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RECENT CHANGES REGARDING THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS IN UKRAINE

Abstract

The article concerns recent changes regarding the law applicable to maintenance obligations in Ukraine. The author analyzes the impact of the ratification of the 2007 Hague Protocol on the amendment of the Ukrainian Law on Private International Law of 2005. The accession to the 2007 Hague Protocol by Ukraine opens a new chapter in the scope of law applicable to maintenance in Ukraine.

The law applicable to the maintenance obligation from parents in favour of children will no longer be determined by the connecting factor of citizenship but by the habitual residence. The habitual residence is the most appropriate connecting factor to determine the form and the amount of maintenance in a given situation. Determining the law applicable to the maintenance for children will be based on the correcting technique, designed to ensure that the creditor has the possibility of obtaining maintenance. In such a way the child's interest is protected against the applicable law which does not guarantee such child the maintenance.

Ukraine has joined the group of countries whose aim is to harmonize the governing laws applicable to the maintenance on a global scale because the 2007 Hague Protocol is the international agreement developed by the Hague Conference on Private International Law (HCCH).

KEYWORDS

Hague Protocol of 2007 on the law applicable to maintenance obligations, Ukrainian Private International Law, reforms of the domestic conflict of laws

SŁOWA KLUCZOWE

Protokół haski z 2007 r. o prawie właściwym dla zobowiązań alimentacyjnych, ukraińskie prawo prywatne międzynarodowe, reformy krajowego prawa kolizyjnego

1. INTRODUCTION

The common thing in relations between Poland and Ukraine is that the maintenance obligations with the so-called 'foreign element'[1] are governed by the national legislation and international agreements, in Poland they are additionally governed by the EU regulations. For the time being, Ukraine is an official candidate for accession to the European Union, therefore, the EU regulations are not directly applicable in its territory. However, the recent changes due to the ratification of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations[2] (hereinafter, the 2007 Hague Protocol) and an amendment of the Ukraine Act on private international law,[3] indicate the alignment of the Ukrainian legislations in the area to the EU regulations. Furthermore, Ukraine has joined the group of countries whose aim is to harmonise the governing laws applicable to the maintenance on the global scale because the Hague Protocol is the international agreement developed by the Hague Conference on Private International Law. The HCCH is the intergovernmental organisation the mandate of which is 'the progressive unification of the rules of private international law'.[4]

[1] On the multiplicity and diversity of sources of law in the discussed scope, cf Andrzej Mączyński, 'Wielość źródeł prawa prywatnego międzynarodowego i spowodowane nią kolizje norm kolizyjnych (na przykładzie norm dotyczących zobowiązań alimentacyjnych)', in *Rozprawy z prawa prywatnego: księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce,* Anna Dańko-Roesler and others (eds), 650–671.

[2] OJ L 331, 16 December 2009, 17–18.

[3] ЗАКОН УКРАЇНИ Про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2802-IX, Про внесення змін до Закону ... | від 01.12.2022 No 2802-IX (<https://rada.gov.ua>), accessed 30 November 2024.

[4] HCCH | About HCCH, Art. 1 of the Statute of HCCH.

In Ukraine, the conflict-of-laws rules are governed by the Act of 23 June 2005 on Private International Law[5] (hereinafter: UA PIL). The UA PIL also contains regulations concerning the international civil procedure[6] and autonomously regulates the governing law applicable to maintenance in Section IX regarding family matters. This Section was significantly amended in December 2022 following the entry into force of the 2007 Hague Protocol in Ukraine.

The conflict-of-laws rules in the Ukraine are also regulated by international bilateral agreements, e.g., the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal cases, signed in Kiev on 24 May 1993[7] and entered into force on 14 August 1994 in the international arena (hereinafter: the 1993 Polish-Ukraine agreement).[8] The 2007 Hague Protocol is a multilateral agreement, which in Ukraine entered into force on 1 December 2022.[9]

In Poland, the 2007 Hague Protocol has applied since 11 June 2011, when the 4/2009 Regulation[10] entered into force based on the Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.[11] The 4/2009 Regulation does not contain provisions on the governing law applicable to the maintenance and Article 15 hereof refers specifically to the 2007 Hague Protocol ('The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States bound by that instrument.'[12]).[13]

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[5] Julia Czubak and others, Polish translation: Anatolyi Dowgert 'Ukraińska kodyfikacja prawa prywatnego międzynarodowego', Kwartalnik Prawa Prywatnego 2008/2, 571 (Закон України „Про міжнародне приватне право") No 2709-IV of 23 June 2005, Vidomosti Verkhovnoi Rady Ukrainy (VVR), 2005, No 32, 422.

