Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

20 September 2018*

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Hague Protocol on the law applicable to maintenance obligations — Article 4(3) — Application for maintenance lodged by the maintenance creditor with the competent authority of the State where the debtor has his habitual residence — Decision which has acquired the force of *res judicata* — Subsequent application, lodged with the same authority by the debtor, seeking a reduction in the amount of maintenance awarded — Appearance entered by the creditor — Determination of the applicable law)

In Case C-214/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 28 March 2017, received at the Court on 25 April 2017, in the proceedings

Alexander Mölk

v

Valentina Mölk,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, S. Rodin and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Mölk, by L. Lorenz, Rechtsanwalt,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and M. Cancela Carvalho, acting as Agents,

– the European Commission, by M. Wilderspin and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 May 2018,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L 331, p. 17) ('the Hague Protocol').

2 The request has been made in proceedings between Mr Alexander Mölk and his daughter, Ms Valentina Mölk, concerning maintenance claims.

Legal context

The Hague Protocol

3 Article 3 of the Hague Protocol, entitled 'General rule on applicable law', provides:

'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.'

4 Article 4 of that protocol, entitled 'Special rules favouring certain creditors', provides:

'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.

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.

…'

5 Article 7 of the Hague Protocol, entitled 'Designation of the law applicable for the purpose of a particular proceeding', states:

'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.'

6 Article 8 of that protocol, entitled 'Designation of the applicable law', is worded as follows:

'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:

…

(b) the law of the State of the habitual residence of either party at the time of designation;

…

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.'

Regulation (EC) No 4/2009

7 Article 1, entitled 'Scope of application', of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1) provides:

'This Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity.

…'

8 Article 3 of that regulation, entitled 'General provisions', states:

'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 …

…'

9 Under Article 5 of that regulation, entitled 'Jurisdiction based on the appearance of the defendant':

'Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.'

10 Article 15 of that regulation, entitled 'Determination of the applicable law', is worded as follows:

'The law applicable to maintenance obligations shall be determined in accordance with [the Hague Protocol] in the Member States bound by that instrument.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Mr Mölk is habitually resident in Austria, while his daughter, Ms Mölk, is habitually resident in Italy.

12 By virtue of an order of the Bezirksgericht Innsbruck (District Court, Innsbruck, Austria) of 10 October 2014, Mr Mölk is obliged to pay maintenance to Ms Mölk on a monthly basis.

13 That order was made, on the basis of Austrian law, following an application for maintenance lodged by the creditor, Ms Mölk, with that court pursuant to Article 4(3) of the Hague Protocol.

14 In 2015 Mr Mölk applied to the Bezirksgericht Innsbruck (District Court, Innsbruck) for a reduction in the amount of maintenance as from 1 February 2015, on the ground that his net income had decreased. Ms Mölk contended that that application should be dismissed.

15 By an order of 11 December 2015, the Bezirksgericht Innsbruck (District Court, Innsbruck) dismissed Mr Mölk's application on the basis of Italian law. According to that court, the application was governed by Italian law by virtue of Article 3(1) of the Hague Protocol, since Ms Mölk was habitually resident in Italy at the time of that application.

16 By an order of 9 March 2016, the Landesgericht Innsbruck (Regional Court, Innsbruck, Austria) confirmed, on appeal, the decision of the Bezirksgericht Innsbruck (District Court, Innsbruck), but based its assessment on Austrian law.

17 That appeal court considered that, since there had been no change in the habitual residence of either of the two parties, there could be no change in the law applied in the order of the Bezirksgericht Innsbruck (District Court, Innsbruck) of 10 October 2014 solely on the ground that the maintenance debtor had submitted an application seeking a reduction in the amount of maintenance only a few months after the date of delivery of that order, which had acquired the force of *res judicata*.

18 Mr Mölk brought an appeal before the referring court requesting a ruling on the maintenance claim on the basis of Italian law. He maintains that, if that law had been applied correctly, his application should have been upheld.

19 The referring court is uncertain as to the law applicable in a situation such as that at issue in the main proceedings, noting that there are two opposing schools of thought in the legal academic writings.

