Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 2 May 2018 [1]

Case C-214/17

Alexander Mölk
v
Valentina Mölk

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

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Hague Protocol on the law applicable to maintenance obligations — Maintenance — Situation where the maintenance creditor and debtor have their habitual residences in different Member States — Action by a debtor seeking a reduction in the amount of maintenance — Determination of the applicable law)

I. Introduction

1. The present request for a preliminary ruling is the second in which the Oberster Gerichtshof (Supreme Court, Austria) is asking the Court to interpret the 2007 Hague Protocol. [2]

2. On this occasion the referring court's doubts concern the interpretation of Article 4(3) of the 2007 Hague Protocol. That provision states that if the creditor lodges an application for maintenance with the authority of the State where the debtor has his habitual residence, the law applicable in principle to the maintenance obligation is to be the law of the forum (*lex fori*).

3. The referring court is seeking to ascertain whether the *lex fori* also applies in proceedings initiated by the debtor. The referring court's doubts, to which the present request for a preliminary ruling relates, have arisen in proceedings before the authority of the debtor's habitual residence, in which that debtor is seeking a reduction in the amount of maintenance which was previously awarded under the law of the State where the debtor has his habitual residence in proceedings initiated by the creditor.

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'). The first request for a preliminary ruling concerned the application of Article 4(2) of the 2007 Hague Protocol in proceedings in which the maintenance creditor was applying for maintenance retrospectively in respect of a period prior to the institution of those proceedings. That request is pending before the Court. I delivered my Opinion in that case on 30 January 2018. See my Opinion in *KP* (C-83/17, EU:C:2018:46). Crucially, unlike the present request for a preliminary ruling, the *KP* case concerned a situation where there was a change in the habitual residence of one of the parties to the maintenance obligation at the time material to the maintenance decision.

II. Legal framework

A. European Union law

1. The 2007 Hague Protocol

4. Articles 3(1), 4(1)(a) and 4(3) of the 2007 Hague Protocol provide:

'*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.

…

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;

....

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. Under Article 7(1) of the 2007 Hague Protocol, entitled 'Designation of the law applicable for the purpose of a particular proceeding':

'Notwithstanding Articles 3 to 6 [of the 2007 Hague Protocol], 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'.

6. Under Article 8(1)(b) of the 2007 Hague Protocol, entitled 'Designation of the applicable law', notwithstanding Articles 3 to 6 of that protocol, the maintenance creditor and debtor may at any time designate the law of the State of the habitual residence of either party at the time of designation as applicable to a maintenance obligation.

2. Regulation No 4/2009

7. The provisions on international jurisdiction in matters relating to maintenance obligations are contained in Chapter II ('Jurisdiction') of Regulation No 4/2009.[3] Prominent among them is Article 3 of that regulation, entitled 'General provisions', 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 …

…'

8. Under Article 5 of Regulation No 4/2009, 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.'

III. The facts of the dispute in the main proceedings

9. Mr Alexander Mölk, who is the debtor under the maintenance obligation to which the main proceedings relate, is the father of the creditor, Ms Valentina Mölk. For several years the debtor, Mr Mölk, has been habitually resident in Austria, whilst the creditor, Ms Mölk, has been habitually resident in Italy.

10. By order of the Bezirksgericht Innsbruck (District Court, Innsbruck, Austria) of 10 October 2014, the debtor is obliged to pay to the creditor maintenance in the amount of EUR 650 per month. The maintenance decision was made on the basis of Austrian law. The proceedings in which the order of 10 October 2014 was made were initiated by the creditor.

11. In 2015 the debtor lodged an application with the Bezirksgericht Innsbruck (District Court, Innsbruck) for a reduction in the amount of maintenance from EUR 650 to EUR 490 as from 1 February 2015.[4] In the grounds of that application the debtor pointed out that his income had fallen following discontinuance of his annual bonus. The creditor contended that the court should dismiss that application.

3 Council Regulation 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; corrigendum OJ 2011 L 131, p. 26).

4 In the request for a preliminary ruling the referring court uses wording which indicates that both a claim for the award of maintenance to a creditor and a claim for a reduction in the amount of maintenance are described using the term 'application'. Consequently, the parties to proceedings initiated as a result of such an application are described as the 'applicant' and the 'other party to the proceedings'. I assume this is dictated by the nature of those proceedings under Austrian rules of procedure which thus avoid treating a case concerning maintenance as litigation proceedings, in which the procedural roles of 'applicant' and 'other party' would correspond to the procedural roles of 'plaintiff' and 'defendant'. However, in the Polish language version of the 2007 Hague Protocol, for example, Article 4(3) thereof refers not to the maintenance creditor's 'zgłoszenie wniosku' (submitting an application) but to his 'wytoczenie powództwa' (bringing an action). Conversely, some other language versions use a much more general wording, which does not resolve the issue. For example, the wording in the French version is: 'le créancier a saisi l'autorité compétente'; in the English version: 'the creditor has seized the competent authority'; and in the German version: 'die berechtigte Person die zuständige Behörde … angerufen'. However, in Regulation No 4/2009, to which the second question refers, the EU legislature uses the terms 'powód' (plaintiff) and 'pozwany' (defendant), not 'wnioskodawca' (applicant) and 'uczestnik' (other party). Therefore, in this Opinion I will use the terms derived from Regulation No 4/2009 ('plaintiff' and 'defendant') where it is necessary to define the procedural roles of the parties to the proceedings.