[6] ibid, 364–365, translation from Ukrainian Julia Czubak and others.

[7] Journal of Laws of 1994, No 96, item 465.

[8] Its provisions may be applied by Polish courts and other authorities after its promulgation on 29 September 1994, cf Mateusz Pilich, in *Ukraińsko-polska umowa o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych. Komentarz do przepisów o sprawach cywilnych*, Mateusz Pilich (ed), Warsawa 2023 and quoted literature, note 9, 21, 253.

[9] ЗАКОН УКРАЇНИ Про ратифікацію Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2339-IX, Про ратифікацію Протоколу пр... | від 01.07.2022 No 2339-IX <https://rada.gov.ua> accessed 30 November 2024.

[10] OJ L 7 of 10 January 2009, 1–79.

[11] 2009/941/WE, OJ L 331, 16 December 2009, 17–18. These issues have already been analysed in the Polish literature, see Anna Juryk, *Maintenance in the Private International Law*, Warsaw 2012, 152–157.

[12] 2009/941/WE, OJ L 331, 16 December 2009, 17–18.

[13] The relationship between various sources of maintenance law has already been discussed in Polish literature, see Anna Juryk*, Alimenty w prawie prywatnym międzynarodowym*, Warsaw 2012, 145–170; Andrzej Mączyński (n 1) 664; Mateusz Pilich, 'An analysis of the Articles 28 and 29, An analysis of the Article 97'*,* in Pilich (n 8) 121–124, 250–251.

2. RATIFICATION OF THE 2007 HAGUE PROTOCOL

Ukraine took steps toward implementing the 2007 Hague Protocol in 2016. However, the ratification did not take place until 6 years after the signing of the Protocol, based on the Act of 1 July 2022.[14] According to Article 9 (1) of the Act on International Agreements of Ukraine,[15] the ratification of international agreements is effected by the adoption of the ratification act and the text of such an international agreement[16] becomes an integral part of this act. The 2007 Hague Protocol is not the first Hague Convention establishing the provision on the law applicable to maintenance obligation. The 2007 Hague Protocol replaced the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations[17] in this area. Contrary to Poland, Ukraine has never adopted the provisions of the 1973 Hague Convention. In the absence of international agreements, the statutory regulation takes on greater significance.

The ratification process of the 2007 Hague Protocol by Ukraine was accomplished together with changes in the statutory regulation which entered into force as of 23 December 2022, soon after the 2007 Hague Protocol entered into force in Ukraine (1 December 2022).[18] As a result, the national statutory regulation duplicates the provisions of the 2007 Hague Protocol. However, the area of application of the statutory regulations is gradually decreasing because the different aspects of the international private law are more commonly regulated by international agreements and EU regulations, which contain the conflict-of-laws rules that have a broad application. We may ask for the reasons put forward by the Ukrainian legislator, however, in practice, the outcomes of such an amendment are more important.

In most of the cases, the main reason for changes in the legislation is the negative assessment of the current legal position. It is reasonable to ask whether the provisions of the UA PIL on the conflict-of-laws rules applicable to the maintenance obligations, which remained in force until 31 November 2022, for more

[14] ЗАКОН УКРАЇНИ Про ратифікацію Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2339-IX, Про ратифікацію Протоколу пр... | від 01.07.2022 No 2339-IX <https://rada.gov.ua> accessed 30 November 2024.

[15] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, ст.540), Про міжнародні договори України | від 29.06.2004 No 1906-IV <https://rada.gov.ua> accessed 30 November 2024.

[16] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, ст.540), Про міжнародні договори України | від 29.06.2004 No 1906-IV <https://rada.gov.ua> accessed 30 November 2024.

[17] Journal of Laws 2000.39.444.

[18] ЗАКОН УКРАЇНИ Про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2802-IX, Про внесення змін до Закону ... | від 01.12.2022 No 2802-IX <https://rada.gov.ua> accessed 7 August 2024.

than 17 years, did not follow the trends in the international regulations on the maintenance obligations. Indeed, the first decade of the 21st century brought major changes to the maintenance obligations defined in the international private law. The main reason justifying such changes was the fact that in 2007, the HCCH (Hague Conference on Private International Law) adopted the 2007 Hague Protocol, which has been in force since 2011 in the EU.

3. THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS IN UKRAINE BEFORE ENTRY INTO FORCE OF THE 2007 HAGUE PROTOCOL

Before the 2022 amendments to the UA PIL, the conflict-of-laws rules applicable to the maintenance obligations were regulated by Articles 66–68.[19] According to Article 66, the law applicable to relations between parents and children was either the law of the child's home country or the law more closely related to the legal relationship, provided that it was more favourable to the child. This was an example of an alternative, as confirmed by the phrase 'or'. Furthermore, the possibility to apply the law more closely related to maintenance depended on the fact that such a regulation is more favourable to the child.[20] The closer connection clause made the conflict-of-laws mechanism more flexible, and under such a clause a judge could, i.e., apply the general connecting factor of the child's country habitual residence, the common nationality of the parties to the maintenance obligation, etc.

In turn, Article 67 of the UA PIL regulated the law applicable to other maintenance obligations arising from family relationship, except for maintenance obligations arising from parent-child relationship.

Therefore, the literal interpretation of Article 67 of the UA PIL indicates a clear distinction between the conflict-of-laws regulation applicable to maintenance obligations arising from parent-child relationship and the conflict-of-law regulation on maintenance obligations arising from other family relationships.

[19] On Private International Law | on 23 June 2005 No 2709-IV (<https://rada.gov.ua>), accessed 5 August 2023; cf Anatoliy Dowgert, 'Ukrainian codification of the private international law', Private Law Quarterly 2008/2, 364-365, translation from Ukrainian Julia Czubak and others: Anatolyi Dowgert (n 5) 381; Mariia Zeniv, 'Dochodzenie alimentów na rzecz dziecka w sytuacjach międzynarodowych na tle prawa ukraińskiego', in Jacek Mazurkiewicz, Piotr Mysiak (eds), *Dobro pojemne jak krzywda. Prawna ochrona dziecka. Deklaracje a rzeczywistość*, Wrocław 2017, 257; Mariia Zeniv, 'Obowiązek alimentacyjny w prawie materialnym i prawie prywatnym międzynarodowym Ukrainy', Problemy Prawa Prywatnego Międzynarodowego, Vol 31, 126–127, <https://doi.org/10.31261/PPPM.2022.31.04> accessed 7 August 2024.

[20] Mariia Zeniv (n 19) 257.

Thus, the law applicable to parent-child and vice-versa maintenance obligations falls under the conflict-of-laws rules specified in Article 66 of the UA PIL, while the regulations applicable to other maintenance claims are regulated by the Article 67 of the UA PIL.

These other maintenance obligations were governed, in the first place, by the law of the country on which territory the person entitled to the maintenance had a residence (Article 67(1) of the UA PIL). In the event that the entitled person was not able to obtain these under the law of the country of his/her residence, according to Article 67(2) of the UA PIL, the *lex patriae* was the law applicable to the maintenance obligations between these parties. However, if the entitled person could not obtain maintenance neither under the law of the country of his/her residence nor under the *lex patriae*, then in such case, the applicable law was the law of the country of residence of the maintenance debtor (Article 67(3) of the UA PIL).

Therefore, even before its amendment, the UA PIL already utilized the corrective technique indicating the applicable law.[21] This type of technique is based on the assumption of seeking such substantive regulations as applicable law which ensure obtaining the maintenance by the entitled person. Taking as an example a situation where the court has determined the law of the country of residence of the maintenance creditor; however, despite such determination, the creditor will not obtain the maintenance; then the judge is not so much entitled as obliged to continue to search for the applicable law, so that the creditor obtains the maintenance. The judge will act based on the connecting factors forming this indication, in the order and sequence indicated by the legislature. The legislature in such cases also designates the maximum number of the connecting factors that can be used while determining the applicable law. The process of determination of the law applicable to the maintenance obligation is limited to maximum 3 connecting factors, in order to prevent excessive prolongation of the determination of the applicable law.

