which forms the Annex to Council Decision 2009/941/EC 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 is to be interpreted as meaning that the law of the forum applies where the creditor claims retroactive maintenance payments from the debtor in so far as: (1) the proceedings concerning the maintenance payments were initiated by that creditor in a State other than that in which the debtor is habitually resident; (2) the creditor is unable to obtain maintenance payments from the debtor by virtue of the law of the State of his habitual residence identified as applicable by Article 3(1) and (2) of the 2007 Hague Protocol; (3) the law of the forum is the law of the State whose courts had jurisdiction for matters relating to the maintenance payments during the period to which those payments relate. That is a matter for the national court to determine.

34 Nor is Article 6 of the 2007 Hague Protocol applicable to a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled. Nonetheless, a peculiar right to object enjoyed by the parties to those categories of obligation was laid down in Article 5 of the 2007 Hague Protocol.

(2) Article 4(2) of the 2007 Hague Protocol is to be interpreted as meaning that the expression 'unable … to obtain maintenance' contained in that provision also refers to cases in which, on the ground of mere failure to comply with certain formal legislative conditions, the law of the creditor's previous place of residence does not provide for a right to retroactive maintenance.