

The maintenance recovery in the member and non-member countries of the European Union

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Abstract: - At present, anywhere in the world, the state and the society require the members of same family to provide mutual assistance based on solidarity within the family. In this respect, there are rules imposed by the state, religion and morality. The purpose of this article is to present the legal rules governing this area and that may be imposed by coercion of the states; we will present the legal instruments provided by the international conventions, which allow the recovery abroad of maintenance, between citizens of states within and outside the EU.

Key-Words: - maintenance (alimony), debtor, creditor, international conventions.

1. General Concepts

The law requires members of the same family to provide mutual assistance on the basis of family solidarity; parents must feed, educate and maintain children; in some member states, children must assist their parents in case of need; a divorced spouse is obliged to pay maintenance to a former spouse who has custody of their children.

This obligation is generally discharged by a monthly payment known as maintenance. The court fixes the amount of the payment and the conditions for its variation, but it may exempt a parent from this obligation if he or she undertakes to house, feed and maintain a child.

In principle, maintenance payments are personal and cannot be transferred to another person.

In some member states, it may be requested an attachment order for the amount of maintenance against sums payable to the debtor by other persons (e.g., an employer or a bank). If civil enforcement proceedings do not determine the desired result, in some circumstances you may be entitled to apply to the court to have the maintenance collected through the national revenue authorities. Finally, some member states have public funds available, if a maintenance creditor fails to pay.

The concept of "parental responsibility" covers the duties and rights to take care of a child's person and property. This includes a responsibility to ensure that the child has a shelter, food and clothes as well as a responsibility for the child's upbringing. It includes the responsibility to look after the child's

property, if any and the right to legally represent the child.

The persons having "parental responsibility" of a child can be referred to as "holders of parental responsibility." In most cases, the child's parents have this responsibility. However, if the parents are deceased or no longer capable or authorized to take care of their child, a guardian can be appointed to represent the child. The guardian may be a relative, a third person or an institution.

As long as the parents live together, they usually exercise the parental responsibility over their children jointly according to the law.

When parents divorce or split up, they need to decide how this responsibility will be exercised in the future. The parents may decide whether the child shall live alternately with both parents, with one parent. In the latter case, the other parent usually has a right to visit the child at certain times. Parents may decide these issues by mutual agreement or by going to court.

When a court is used, it decides which parent shall have the custody rights over the child. The rules on custody and access rights differ from Member State to Member State. The court may decide that both parents shall have custody over the child (joint custody) or that one of the parents shall have custody (single custody). When one of the parents is granted single custody, the other parent is often granted the right to see the child during certain periods (access rights or visiting rights).

2. The maintenance recovery from a debtor in a non-member state.

In order to compel a maintenance debtor in a State outside the European Union to pay maintenance, you must use the courts of the State in which you want to have your judgment enforced. There are, however, International Conventions, such as those listed below, which can help you in the execution of the legal obligation of maintenance abroad:

2.1. The New York Convention of 20 June 1956 on the recovery abroad of maintenance (United Nations)

The Convention on recovery abroad of maintenance signed at New York on 20 June 1956 (to which Romania acceded by Law no. 26/1991, published in the Official Gazette no.54 of 19 March 1991) establishes arrangements on administrative co-operation between the competent authorities. More specifically, the Convention seeks to facilitate a person (lender), found in one of the contracting parties (creditor state), obtain alimony, which she claims is entitled from a person (debtor), which is under the jurisdiction of another contracting party (state of the debtor).

The lender may submit a claim to a transmitting authority of the state he lives, to obtain alimony from the debtor. The application must be accompanied by all relevant documents and especially, if is necessary, by a power of attorney authorizing *the intermediary institution* to act on behalf of the creditor or to appoint an authorized person to act on behalf of the creditor; the application will also be accompanied by a photo of the creditor and, if possible, a photograph of the debtor. However the application must include: name, address, date of birth, nationality and occupation of the creditor and, where appropriate, name and address of his legal representative; the name and surname of the debtor and creditor to the extent he/she has knowledge of his/her successive addresses over the past five years, date of birth, nationality and profession; a detailed statement of the grounds on which the application relates and any other relevant data on particular resources and family situation of the creditor and debtor.

The transmitting authority remits the file to the intermediate institution designated by the debtor's state, unless it considers that the application is in good faith.