This technique shows a trend toward materialization of private international law, the goal of which is to provide sufficient protection of the creditor in obtaining the maintenance by setting a specific material legal objectives. This goal is gaining importance in the area of maintenance obligations in the parent-child relationships, where the child is the maintenance creditor. Meanwhile, the UA

[21] Andrzej Mączyński, 'Międzynarodowe prawo rodzicielskie w ustawodawstwach państw europejskich', Kwartalnik Prawa Prywatnego 1992/1–4, 135, 143; Andrzej Mączyński, 'Wskazanie kilku praw przez normę kolizyjną prawa prywatnego międzynarodowego', in *Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu*, Andrzej Mączyński, Maksymilian Pazdan, Adam Szpunar (eds), Kraków 1994, 238–239; Tomasz Pajor, *Nowe tendencje w części ogólnej prawa prywatnego międzynarodowego państw europejskich,* PPHZ, Vol 18, Katowice 1995, 64–65; Anna Juryk, *Maintenance in the private international law*, Warsaw 2012, 191–194, 197–198.

PIL, before its amendment in 2022, utilized the corrective designation technique for all maintenance obligations, except for the maintenance obligations arising from a parent-child relationship. The maintenance obligations arising between parents and a child were governed either by the law determined by the connecting factor of the child's citizenship or other law falling under the closer connection clause.

The corrective technique indicating the applicable law is characteristic of the Hague Conventions produced by the Hague Conference on Private International Law (HCCH).

In accordance with Article 68 of the UA PIL, the maintenance debtor could avoid the payment of maintenance for his/her relatives, if in the light of the country residence law, such maintenance obligation between him/her and the relatives did not exist.

The UA PIL did not recognize the habitual residence as the connecting factor, even though the habitual residence is considered as the most relevant factor to determine the law applicable to the maintenance obligations. The UA PIL consistently utilized the place of residence as such a connecting factor. In very broad terms, the connecting factor of habitual residence is based on the factual matters and permanence of stay, whereas the main component of the place of residence is an element of the will expressed as an intent to stay in a given place.

The UA PIL, before its amendment, was generally a combination of different arrangements utilized in the bilateral agreements, made by Ukraine with other States, i.e., Poland, and the provisions of the Hague Convention of 2 October 1973 on the law applicable to maintenance obligations.[22] It is worth mentioning in this place that Ukraine has never been bound by the provisions of the 1973 Hague Convention. Instead, Ukraine attempted to adjust the provisions of the UA PIL accordingly.

The qualification of the maintenance from parents on behalf of children as the conflict-of-laws rule concerning the parent-child legal relationship and the citizenship of the child as the connecting factor, indicates similarities to the Polish-Ukrainian Agreement of 1993. According to Article 28 of the 1993 Polish-Ukrainian Agreement, the legal relationships between parents and children, including maintenance claims involving children (including a child who reached the age of majority[23] – after AJ) are governed by the country laws of the child, in this particular case, either Polish or Ukrainian law. Nonetheless, the scope of the conflict-of-laws rule defined in Article 66 of the UA PIL was broader than the scope of a similar rule in Article 28 of the 1993 Polish-Ukrainian Agreement and also included the maintenance claims from children on behalf of parents and

[22] Journal of Laws of 2000 No 39, item 444.

[23] cf Mateusz Pilich, 'An analysis of the Article 28', in Pilich (n 8) 113–114.

introduced, as an alternative, the closer connection clause for maintenance claims between children and parents.

Pursuant to Article 29 of the 1993 Polish-Ukrainian Agreement, the law of the place of the residence of the maintenance creditor, other than the maintenance claims defined in Article 29 (after AJ), is applicable to other family law claims[24] (including, i.e., the maintenance claims from children for parents, between other relatives, relatives by affinity, spouses, ex-spouses, partners). The 1993 Polish-Ukrainian Agreement, contrary to UA PIL, does not utilize the corrective technique indicating the applicable law.

Furthermore, the corrective technique and *lex fori*, common nationality[25] as the connecting factor indicating the applicable law to maintenance obligations, utilized by the Ukrainian legislature in UA PIL are similar to the provisions of the 1973 Hague Convention. Moreover, Article 68 of the UA PIL was modelled based on the regulations of the 1973 Hague Convention.[26] The main difference lies in the exclusion of the corrective technique indicating the applicable law in the maintenance claims between children and parents. Such an exclusion denies the purposes why it was introduced in the first place, which is a facilitation concerning recovery of maintenance for children. Even though the provision of the UA PIL regarding the conflict-of-laws rules sought to keep up with the rapid changes in the then current trends, its provisions did not extend the corrective technique indicating the applicable law on the child maintenance claims. Additionally, it did not utilize the connecting factor of the habitual residence of the maintenance creditor.