12. By order of 11 December 2015 the Bezirksgericht Innsbruck (District Court, Innsbruck) dismissed the application for a reduction in the amount of maintenance. In that court's view, the debtor's application fell to be examined under Italian law, since the creditor has her habitual residence in Italy.

13. The debtor appealed against the order of 11 December 2015 before the Landesgericht Innsbruck (Regional Court, Innsbruck, Austria). The appeal court upheld the order of the court of first instance by order of 9 March 2016.

14. However, unlike the court of first instance, the appeal court ruled that Austrian law should be applied when assessing the application for a reduction in the amount of maintenance. This was because the maintenance decision in the order of 10 October 2014 was made on the basis of Austrian law. Under Article 3(2) of the 2007 Hague Protocol ('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'), a change in the applicable law may take place if there has been a change in the factual situation on the basis of which the conflict-of-law rules contained in that protocol designate the law applicable to the maintenance obligation. Since there was no change in the habitual residence of either party to the maintenance obligation after the order of 10 October 2014 was made, the appeal court considers that there can have been no change in the law applicable to that obligation. In the opinion of that court, to take a different view, which assumes that a change in the applicable law may take place despite the fact that there has been no change in that factual situation, could lead to a situation where competing applications, seeking an increase and a reduction in the amount of maintenance respectively, would be assessed on the basis of different applicable laws.

15. The debtor appealed against the order of 9 March 2016 before the referring court. He considers that Italian law should apply to the assessment of the maintenance obligation. Moreover, the correct application of that law should result in the application for a reduction in the amount of maintenance being upheld.

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 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 2007 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 2007 Hague Protocol], according to the law of the State where the debtor has his habitual residence, which has not changed?

If the answer to Question 1 is in the affirmative:

(2) Is Article 4(3) of [the 2007 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?'

17. The request for a preliminary ruling was lodged at the Court Registry on 25 April 2017.

18. Written observations were submitted by Mr Mölk, the Portuguese Government and the European Commission.

V. Analysis

A. The first question

19. By its first question, the referring court seeks, in essence, to ascertain whether the mere fact that the creditor applied for maintenance before the authority of the State where the debtor has his habitual residence and that authority made an order on the basis of the law in force in that State (Article 4(3) of the 2007 Hague Protocol) means that the law of that State should also apply in proceedings initiated later by the debtor seeking a change in the amount of maintenance. As is apparent from the wording of that question and the facts set out in the request for a preliminary ruling, this is a situation where there has been no change in the debtor's habitual residence. Furthermore, it is apparent from the wording of that request that there has also been no change in the creditor's habitual residence.

20. In the request for a preliminary ruling the referring court cites two different positions with regard to that issue.

21. The first position is that Article 4(3) of the 2007 Hague Protocol applies only in proceedings initiated by the creditor. In that context, the referring court invokes, in particular, the Bonomi report.[5] Paragraph 67 of that report explains that the application of the law of the forum in a case is justified where the creditor is submitting an application for maintenance to an authority of the State where the debtor has his habitual residence. However, it would be excessive to apply the law of the forum (the law of the State of the debtor's habitual residence) where proceedings are initiated by the debtor.

22. The referring court makes it clear that this position has its supporters in legal academic writings. It is stated that the law applicable to the maintenance obligation in proceedings initiated by the debtor is the law of the State where the creditor has his habitual residence (Article 3(1) of the 2007 Hague Protocol).

23. The other position assumes that the law on the basis of which the original maintenance decision was made in proceedings initiated by the creditor should also apply in subsequent proceedings initiated by the debtor. Otherwise the debtor could, even after a relatively short time, initiate further proceedings which would not be governed by the law of the State under which the maintenance was previously awarded to the creditor. This would result in a restriction of the creditor's right to designate the law of the State where the debtor has his habitual residence as the law applicable to the maintenance obligation.

1. Positions of the parties

24. Mr Mölk takes the view that Article 4(3) of the 2007 Hague Protocol determines the law applicable to a maintenance obligation only in respect of proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence. However, that provision does not apply in proceedings initiated by the debtor.