20 According to the first school of thought, the law applicable, determined on the basis of Article 3 of the Hague Protocol, is the law of the State of the habitual residence of the creditor, even if it is not the law of the State where the authority which made the initial maintenance decision is located.

21 According to the second school of thought, it is the law which has already been applied in respect of maintenance obligations that should be applied to an application for alteration of a national or recognised foreign decision.

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

‘(1) Is Article 4(3) read in conjunction with Article 3 of [the Hague Protocol] to be interpreted as meaning that a maintenance debtor’s application, on the basis of a change in his income, for a reduction in the amount of maintenance awarded by a decision that has become final is governed by the law of the State of the creditor’s habitual residence even if the amount of maintenance previously payable was determined by the court, on application by the creditor pursuant to Article 4(3) of [the Hague Protocol], according to the law of the State where the debtor has his habitual residence, which has not changed?

(2) If the answer to Question 1 is in the affirmative:

Is Article 4(3) of [the Hague Protocol] to be interpreted as meaning that a creditor also “seises” the competent authority of the State where the debtor has his habitual residence by entering an appearance, within the meaning of Article 5 of [Regulation No 4/2009], and contesting the substance of the matter in proceedings initiated by the debtor with the competent authority?’

Consideration of the questions referred

23 As a preliminary point, it should be borne in mind that the Court has jurisdiction to interpret the Hague Protocol (judgment of 7 June 2018, *KP*, C-83/17, EU:C:2018:408, paragraph 25).

The first question

24 By its first question, the referring court asks, in essence, whether, on a proper construction of Article 4(3) of the Hague Protocol, the result of a situation such as that at issue in the main proceedings, where the maintenance to be paid was set by a decision, which has acquired the force of *res judicata*, in response to an application by the creditor and, pursuant to Article 4(3) of that protocol, on the basis of the law of the forum designated under that provision, is that that law governs a subsequent application for a reduction in the amount of maintenance lodged by the debtor against the creditor with the competent authority of the State where that debtor is habitually resident.

25 Under Article 4(3) of the Hague Protocol, the law of the forum is to apply, notwithstanding Article 3 of that protocol, in proceedings initiated by the creditor where that creditor has, like Ms Mölk in the case in the main proceedings, lodged their application with the competent authority of the State where the maintenance debtor has his habitual residence.

26 The question arises as to whether Article 4(3) of that protocol, although no express provision to that effect is laid down in its wording, continues to produce effects where the debtor, like Mr Mölk in the case in the main proceedings, seises that same authority in respect of a subsequent application, with the result that the law designated previously is also applicable to the new proceedings.

27 In order to answer that question, it is necessary to interpret Article 4(3) of the Hague Protocol taking into account not only the wording of that provision but also the context in which it occurs and the objectives pursued by the rules of which it forms part.

28 Regarding the context of Article 4(3) of the Hague Protocol, it should be noted that that provision forms part of a system of connecting rules introduced by that protocol, which primarily provides for the application of the law of the State of the creditor’s habitual residence under Article 3 thereof. The authors of the Hague Protocol considered that that law was the most closely connected with the

creditor's situation and appeared therefore to be the best adapted to govern the specific problems which the maintenance creditor may encounter (judgment of 7 June 2018, *KP*, C-83/17, EU:C:2018:408, paragraph 42).

29 Article 4 of the Hague Protocol contains special rules favouring certain creditors which concern, inter alia, parents' obligations towards their children and are to be applied in the alternative. Thus, Article 4(2) of that protocol provides that if the creditor is unable to obtain maintenance by virtue of the law primarily designated under Article 3 thereof, the law of the forum is to apply.

30 Article 4(3) of the Hague Protocol derogates from the rule laid down by that protocol and recalled in paragraph 28 above pursuant to which the competent authority is primarily to apply the law of the State of the creditor's habitual residence. That provision reverses the connecting criteria laid down in Article 3 and Article 4(2) of that protocol by designating first of all the law of the forum in cases where the creditor has seized the competent authority of the State in which the debtor has his habitual residence (judgment of 7 June 2018, *KP*, C-83/17, EU:C:2018:408, paragraph 44) and, in the alternative, the law of the State of the habitual residence of the creditor if that creditor is unable, by virtue of the law of the forum, to obtain maintenance from the debtor.