4. THE AMENDMENT OF THE UA PIL AS A CONSEQUENCE OF THE IMPLEMENTATION OF THE 2007 HAGUE PROTOCOL

After the amendment of the UA PIL in 2022, the regulation of the law applicable to the maintenance in the UA PIL was expanded to 6 articles: Article 67, Article 67^1, Article 67^2, Article 67^3, Article 67^4, Article 68, while the location of these provisions within the Act did not change.[27]

The first important modification applies to the exclusion of the maintenance between parents and children from the scope of Article 66 which defines the

[24] ibid, 123.

[25] See Articles 4 and 5 of the Convention of 1973 on the Law applicable to maintenance obligations.

[26] Articles 7 of the Convention of 1973 on the Law applicable to maintenance obligations.

[27] Про міжнародне приватне право | від 23.06.2005 No 2709-IV (<https://rada.gov.ua>), accessed 15 August 2024.

law applicable to the parent-children relationships. The second major change concerns modifications made in Article 67 of the UA PIL introducing the general rule on the law applicable to the maintenance obligations. In accordance with Article 67(1), the maintenance obligations arising from the family relationships fall under the law of the country's place of residence of the maintenance creditor, regardless of the sources of such maintenance. In other words, family relationships shape the grounds for such maintenance.

However, this general rule has several exceptions. The foremost exception is that the applicable law chosen by both parties prevails over this general rule. According to the provisions of Article 67(2) of the UA PIL, parties to the maintenance obligation may also designate the law applicable to the maintenance obligation on conditions defined in Article 67^4. It is, therefore, a limited designation because Article 67^4 authorises the designation of one from a number of laws: 1) the law of the State of one of the parties at the time of designation, 2) the law of the States of the place of residence of one of the parties at the time of designation, 3) the law designated by the parties as applicable, or the law in fact applied, to their property regime; 4) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation, 5) the law at the place where the court selected by the parties has its seat for the purposes of the given maintenance proceeding. The provisions specified in subsections 3 and 4 of Article 67^4(2) are dedicated to spouses, ex-spouses and partners. This, however, does not exclude the selection of other law defined in subsections 1, 3 and 5 of Article 67^4(2) of the UA PIL. The UA PIL also determines the form of the agreement on the designation. In accordance with Article 67^4, such an agreement has to be in writing and an agreement concluded in Ukraine requires notarisation.

Furthermore, the designation of law is not always possible. The provisions of Article 67^4(2) explicitly exclude the parties' designation of the law applicable to maintenance paid to minors, especially a person under the age of 18 years or 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. In addition, Article 67^4(2) *in fine* specifies the timeframes of the law applicable to the given maintenance proceeding applied by the court selected by the parties in its seat. Such designation has to be done prior to the beginning of such a proceeding. Last but not least, the limitation on the selection of the applicable law is defined in Article 67^4(3) of the UA PIL, according to which the agreement on the designation of law is void if it leads to manifestly unfair or unreasonable consequences for any of the parties, unless at the time of the designation, the parties were fully informed and aware of the consequences of their designation.

It is also noteworthy that the choice of law is also addressed in Article 5 of the UA PIL, which establishes the institution of general private international law. This may have implications for the application of the applicable law under the maintenance provisions set forth in Articles 67–68 of the UA PIL. Indeed, in the

absence of any regulation pertaining to the choice of law in Article 67(4) of the UA PIL, recourse may be made to Article 5 of the UA PIL.

Another exception to the general rule governs the designation of the law applicable to the maintenance between spouses, ex-spouses and partners. Contrary to the Polish law, the substantive law of Ukraine[28] also regulates the maintenance obligation between partners. The partnership is understood as a relationship between a man and a woman who are not married, but have lived together as a family for longer time.[29] For this group of maintenance creditors and debtors, Article 67^3 of the UA PIL stipulates that the law applicable is either the law of the State of last common place of residence of the spouses, ex-spouses or partners, or the law of the State which has a closer connection with the married couple (partnership), only if one of the parties to the maintenance proceeding objects utilizing the law designated by the general rule, which is the law applicable to the place of residence of the maintenance creditor (Article 67(1) of the UA PIL). Article 67^3 makes the departure from the application of the general rule dependent only on the objection of the (ex-)spouse or partner. The objection of one party, not to mention both parties, is sufficient to apply the provisions of Article 67^3 of the UA PIL. *A contrario*, an absence of such an objection results in the application of the general rule, according to which the place of residence designates the applicable law.