5 Explanatory Report by A. Bonomi on the 2007 Hague Protocol, *Actes et documents de la Vingt et unième session de la Conférence de La Haye (2007)*, also available in an electronic version: https://www.hcch.net/fr/publications-and-studies/details4/?pid= 4898&dtid= 3. It is true that the explanatory reports on the acts drawn up in connection with the Hague Conference on Private International Law are not binding in nature. However, they are a valuable source of guidance regarding the interpretation of the provisions of those acts. The purpose of those reports is to explain the meaning which the delegations involved in drafting the acts drawn up in connection with the Hague Conference on Private International Law wished to confer on those acts. See https://www.hcch.net/fr/publications-and-studies/publications2/explanatory-reports.

25. That is also the position of the Commission, which notes that Article 4(3) of the 2007 Hague Protocol is a provision of an exceptional nature which must therefore be applied strictly. In that context, the Commission refers to paragraph 67 of the Bonomi report and makes it clear that Article 4(3) of the 2007 Hague Protocol does not apply in proceedings initiated by the debtor before the authority of the State where that debtor has his habitual residence. It is true that this may sometimes lead to a situation where the law of a State other than the law on the basis of which the maintenance decision was made in proceedings initiated earlier by the creditor applies. However, the Commission considers that such a risk is inherent in the system of conflict-of-law rules laid down by the 2007 Hague Protocol.

26. The Portuguese Government considers that Article 4 of the 2007 Hague Protocol lays down special conflict-of-law rules to favour certain categories of maintenance creditors. By lodging an application with the authority of the State where the debtor has his habitual residence, a creditor can have the *lex fori* applied as the law applicable to the assessment of the maintenance obligation. Therefore, where the factual situation remains unchanged, the law of that State should also apply to the assessment of the maintenance obligation in subsequent proceedings. That government considers that taking the opposite view would lead to a situation where competing applications, concerning an increase and a reduction in the amount of maintenance respectively, would be settled on the basis of two different applicable laws.

2. Introductory remark

27. It should be noted at the outset that the first question referred does not actually relate to whether or not Article 4(3) of the 2007 Hague Protocol should apply in the main proceedings. That issue is the subject of the second question referred. By its first question the referring court is seeking to ascertain whether the effects of applying Article 4(3) of the 2007 Hague Protocol in one set of proceedings also extend to subsequent proceedings concerning the same maintenance obligation and, more precisely, to proceedings initiated by the debtor seeking a reduction in the amount of maintenance.

28. In my view, this means that it is not possible, by way of a literal interpretation of Article 4(3) of the 2007 Hague Protocol, to draw unequivocal conclusions for the purpose of answering the first question referred. In the context of that provision, it is clear that the *lex fori* applies in proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence. However, that provision does not determine whether the application of the *lex fori* in such proceedings produces effects in subsequent proceedings concerning the same maintenance obligation which are initiated by the debtor. I therefore consider that it is necessary to examine the first question referred in the light of the scheme of the 2007 Hague Protocol and the legal rationale of Article 4(3) thereof.

3. Application of the lex fori *on the basis of Article 4(3) of the 2007 Hague Protocol in the light of other provisions of that protocol enabling the law applicable to maintenance obligations to be designated*

(a) Article 4(3) of the 2007 Hague Protocol as a provision allowing the creditor to designate the law applicable to the maintenance obligation

29. The position of the Portuguese Government — like some of the views cited by the referring court — comes down to the conviction that a refusal to apply, in subsequent proceedings, the law which was applied in the previous proceedings on the basis of Article 4(3) of the 2007 Hague Protocol would result in a restriction of the creditor's rights as laid down in that provision. That view is based on the assumption that the creditor has the possibility to designate the law applicable to the maintenance obligation by lodging an application for maintenance with the authority of the State where the debtor has his habitual residence.

30. However, I have doubts as to whether that position accurately reflects the role of Article 4(3) of the 2007 Hague Protocol in the system of conflict-of-law rules laid down in that protocol.

31. Under the 2007 Hague Protocol, the law applicable in principle to maintenance obligations is to be the law of the State of the habitual residence of the creditor (Article 3(1) of that protocol). However, the authors of the 2007 Hague Protocol have laid down special conflict-of-law rules with regard to certain categories of maintenance obligations. These include, in particular, maintenance payable by parents to their children (Article 4(1)(a) of the 2007 Hague Protocol).

32. The purpose of the conflict-of-law rules contained in Article 4(2), (3) and (4) of the 2007 Hague Protocol is to determine the law which may then be applied as the law applicable to the assessment of the maintenance obligation where, under the law applicable in principle to that obligation, the creditor is unable to obtain maintenance from the debtor.

33. In the case of proceedings in which Article 4(2) of the 2007 Hague Protocol applies, the law applicable in principle to the maintenance obligation is — under Article 3 of that protocol — the law of the State of the habitual residence of the creditor. Then, if the creditor is unable, by virtue of that law, to obtain maintenance from the debtor, the law of the forum is to apply (Article 4(2) of the 2007 Hague Protocol).[6] Finally, if the creditor is unable, under that law, to obtain maintenance from the debtor, the law of the State of the parties' common nationality is to apply (Article 4(4) thereof).