The duration and the proceedings of solving the files are under the exclusive competence of foreign authorities and the exequatur or obtaining new

decision proceedings are subject to the law of the debtor's state, including private international law.

In Romania, according to Art.2, paragraphs 1 and 2 of the Convention, the *Ministry of Justice* was designated as *central transmitting authority* and *Bucharest Bar Association* has been designated as - *intermediary institution*. The following situations may arise:

2.1.1 Romania - Requesting State

The attributes of the Ministry of Justice:

- if the debtor required to pay maintenance charges lives in one of the signatory countries from the Convention and it is known the exact address, the Ministry of Justice as central transmitting authority, transmits, at the request of the creditor, the file which it establish for the central authority designated by the contracting state;
- as a central transmitting authority, the Ministry of Justice cooperates with the central authorities of other states parties of the Convention and notifies the creditor from Romania of documents / information received from abroad.

2.1.2 Romania – Requested State

The central *transmitting authority* from the contracting state, transmits the request of the creditor and its supporting documents, to obtain alimony from the debtor residing in Romania, to the Bar of Bucharest, *the intermediary institution empowered to apply the Convention*.

2.2 The Hague Conventions of 1958 and 1973 concerning the recognition and enforcement of decisions relating to maintenance obligations, establish arrangements between the contracting parties for reciprocal recognition and enforcement and rules applicable to legal aid.

2.3 The Hague Conventions of 1956 and 1973 on the law applicable to maintenance obligations

The Conventions give priority to the law of habitual residence of the child in question or of maintenance creditors in general (or the law of the country of new habitual residence in the case of a change in habitual residence). But there are a number of exceptions:

- The law governing maintenance obligations between spouses who are divorced or separated is the law applicable to the divorce or separation;
- The application of the law designated by the Convention may be refused only if it is manifestly incompatible with public policy;
- In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a claim by the creditor on the ground that there is no such obligation under the law of their common nationality or the law of the debtor's habitual residence.

Moreover, *the two Conventions differ on certain points*: a) The 1956 Convention determines the law applicable to maintenance obligations only regarding children, while the 1973 Convention applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate; b) The 1956 Convention applies only if the designated law is that of a contracting State, while the 1973 Convention is universal in that it applies even though the applicable law is that of a non-contracting State.

These divergences give rise to complications. Moreover, the five Conventions are not complementary and do not provide a quick and effective means of tracing debtors who are seeking to evade their obligations. For those reasons, consideration is being given to carrying out a general review of those obligations and embodying them in a new general convention on maintenance obligations.

2.4 Bilateral agreements

In the domain of the recognition and enforcement of judgments on recovery abroad of maintenance may also apply *bilateral conventions / treaties signed by Romania with the following countries which are also part in the New York Convention of 1956*: Algeria, Belgium, Czech Republic, China, Cuba, France, Italy, Morocco, Poland, Serbia and Montenegro (a declaration of succession), Slovenia, (a declaration of succession), Slovakia (a declaration of succession), Spain, Tunisia, Turkey, Hungary.

In the relationship between Romania and the countries that are part of the 1956 New York Convention on the recovery abroad of maintenance, but with whom were also signed bilateral treaties /conventions in the judicial assistance in civil or commercial matters, the transmission of the judicial assistance requests having the main subject the communication/notification of some judicial and

extrajudicial documents carried out: - either on the basis of the New York Convention - or under the bilateral convention/treaty (at the option of the state - part), but with due observance of procedure laid by that convention /treaty.

In the domain of recognition and enforcement of judgments relating to recovery of maintenance may also be applicable *bilateral conventions/ treaties signed by Romania with the following states that do not take part to the New York Convention*: Albania, Bulgaria, North Korea, Egypt, Moldova, Mongolia, Russia, and Syria.

3. The maintenance recovery from a debtor from another member state.

There are Rules of Community law that help us recover maintenance from another member state than that in which we live: Council Regulation No. 44/2001 of 22 December 2001 on jurisdiction and enforcement of judgments in civil and commercial matters (Brussels I) lays down rules on special jurisdiction for the courts concerning maintenance payments.