Article 67^3 of the UA PIL lays down the alternative and equivalent application of the two different laws: the law of the last common place of residence of the (ex-) spouses/partners or other law which has a closer connection with the married couple (partnership). Designation of law having a closer connection with the married couple (or partnership in case of partners) rather than the law of the last common place of residence is an example of an application of the closer connection clause determining the law applicable to the maintenance obligation.

The amendment to the UA PIL employed the corrective technique determining the applicable law. Unlike under the previous legal regime, the amendment applies only to the maintenance included in Articles 67^1 and 67^2. It is about the maintenance between the parents and children and maintenance from persons other than parents for the benefit of a minor. Whereby Article 67^2 of the UA PIL precisely lists the maintenance creditors, which refers to the substantive regulation of the maintenance in Ukraine. Article 67^2 specifies the maintenance from grandparents on behalf of their minor grandchildren, stepmothers/stepfathers for their stepchildren, from siblings for the benefit of minor siblings and from people who raised the child. The utilization of the conceptual grid of the substantive law

[28] Article 91 of the Ukrainian Family Code (UA Family Code), СІМЕЙНИЙ КОДЕКС УКРАЇНИ (Відомості Верховної Ради України (ВВР), 2002, No 21–22, 135), <https://zakon.rada.gov.ua/laws/show/2947-14#Text> accessed 15 August 2023.

[29] Article 91 of the UA Family Code explains that its provisions apply only to the relationship between a female and male („жінки та чоловіка"), similar position is presented in doctrine, cf Mariia Zeniv (n 19) 114–116 and the literature therein.

to define the scope of conflict-of law rules cannot be considered as a positive phenomenon because such rules serve to demarcate different legal systems.

Therefore, in the corrective technique indicating the applicable law, if the maintenance creditor cannot obtain the maintenance from the debtor based on the law applicable to the place of residence of the creditor, then the priority shall be given to the law applicable at the seat of the court (*lex fori* – Article 67^1). If the creditor cannot obtain the maintenance based on the law applicable to the place of the site of the court, then according to the Article 67^1(3), the law of the common citizenship of the parties to the maintenance obligation shall apply. However, if the maintenance creditor seeks the maintenance before the court in which the maintenance debtor has his/her place of residence, *lex fori* is the connecting factor enshrining the corrective technique indicating the applicable law and the connector of the place of residence can be utilized only if the maintenance creditor will not be able to obtain the maintenance in accordance with the law applicable at the seat of the court (in the State of residence of the creditor entitled to maintenance according to Article 67^1(2)). In these rare situations when the creditor is not able to receive the maintenance based on the law applicable to the place of residence, the parties should refer to the law applicable to their common citizenship (Article 67^1(3)). However, if the parties do not have the common citizenship, the search for the applicable law ends on the second factor in the corrective technique indicating the applicable law. For some incomprehensible reason, the factor of the habitual residence is missing.

Article 68(1) of the UA PIL[30] is not sufficiently precise. According to subsection 1 thereof, the entitlement to waive the creditor's right to maintenance is determined by the place of residence. However, only the interpretation, *a contrario*, of the subsection 2 of this Article states that the subsection 1 refers to the maintenance creditor. Notwithstanding the connecting factor which is utilized to determine the applicable law, or the right of the maintenance creditor to waive his/her rights, must be solely based on the creditor's place of residence applicable law. In turn, in accordance with the Article 68(2), the maintenance creditor can avoid paying the maintenance on the ground that either there is no such obligation under the law of the place of residence of the debtor, or in the absence of the common nationality of both parties to the maintenance obligation, if they do have one. In the case of the common nationality of the creditor and debtor, such assessment is made cumulatively including two legal systems. The existence of such an obligation in one of the two legal systems precludes the debtor from invoking his/her rights specified in subsection 2 of Article 68. The entitlement of the creditor does not apply to rejection of the maintenance from parents on behalf of children and maintenance between (ex-)spouses (partners).

[30] Compare Article 6 of the 2007 Hague Protocol.