34. However, the sequence of the laws which can apply to the assessment of a maintenance obligation is different in cases falling within the scope of Article 4(3) of the 2007 Hague Protocol. If the creditor lodges an application with the authority of the State where the debtor has his habitual residence, the law of that State is applicable (*lex fori*). If the creditor is unable to obtain maintenance from the debtor by virtue of the *lex fori*, the law of the State where the creditor has his habitual residence is then to apply.

35. This means that the creditor can, by deciding to lodge an application for maintenance with the authority of the State of habitual residence of the debtor, influence which law is applicable in principle to the assessment of the maintenance obligation. However, in proceedings before the authority of the State where the debtor has his habitual residence, the creditor cannot require that the law of the State of his habitual residence be applied (instead of the *lex fori*) as the law applicable in principle to the maintenance obligation. That law can only apply subsequently if, under the *lex fori*, the creditor is unable to obtain maintenance from the debtor. Therefore, Article 4(3) of the 2007 Hague Protocol does not relate to the designation of the applicable law in the strict sense of the term. This is rather a phenomenon which consists in designating the law indirectly or — with reference to the phrasing used by the Court in its case-law in a slightly different context — designating the law de facto.[7]

6 Crucially, leaving aside situations where there is a change in the habitual residence of the parties to a maintenance obligation, such a possibility exists only where the law of the forum is not the law of the State where the creditor has his habitual residence. See my Opinion of 30 January 2018 in *KP* (C-83/17, EU:C:2018:46, points 48 and 49).

7 In its judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612, paragraph 47), the Court made it clear that by determining the law applicable to a contractual obligation on the basis of Article 4(3) 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), it is possible, in certain cases, 'de facto … to choose the law' to which a non-contractual obligation is subject. The Court thus referred to the division established in academic legal writings between directly choosing the applicable law and indirectly choosing the applicable law (J. Basedow, 'The Law of Open Societies — Private Ordering and Public Regulation of International Relations', *Recueil des cours de l'Académie de la Haye*, vol. 360, 2013, p. 239 et seq.), sometimes also described as indirect influence on the applicability of the law (M. Pazdan, 'Kolizyjnoprawny wybór prawa a inne przejawy autonomii woli w prawie prywatnym międzynarodowym', in: A. Matlak, S. Stanisławkska-Koc (editors), *Spory o własność intelektualną. Księga jubileuszowa dedykowana Profesorom Janoszowi Barcie i Ryszardowi Markiewiczowi*, Wolters Kluwer Polska, Warsaw, 2013, p. 782 et seq.).

36. Recognising this peculiarity of Article 4(3) of the 2007 Hague Protocol, it is necessary, in my view, to consider whether the effects of applying that provision should be equated to a fully-fledged choice of the law applicable to the maintenance obligation which, in principle, produces effects in all proceedings relating to a particular maintenance obligation.

(b) Effects of applying the lex fori *in proceedings initiated by the creditor*

37. It should be borne in mind that under the 2007 Hague Protocol the parties have the possibility to 'rigidify' the issue of the law applicable to the maintenance obligation by designating the applicable law on the basis of Article 8(1) of the 2007 Hague Protocol. A designation on the basis of that provision produces effects, in principle, in all proceedings relating to the maintenance obligation concerned.

38. Therefore, the referring court's uncertainty can give rise to the following question: should the possibility for the creditor to influence the identification of the applicable law by initiating proceedings before the authority of the debtor's habitual residence be equated, in terms of its effects, to a designation of the applicable law by the parties on the basis of Article 8 of the 2007 Hague Protocol?

39. Under Article 8 of the 2007 Hague Protocol, the parties may designate one of several laws. Under Article 8(1)(b) of that protocol, that designation can consist in particular in identifying as applicable the law of the State of the habitual residence of either party to the maintenance obligation at the time of designation. Crucially, the law of the State of the habitual residence of either party is to apply as the designated law in any proceedings relating to that maintenance obligation, regardless of whether specific proceedings are conducted by the authority of that State.

40. However, Article 4(3) of the 2007 Hague Protocol is based on a different assumption. It exclusively concerns the application of the *lex fori* in proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence. Therefore, unlike a designation of the law on the basis of Article 8 of the 2007 Hague Protocol, the purpose of Article 4(3) of that protocol is not to 'rigidify' the law applicable to a particular maintenance obligation so that it applies as the law applicable in all proceedings relating to the maintenance obligation concerned.

41. Moreover, in the 2007 Hague Protocol the effects of a designation of the applicable law on the basis of Article 8 of that protocol can be distinguished clearly from a designation on the basis of Article 7 thereof. The latter provision envisages the possibility of designating the *lex fori* for the purposes of specific proceedings. Therefore, a designation on the basis of that provision does not produce effects in further proceedings relating to the same maintenance obligation.