31 By providing that the law of the forum, rather than the law of the State of the habitual residence of the creditor, may be applied first of all, the Hague Protocol provides that creditor with the possibility to choose the former law indirectly, a choice resulting from the creditor lodging his application with the competent authority of the State where the debtor has his habitual residence.

32 That possibility pursues the objective of protecting the creditor, regarded as the weaker party in his dealings with the debtor, by enabling that creditor, de facto, to choose the law applicable to his application. In those circumstances, where the proceedings in which that application was submitted have been closed by a decision which has acquired the force of *res judicata*, it does not follow from Article 4(3) of the Hague Protocol that the effects of that choice should be extended to new proceedings brought not by the creditor but by the debtor.

33 Moreover, a rule derogating from the rule set out in Article 3 of the Hague Protocol must be interpreted strictly, without going beyond the situation expressly envisaged thereby.

34 Those considerations are borne out by the explanatory report on the Hague Protocol drawn up by Mr Andrea Bonomi (text adopted by the Twenty-First Session of the Hague Conference on Private International Law).

35 As was noted by Mr Bonomi in paragraph 67 of that report, the envisaged derogation from the standard connection to the law of the habitual residence of the creditor may be justified if the creditor himself decides to bring the action in the State where the debtor has his habitual residence, whereas it appears excessive in a situation where the action was initiated in that State by the debtor, in particular with regard to a request for alteration of a decision concerning maintenance obligations.

36 A comparison of Article 4(3) of the Hague Protocol with the provisions of that protocol enabling the parties to choose the law applicable to the maintenance obligation by common agreement, namely Articles 7 and 8 thereof, also supports that analysis.

37 Article 8 of the Hague Protocol enables the creditor and the debtor to designate, at any time, one of the various laws listed in paragraph 1 thereof as applicable to a maintenance obligation. The law thus designated is not to apply to specific proceedings but to all proceedings relating to that obligation.

38 As the choice of the applicable law is a long-lasting one, the authors of the Hague Protocol made the application of Article 8 thereof subject to certain conditions in order to minimise the risk of adverse effects, in particular for the creditor. Of those conditions, it is necessary to cite, inter alia, the

condition set out in Article 8(3) of that protocol, pursuant to which only parties aged 18 or over may make such a choice on the basis of that article. In addition, Article 8(5) thereof 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.

39 No such protective provisions exist in the context of Article 7 of the Hague Protocol, which also enables parties to choose the applicable law, but only in the case of specific proceedings. The choice of law is thus valid only for those proceedings and not for subsequent proceedings relating to the same maintenance obligation, which limits the risk of adverse effects resulting from that choice.

40 The lack of such protective provisions in the wording of Article 4(3) of the Hague Protocol also supports the argument that that provision is to apply in only one set of proceedings, namely the proceedings brought by the creditor under the conditions expressly laid down therein.

41 In that regard, as the Advocate General noted in point 48 of his Opinion, if the initial choice of the law of the forum by the creditor under Article 4(3) of the Hague Protocol were to mean that, in subsequent proceedings initiated by the debtor before the competent authority of his habitual residence, that same law would also apply, this would allow the minimum age threshold laid down in Article 8(3) of the Hague Protocol to be circumvented, together with the other protective provisions set out in that article.

42 Accordingly, it must be held that Article 4(3) of the Hague Protocol covers only a situation where the creditor indirectly chooses the law of the forum in the context of proceedings which he has initiated before the competent authority of the State where the debtor has his habitual residence and does not extend to subsequent proceedings initiated after the decision in the initial proceedings has acquired the force of *res judicata*.

43 That conclusion cannot be undermined by the fact, mentioned by the Portuguese Government, that the subsequent proceedings may have been brought shortly after the initial proceedings and that it would be paradoxical for competing applications in respect of a short period during which there has been no change in the habitual residence of the parties to have to be examined under different legal systems.