5. THE POTENTIAL IMPLICATIONS AND ASSESSMENT OF THE NEW REGULATION OF THE UA PIL

Even the provisional analysis of the UA PIL shows the significant similarities to the provisions of the 2007 Hague Protocol.[31] The title of the amendment to the UA PIL, as well the adoption date by the Verkhovna Rada of Ukraine (1 December 2022) indicate a link between this amendment and the 2007 Hague Protocol. The subject amendment was introduced under the Act of 1 December 2022 on the changes to the Ukrainian International Private Law in connection with the ratification of the Protocol on the Law Applicable to Maintenance Obligations. As mentioned above, such act was adopted by the Ukrainian parliament on the exactly same date as when the 2007 Hague Protocol entered into force in Ukraine.

The title of the Act amending the UA PIL, as well as its effective date causes associations of the implementation of the provisions of the 2007 Hague Protocol to the UA PIL. Such construct is not known in Polish practice. However, according to the Article 9 of the Constitution of Ukraine,[32] international agreements, ratified by the Verkhovna Rada of Ukraine, become an integral part of the national legislation, similarly as in Poland.[33]

The Ukrainian legislator presented a similar approach in Article 19 of the Act of 29 Juni 2004[34] on international agreements. According to Article 19(1) thereof, international agreements are the integral part of the national legislation of Ukraine and apply to the same extent. On the other hand, Article 19(2) clearly shows that in the case of conflicts between the provisions of international agreement and the provisions of national rules, the former shall prevail. Article 3 of the UA PIL presents similar approach, international agreements take precedence over the provisions of this Act. Similar assumptions underlay the Polish legislation.

In the explanatory memorandum[35] accompanying the draft of the Act from 2022 amending the UA PIL, the Ukrainian legislator confirmed that the main purpose of this project is the appropriate implementation of the provisions of the

[31] Compare Article 3–8 of the 2007 Hague Protocol.

[32] КОНСТИТУЦІЯ УКРАЇНИ (Відомості Верховної Ради України (ВВР), 1996, No 30, 141), Конституція України | від 28.06.1996 No 254к/96-ВР (<https://rada.gov.ua>) accessed 15 August 2024.

[33] Article 91(1) of the Constitution of the Republic of Poland, Journal of Laws of 1997, No 78, item 483.

[34] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, 540), Про міжнародні договори України | від 29.06.2004 No 1906-IV (<https://rada.gov.ua>) accessed 15 August 2024.

[35] ПОЯСНЮВАЛЬНА ЗАПИСКА до проєкту Закону України «Про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання», Картка законопроекту – Законотворчість (<https://rada.gov.ua>) accessed 15 August 2024.

2007 Hague Protocol to the Ukrainian national legislation. Such implementation is a condition *sine qua non* for the correct application of such provisions by the courts and the application of the rights of citizens in terms of the maintenance obligation. Elsewhere, the explanatory memorandum states that the purpose of the amendment is to adjust the national conflict-of-laws rules to the conflict-of-laws rules included in the 2007 Hague Protocol and, in my opinion, this is the main purpose of the amendment to the UA PIL.

The implementation referred to in the explanatory memorandum may suggest that the international agreement is not directly applicable. The explanatory memorandum also explains that one of the reasons behind the amendment of the UA PIL is to ensure that the 2007 Hague Protocol is applied properly. The memorandum invokes Article 9(7) of the Act on international agreements according to which if the ratification process of an international agreement requires the adoption of a new act or amendment of the existing act, then the drafts of such acts should be submitted to the Verkhovna Rada of Ukraine together with the ratification draft and the Verkhovna Rada of Ukraine should adopt them simultaneously. It was, therefore, considered appropriate to amend the UA PIL as a necessary measure to implement the 2007 Hague Protocol. It is difficult to agree with such approach because the provisions of the 2007 Hague Protocol are sufficiently precise and clear to allow direct implementation and there is no need to issue an additional act in order to implement the international agreement. The Polish constitution law also recognises two types of international agreements: agreements applicable directly and agreements requiring introducing amendments to the domestic laws (Article 91(1) of the Constitution of the Republic of Poland). The 2007 Hague Protocol belongs to the first group of the agreements applicable directly. An opinion of the Supreme Court of Ukraine[36] concerning the amendment project of 2022 confirms such approach. The Supreme Court of Ukraine took the view that including the detailed provisions in the UA PIL modelled on the provisions of the 2007 Hague Protocol is not required because the ratified Protocol will become an integral part of the Ukrainian national legislature and will apply directly. The Supreme Court recommended including a clear reference to the 2007 Hague Protocol in the UA PIL. [37]

It is also worth mentioning that Article 4(4) of the Act on international agreements of Ukraine[38] describes a situation in which the new international agreement

[36] Картка законопроекту - Законотворчість (<https://rada.gov.ua>) accessed 15 August 2024.