42. Thus, the authors of the protocol realised that sometimes designating the law for the purposes of specific proceedings may be in the interests of the parties to a maintenance obligation even though in principle either of them can then bring further proceedings in which that designation will no longer be relevant. In the context of the 2007 Hague Protocol, it is therefore not possible to rule out the possibility that different applicable laws will be applied in subsequent proceedings between those parties. Such a solution appears to be inherent in the system of conflict-of-law rules laid down in that protocol.

43. Consequently, I consider that the effects of applying the *lex fori* on the basis of Article 4(3) of the 2007 Hague Protocol in proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence are not identical to the effects of designating the applicable law on the basis of Article 8 of that protocol. The effects of applying the *lex fori* on the basis of Article 4(3) of the 2007 Hague Protocol display some similarities with the effects of designating the

applicable law for the purposes of specific proceedings on the basis of Article 7 of that protocol. Therefore, the application, on the basis of Article 4(3) of the 2007 Hague Protocol, of the law of the State where the debtor has his habitual residence in proceedings initiated by the creditor does not necessarily mean that the same law must apply in subsequent proceedings initiated by the debtor.

(c) Limitations of the effects produced by designating the applicable law on the basis of the rules of the 2007 Hague Protocol

44. The position that the application of the *lex fori* in proceedings initiated by the creditor produces no effects in subsequent proceedings initiated by the debtor is also supported by the existence of certain restrictions on a designation of the law on the basis of Article 8 of the 2007 Hague Protocol which do not arise in the case of a designation on the basis of Article 7 of that protocol.

45. First, under Article 8(3) of the 2007 Hague Protocol a designation of the applicable law cannot be made in relation to maintenance payable to a person under the age of 18 years. [8]

46. No restriction of this kind on the permissibility of designating the applicable law was laid down in Article 7 of the 2007 Hague Protocol. In paragraph 111 of the Bonomi report this is explained by the fact that the risks to the parties to the maintenance obligation that arise from a designation for the purposes of specific proceedings are more limited than in the case of a designation on the basis of Article 8 of that protocol, which produces lasting effects in all proceedings relating to the same maintenance obligation. This means that a person under 18 years of age is also able, together with the debtor, to designate the law applicable for the purposes of specific proceedings on the basis of Article 7 of the 2007 Hague Protocol.

47. Nor were similar restrictions on the permissibility of the creditor indirectly designating the law applicable by initiating proceedings before an authority of the State where the debtor has his habitual residence set out clearly in Article 4(3) of the 2007 Hague Protocol. However, that provision relates, inter alia, to proceedings concerning maintenance payable to children by their parents (Article 4(1)(a) of the 2007 Hague Protocol). Therefore, this also includes maintenance payable to persons under the age of 18 years. It therefore refers to persons who would be unable to designate the applicable law on the basis of Article 8(1) of the 2007 Hague Protocol on account of the restriction laid down in Article 8(3) thereof.

48. In my view, the law identified as applicable on the basis of Article 4(3) of the 2007 Hague Protocol also applies only in specific proceedings which have been initiated by the creditor before the authority of the State where the debtor has his habitual residence. A different solution, which assumes that the application of the law of the State where the debtor has his habitual residence would also produce effects in subsequent proceedings initiated by the debtor, would allow the prohibition laid down in Article 8(3) of the 2007 Hague Protocol to be circumvented in cases where the creditor was under 18 years of age. [9]

49. Secondly, under Article 8(5) of the 2007 Hague Protocol, unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated is not to apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties. No such restriction is laid down in Article 7 of the 2007 Hague Protocol.

8 It is true that the main proceedings were initiated in 2015, whilst the creditor in the main proceedings was born in 1996. This means that the creditor was 18 years of age before the main proceedings were initiated. However, it is not clear whether the creditor had reached that age at the time the proceedings in which the order of 10 October 2014 was made were initiated. In any event, this is not of decisive relevance to the analysis of the first question referred. The Court's interpretation of Article 4(3) of the 2007 Hague Protocol in the ruling in the present case will also apply in factual situations other than that at issue in the main proceedings.

9 I drew attention to this issue in my Opinion in *KP* (C-83/17, EU:C:2018:46, footnote 23).

50. Article 4(3) of the 2007 Hague Protocol likewise does not make the application of the law of the State where the debtor has his habitual residence subject to the effects which the law of that State produces for the parties to the maintenance obligation. This means that — as is made clear in paragraph 66 of the Bonomi report — the *lex fori* is to be applied in proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence, even if that law is less favourable to the creditor than the law of his habitual residence. The fact that Article 4(3) of the 2007 Hague Protocol does not contain a similar solution to Article 8(5) thereof could be explained by the fact that the *lex fori* is not permanently identified as the law applicable to the assessment of the maintenance obligation.