This Regulation has been directly applicable since 1 March 2002, which means that its provisions can be relied on in a court action. But they do not apply to Denmark, where the Brussels Convention of 27 September 1968 on the same subject matter still applies. According to this regulation, *the maintenance creditor can choose to bring a case, either to the court of the Member State where the debtor has his domicile, or the court where the creditor himself has his domicile or habitual residence.*

The creditor is therefore in a favourable position. On the other hand, when the debtor takes the initiative to act, he is submitted to the general rule and has only one possibility, which is to bring the case to the court where the creditor is living. Moreover, if the matter is ancillary to proceedings concerning the "status of a person" (divorce for example), it will be heard by the court which, according to its own law, has jurisdiction, unless that jurisdiction is based solely on the nationality of one of the parties.

A judgment concerning maintenance given in a Member State will be recognized in other Member States (Article 33 of the Regulation) and will be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there (Article 38).

As compared to the 1968 Brussels Convention, which it supersedes, the Regulation (Article 34) now

rules out refusal to recognise a judgment contrary to the private international law of the State in which recognition is sought, if the judgment of the original court determines an issue of the status or capacity of persons. A foreign judgment can now be refused recognition only if it is contrary to public policy, if it is irreconcilable with an earlier judgment or if the defendant was not served with the document instituting the proceedings within the prescribed time limits.

Lastly, arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them are regarded as authentic instruments qualifying for the simplified enforcement procedure (Article 57).

4. Conclusion

Although that procedure may seem relatively straightforward, the Regulation does not remove all obstacles to the "free movement of judgments" within the European Union and leaves intermediate measures in place that are still too restrictive.

Subsequently, on 21 April 2004 the European Parliament and the Council adopted *Regulation No 805/2004 creating a European Enforcement Order for uncontested claims*. It covers claims for maintenance payments, but only where these are considered to be uncontested.

In order to cover the whole range of problems linked to the recovery of maintenance claims, the Commission published a *Green Paper* in April 2004.

On 15 December 2005 the Commission presented to the Council a proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

The aim of this proposal is to remove all remaining obstacles to the collection of maintenance payments within the European Union. If adopted, it will enable the creation of a legal environment adapted to the legitimate expectations of maintenance creditors. Maintenance creditors will then be able to obtain enforceable decisions that "travel freely" throughout the European Judicial Area and result in regular maintenance payments. This should be easy, quick and, as a rule, free of charge.

This new European legal order calls for more than just fine-tuning existing arrangements. That is why the Commission proposes to take ambitious measures in all relevant areas of civil judicial cooperation: international jurisdiction, applicable law, recognition and enforcement, cooperation and lifting all obstacles to the proper conduct of legal proceedings.

These overall solutions will be grouped into one single legal instrument. The proposal for a Regulation has three main objectives: 1. To make life easier for European citizens by reducing the formalities involved in obtaining and enforcing court orders in any Member State, and by introducing measures specifically aimed at assisting maintenance creditors. It should be possible to take all the necessary steps at the place of normal residence, including measures at the enforcement stage itself, such as the possibility of obtaining attachment on wages or on a bank account, to trigger the cooperation mechanisms or to have access to information making it possible to locate the debtor and to evaluate his assets. 2. To increase legal security by harmonising divergent conflict-of-laws rules. 3. To ensure effective and durable collection of maintenance payments by offering the creditor the possibility of obtaining a court order that has effect in the entire European Union, backed up by a simple and harmonised system to have it enforced.

References:

- [1] Máire Ní Shúilleabháin, Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective, *International & Comparative Law Quarterly*, Volume 59, Issue 04, pp 1021–1053, 2010.
- [2] McEleavy, P., The Brussels II Regulation: How the European Community has Moved into Family Law, *International & Comparative Law Quarterly*, Volume 51, Issue 04, pp 883–908, 2008.
- [3] Nicolae, I., Marketing Research about Special Problems Related to Parental Liability for Prejudice Caused by their Minor Children, *Proceedings of the 3rd international conference on management, marketing and finances - advances in marketing, management and finances*, 2009, pp. 116-119.
- [4] Oldham, J.T., Changes in the Economic Consequences of Divorces, 1958-2008, *Family Law Quarterly*, Vol.42 Issue:3, 2008, pp.419-447.
- [5] Rosettenstein, D., Choice of Law in International Child Support Obligations: Hague or Vague, and Does it Matter? *International Journal of Law, Policy and the Family*, 2008, pp.122-134.