44 In that regard, it should be emphasised that the determination of the applicable law cannot be dependent on the date when a second set of proceedings may be initiated. Indeed, such an interpretation would undermine the objective of predictability pursued by the Hague Protocol (see, to that effect, judgment of 7 June 2018, *KP*, C-83/17, EU:C:2018:408, paragraph 41).

45 As was noted by the Advocate General in points 42 and 64 of his Opinion, the risk of applying different laws in successive proceedings between the same parties appears to be inherent in the system of conflict-of-law rules laid down in the Hague Protocol.

46 In the light of the foregoing considerations, the answer to the first question is that, on a proper construction of Article 4(3) of the Hague Protocol, the result of a situation such as that at issue in the main proceedings, where the maintenance to be paid was set by a decision, which has acquired the force of *res judicata*, in response to an application by the creditor and, pursuant to Article 4(3) of that protocol, on the basis of the law of the forum designated under that provision, is not that that law governs a subsequent application for a reduction in the amount of maintenance lodged by the debtor against the creditor with the courts of the State where that debtor is habitually resident.

The second question

47 By its second question, the referring court asks, in essence, whether Article 4(3) of the Hague Protocol is to be interpreted as meaning that a creditor 'seises', for the purposes of that article, the competent authority of the State where the debtor has his habitual residence when that creditor, in the context of proceedings initiated by the debtor before that authority, enters an appearance, for the purposes of Article 5 of Regulation No 4/2009, contending that the application should be dismissed on the merits.

48 As is apparent from the analysis carried out in the context of the answer to the first question, Article 4(3) of the Hague Protocol is a provision derogating from the primary connecting rule recalled in paragraph 28 above, with the result that it is not appropriate to extend its application beyond the situations expressly envisaged thereby.

49 That provision applies only on two conditions, namely that the authority seised is the authority of the State where the debtor has his habitual residence and that it is the creditor who seises that authority, meaning that the action must thus be initiated by the creditor.

50 In the case of an action initiated by the debtor before the authority of the State where he is habitually resident, the creditor entering an appearance may admittedly result in that authority having jurisdiction, as provided for in Article 5 of Regulation No 4/2009.

51 However, it cannot be inferred from that acceptance of jurisdiction that the creditor has also 'seised' the authority of the State where the debtor has his habitual residence for the purposes of Article 4(3) of the Hague Protocol.

52 The result of that interpretation would be, as was noted by the Advocate General in point 72 of his Opinion, that the law of the forum imposed by that provision would apply in all proceedings brought before such an authority, whereas it is apparent from the answer to the first question that the possibility given to the creditor by Article 4(3) of the Hague Protocol to choose that law indirectly is only available in respect of proceedings initiated by that creditor.

53 In the light of the foregoing considerations, the answer to the second question is that Article 4(3) of the Hague Protocol must be interpreted as meaning that a creditor does not 'seise', for the purposes of that article, the competent authority of the State where the debtor has his habitual residence when that creditor, in the context of proceedings initiated by the debtor before that authority, enters an appearance, for the purposes of Article 5 of Regulation No 4/2009, contending that the application should be dismissed on the merits.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **On a proper construction of Article 4(3) of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009, the result of a situation such as that at issue in the main proceedings, where the maintenance to be paid was set by a decision, which has acquired the force of *res judicata*, in response to an application by the creditor and, pursuant to Article 4(3) of that protocol, on the basis of the law of the forum**

designated under that provision, is not that that law governs a subsequent application for a reduction in the amount of maintenance lodged by the debtor against the creditor with the courts of the State where that debtor is habitually resident.

2. **Article 4(3) of the Hague Protocol of 23 November 2007 must be interpreted as meaning that a creditor does not 'seise', for the purposes of that article, the competent authority of the State where the debtor has his habitual residence when that creditor, in the context of proceedings initiated by the debtor before that authority, enters an appearance, for the purposes of Article 5 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, contending that the application should be dismissed on the merits.**

[Signatures]