51. I therefore consider that the differences described above between Article 8 of the 2007 Hague Protocol and Article 4(3) thereof support the position that the application of the *lex fori* pursuant to the latter provision in proceedings initiated by the creditor before the authority of the State of the habitual residence of the debtor does not mean that that law should also apply in subsequent proceedings initiated by the debtor.

52. Although the conclusions stemming from a systematic interpretation of the 2007 Hague Protocol seem to me to be unequivocal, I will compare them with the legal rationale of Article 4(3) of that protocol below.

4. Legal rationale for the application of the lex fori *on the basis of Article 4(3) of the 2007 Hague Protocol*

53. In the light of the explanations contained in paragraph 66 of the Bonomi report, the essential reason why Article 4(3) of the 2007 Hague Protocol requires the application of the *lex fori* in proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence is the desire to avoid a situation where the authority hearing a maintenance case will apply foreign law. This is because it could prove to be time-consuming and generate unnecessary costs.[10]

54. In that context, I would like to point to a certain peculiarity of the proceedings in connection with which the referring court has made its request for a preliminary ruling. The main proceedings were initiated against the maintenance creditor by the debtor before a court of the State where the debtor has his habitual residence (an Austrian court).

55. The possibility for the plaintiff to initiate proceedings before the courts of the State which is in some way connected with the defendant is a widely accepted solution in international civil proceedings. This connection may relate in particular to the habitual residence of the defendant. Such a solution reflects the principle of *actor sequitur forum rei*.[11]

10 See also L. Walker, *Maintenance and Child Support in Private International Law*, Hart Publishing, Oxford and Portland, 2015, p. 83. This is therefore a different solution from that provided for in Article 4(2) of the 2007 Hague Protocol. In the context of that provision, the *lex fori* plays a secondary role. Under Article 4(2) of the 2007 Hague Protocol, the *lex fori* applies only where the creditor is unable to obtain maintenance by virtue of the law applicable in principle to the maintenance obligation, that is to say, the law of the State where the creditor has his habitual residence. Therefore, it does not relate to the speeding up of proceedings or the reduction of the costs thereof since the law applicable in principle is the law of the State where the creditor has his habitual residence. Obviously, this does not have to be the law of the forum. In such cases Article 4(2) of the 2007 Hague Protocol does not, in principle, apply. See my Opinion in *KP* (C-83/17, EU:C:2018:46, points 48 and 49).

11 V. Lazić, 'Procedural Justice for "Weaker Parties" in Cross-Border Litigation under the EU Regulatory Scheme', *Utrecht Law Review 2014*, vol. 10, issue 4, p. 105, footnote 38.

56. Sometimes the rules of jurisdiction provide for departures from this principle. However, they are exceptional in nature. This is so, for example, in the context of Regulation No 4/2009, which allows the maintenance creditor to initiate proceedings against the debtor before a court of the creditor's habitual residence. However, Regulation No 4/2009 does not lay down similar rules which would allow the debtor to initiate proceedings against the creditor before the courts of the debtor's habitual residence. This stems from the assumption that the maintenance creditor is a 'weaker party' who requires additional protection at jurisdictional level.

57. This means that in circumstances such as those at issue in the present case, the main proceedings are taking place before a court which in principle does not have jurisdiction to hear maintenance proceedings which the debtor has initiated against the creditor. However, I can conclude from the wording of the second question referred that the court of first instance considered that it had jurisdiction to hear the case, since the creditor had entered an appearance without raising an objection that that court lacked jurisdiction. Article 5 of Regulation No 4/2009 provides for the possibility for a court which in principle has no jurisdiction to hear maintenance proceedings to have jurisdiction as a result of the creditor entering an appearance. Moreover, that provision was cited in the second question referred.

58. If, in circumstances such as those at issue in the present case, the creditor were to challenge the jurisdiction of the court of first instance in the main proceedings, that court would probably hold that it did not have jurisdiction to hear the case. Consequently, the debtor would have to initiate proceedings before a court of the maintenance creditor's habitual residence (an Italian court). For that court, the law of the State of the habitual residence of the debtor (Austrian law), on the basis of which the maintenance decision in the order of 10 October 2014 was made, would not be the *lex fori*, but foreign law.

59. Therefore, the fact that the Austrian courts will apply Austrian law in the main proceedings cannot support an answer to the first question which assumes that the application of the *lex fori* on the basis of Article 4(3) of the 2007 Hague Protocol in proceedings initiated by the creditor means that that law also applies in proceedings initiated subsequently by the debtor.

60. It is true that the main proceedings are being conducted before a court of the debtor's habitual residence (an Austrian court), for which the law of the State under which the maintenance was awarded previously is the *lex fori*.

61. That would not be the situation if the debtor were to lodge an application for a reduction in the amount of maintenance with the court having jurisdiction in principle to hear that application (the court of the State where the creditor has her habitual residence). In such a situation, the law of the State where the debtor has his habitual residence, and on the basis of which the maintenance decision was made in the order of 10 October 2014, would be applied contrary to the assumption on which Article 4(3) of that protocol is based. This is because it would not be the *lex fori*.

62. Therefore, in the light of the legal rationale of Article 4(3) of the 2007 Hague Protocol, the application of the *lex fori* under that provision in proceedings initiated by the creditor before an authority of the debtor's habitual residence does not mean that that law should also apply in subsequent proceedings initiated by the debtor.

5. Application of different applicable laws in proceedings for increasing and reducing the amount of maintenance

63. I understand the argument put forward by the Portuguese Government, which points out that answering the first question in the affirmative may lead to a situation where competing applications, concerning an increase and a reduction in the amount of maintenance respectively, would be decided on the basis of two different applicable laws.

64. However, in this regard I concur with the position of the Commission, which points out that such an eventuality is inherent in the system of conflict-of-law rules laid down in the 2007 Hague Protocol. Moreover, in point 42 of this Opinion, I noted that the possibility of applying different laws as applicable to a maintenance obligation in subsequent proceedings between the same parties is a natural consequence of designating the law applicable to specific proceedings on the basis of Article 7 of the 2007 Hague Protocol.

65. I therefore consider that the need to apply different applicable laws in further proceedings relating to the same maintenance obligation does not support a departure from the systematic and teleological interpretation of Article 4(3) of the 2007 Hague Protocol according to which the effects of applying the *lex fori* in proceedings initiated by the creditor before the authority of the State where the debtor has his habitual residence are limited to those proceedings.

66. In the light of the foregoing, I propose that the Court answer the first question referred as follows: Article 4(3) of the 2007 Hague Protocol must be interpreted as meaning that a maintenance decision made on the basis of the law of the forum in proceedings initiated by the creditor against the debtor before the authority of the State where the debtor has his habitual residence does not mean that the law of that State applies in subsequent proceedings initiated by the debtor against the creditor for a reduction in the amount of maintenance.

B. The second question

67. The second question was referred in the event of the Court finding that, in order for the law of the State where the debtor has his habitual residence to apply in circumstances such as those at issue in the main proceedings, it is not sufficient that a maintenance decision has been made previously on the basis of that law. By its second question, the referring court wishes to ascertain whether the creditor entering an appearance before an authority which in principle does not have jurisdiction to decide on a maintenance issue is equivalent to 'the creditor [seising] the competent authority of the State where the debtor has his habitual residence' for the purposes of Article 4(3) of the 2007 Hague Protocol. That would mean that the law of the State where the debtor has his habitual residence applies in the main proceedings as the law of the forum.

68. In that context, the referring court points out that in a situation where the debtor lodges an application concerning maintenance with the authority of his habitual residence, the creditor can challenge the jurisdiction of that authority.[12] The referring court asks whether it should therefore be concluded that a creditor who enters an appearance and does not challenge the jurisdiction of that authority is, in essence, '[seising] the competent authority of the State where the debtor has his habitual residence' for the purposes of Article 4(3) of the 2007 Hague Protocol.

69. Mr Mölk and the Commission propose that the answer to the second question referred should be in the negative. The Portuguese Government, for its part, considers that its proposed answer to the first question referred determines the answer to the second question referred.

12 See also points 54 to 58 of this Opinion.

70. Therefore, in order to answer the second question referred, it is necessary to interpret Article 4(3) of the 2007 Hague Protocol in order to ascertain whether that provision applies in the main proceedings.

1. Application of the lex fori *in proceedings initiated by the debtor in the light of a literal interpretation of Article 4(3) of the 2007 Hague Protocol and a systematic interpretation of that protocol*

71. It should be borne in mind that Article 4(3) of the 2007 Hague Protocol applies to a narrow category of maintenance obligations and then only where there is a specific form of procedure. That provision relates, inter alia, to parents' maintenance obligations towards their children (Article 4(1)(a) of the 2007 Hague Protocol). Moreover, it is not applied in all proceedings which relate to maintenance payable by parents to their children. That provision applies only 'if the creditor has seized the competent authority of the State where the debtor has his habitual residence'.

72. I have no doubt that Article 4(3) of the 2007 Hague Protocol is a provision of an exceptional nature. It certainly should not be interpreted broadly. There is nothing to indicate that Article 4(3) of the 2007 Hague Protocol should also apply in a situation where the debtor initiates proceedings before an authority of his habitual residence. That would mean that that provision would be applied in all proceedings before the authority of the debtor's habitual residence.

73. Furthermore, Article 4(3) of the 2007 Hague Protocol defines its scope by means of wording relating to a specific set of procedural circumstances. These are situations where the creditor lodges an application with an authority of the State where the debtor has his habitual residence. However, I cannot find wording of this kind, for example, in Article 4(2) and (4) of the 2007 Hague Protocol.

74. Therefore, the authors of the 2007 Hague Protocol gave Article 4(3) of that protocol a specific wording providing for the possibility of it being applied in a specific set of procedural circumstances, which contrasts sharply with the other subparagraphs of Article 4 thereof. In view of the exceptional nature of Article 4(3), I consider that that provision should not be interpreted broadly so as to rule that it should also apply in proceedings initiated by the debtor. A different view could in some cases lead to the application of Article 4(3) of the 2007 Hague Protocol in proceedings in which Article 4(2) of that protocol should be applied.

75. I therefore consider that the conclusions stemming from a literal interpretation of Article 4(3) of the 2007 Hague Protocol and a systematic interpretation of that protocol appear unambiguously to rule out the possibility of applying the *lex fori* in proceedings initiated by a debtor against a creditor before an authority of the State where the debtor has his habitual residence.

2. Application of Article 4(3) of the 2007 Hague Protocol in proceedings initiated by the debtor in the light of the legal rationale of that provision

76. I can see certain merits in applying the *lex fori* in proceedings initiated by a debtor before the authority of the State where that debtor has his habitual residence. Such a solution could sometimes help speed up proceedings and limit the costs arising from the need for the authority deciding on the maintenance to determine the content of foreign law.

77. However, the mere fact that a creditor enters an appearance and does not challenge jurisdiction does not mean that that creditor agrees to the application of a particular applicable law. In some cases it may be in the creditor's interest for the case to be heard by the authority of the debtor's habitual residence. Nonetheless, those considerations do not necessarily mean that it is in the creditor's interest for the case to be heard on the basis of the law of the State where the debtor has his habitual residence.

78. The explanation contained in paragraph 114 of the Bonomi report also runs counter to the position which assumes that Article 4(3) of the 2007 Hague Protocol applies in proceedings before an authority which has jurisdiction as a result of the creditor entering an appearance.

79. That report makes it clear that, on the one hand, the possibility of designating the *lex fori* as the law applicable for the purposes of specific proceedings on the basis of Article 7 of the 2007 Hague Protocol is irrelevant in respect of proceedings initiated by a creditor (belonging to one of the categories listed in Article 4(1) of that protocol) before the authorities of the State where the debtor has his habitual residence. In a situation where a creditor lodges an application before a judicial authority of the State where the debtor has his habitual residence, the *lex fori* applies as the law applicable to the maintenance obligation on the basis of Article 4(3) of the 2007 Hague Protocol. On the other hand, the creditor and the debtor may designate the *lex fori* as the law applicable for the purposes of specific proceedings on the basis of Article 7 of the 2007 Hague Protocol in a situation where it is the debtor who is lodging an application concerning maintenance with the authority of the State where that debtor has his habitual residence, in so far as that authority has jurisdiction to hear the case concerned.

80. In point 57 of this Opinion I have already made it clear that the authority of the State where the debtor has his habitual residence may have jurisdiction to hear proceedings initiated by that debtor in particular as a result of the creditor entering an appearance. This therefore includes the circumstances to which the second question relates.

81. In the light of the explanations contained in paragraph 114 of the Bonomi report, the parties to the main proceedings could designate the *lex fori* as the law applicable for the purposes of specific proceedings on the basis of Article 7 of the 2007 Hague Protocol. This means that Article 4(3) of that protocol does not apply in those proceedings. Otherwise, the designation of the *lex fori* for the purposes of specific proceedings would not be possible since that law would already be the applicable law on the basis of Article 4(3) of the 2007 Hague Protocol.

82. To sum up, I can find no convincing arguments based on a teleological interpretation which would justify the adoption of a different solution from that indicated by the conclusions stemming from a literal and systematic interpretation of Article 4(3) of the 2007 Hague Protocol. Therefore, in my view, there are no justifiable grounds for ruling that proceedings are initiated by a creditor merely because he enters an appearance and does not challenge the jurisdiction of the authority before which those proceedings are taking place.

83. In the light of the foregoing considerations, I propose that the Court should answer that question as follows: Article 4(3) of the 2007 Hague Protocol must be interpreted as not applying where a creditor enters an appearance in proceedings initiated by the debtor before the authority of the State where the debtor has his habitual residence, despite the fact that, as a result of the creditor making an appearance, that authority has jurisdiction to hear the proceedings on the basis of Article 5 of Regulation No 4/2009.

VI. Conclusions

84. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) Article 4(3) 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, must be interpreted as meaning that a maintenance decision made on the basis of the law of the forum in proceedings initiated by the creditor against the debtor before the authority of the State where

the debtor has his habitual residence does not mean that the law of that State applies in subsequent proceedings initiated by the debtor against the creditor for a reduction in the amount of maintenance.

(2) Article 4(3) of the 2007 Hague Protocol must be interpreted as not applying where a creditor enters an appearance in proceedings initiated by the debtor before the authority of the State where the debtor has his habitual residence, despite the fact that, as a result of the creditor making an appearance, that authority has jurisdiction to hear the proceedings on the basis 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.