[37] <https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=6107&conv=9&_gl=1*xg-8wga*_ga*NDY4OTQ1MzAuMTY5MjA0MDUyNA..*_ga_G9VY19PRSD*MTY5MzMzOD-MzNy4yMy4xLjE2OTMzMzg0MDMuNjAuMC4w> accessed 15 August 2024.

[38] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, 540), Про міжнародні договори України | від 29.06.2004 No 1906-IV (<https://rada.gov.ua>) accessed 15 August 2024.

will have an impact on the present regulations of the Ukrainian domestic law. In such a situation, an offer to conclude the new international agreement should be accompanied by a draft presenting the potential changes to the existing acts or a need for new legislation. The preparatory documents to the amendment of the UA PIL did not refer to the provisions of the Article 4(4) of the Law on international agreements of Ukraine, instead the full analysis was made based on Article 9(7) of this Law.

The above mentioned regulations confirm/indicate that the Ukrainian legislation does not have a uniform position on the direct implementation of international agreements. The advantage of the solution proposed by Article 4(4) of the Law on the international agreements of Ukraine is to accommodate the needs of the practice which does not need to engage in the process determining which provisions of the international agreement are incompatible with the domestic regulation. Article 4(4) ensures that that the provisions of the domestic laws will be aligned with international agreements. A different view is presented by the international private law and reflected in Article 3 of the UA PIL, which states that international agreements prevail over the statutory regulation.

The amendment of the UA PIL after the 2007 Hague Protocol came into force is considered as a good opportunity to refine some of the provisions of international agreements, give them an interpretation or even to extend their scope. For instance, Article 67^3 of the UA PIL was added after the UA PIL was amended in 2022. This Article clearly refers to the maintenance obligation between partners, contrary to provisions of Articles, 1, 5 and 8(1) of the 2007 Hague Protocol. Article 1 of the 2007 Hague Protocol defines the scope of the act and explains, among others, that this provision determines the law applicable to the maintenance obligation arising from marriage. Only Articles 5 and 8(1)(d) provide further details according to which the provisions of this Protocol are also applicable to maintenance obligation between ex-spouses and the parties to a marriage which has been annulled. The literal interpretation of Article 1 in conjunction with Article 5 and 8 of the 2007 Hague Protocol indicates that the maintenance between partners is outside its scope. In my opinion, the 2007 Hague Protocol should be applied to maintenance between partners if the substantive law specified as the law applicable defines such an obligation between the partners. It could be also argued that since the doctrine allows for the application of the 2007 Hague Protocol to partnerships, which are not perceived as marriages, the provisions of such Protocol should also apply to the relationships existing as marriages, even though formally they are not recognized as ones. According to Article 91 of the Ukrainian Family Code, the maintenance obligation between partners applies only to a situation where one of the partners becomes incapacitated for work during cohabitation with his/her partner.[39]

[39] Zoryslava Romovska, 'The Family Code of Ukraine: the synthesis of own and foreign', in *From family law and official register issues*, Henryk Cioch, Piotr Kasprzyk (eds), Lublin 2007, 40.

Nevertheless, the amendment of the UA PIL from 2022 prejudged the application of the conflict-of-laws rules to the maintenance obligations between partners. The intent of such amendment is to ensure the proper application of the 2007 Hague Protocol by the Ukrainian authorities. In such a situation, these authorities will be more willing to apply to the maintenance obligations between partners, not only the statutory conflict-of-laws rules but also the conflict-of-laws rules specified in the 2007 Hague Protocol. This may also apply to Polish citizens living in Ukraine.

Another example presenting how the provisions of the 2007 Hague Protocol were clarified in the UA PIL is Article 67^4 (2) *in fine*. According to it, the designation of the law as applicable to the given proceeding can be made only prior to initiating the particular case, which is not provided by Article 7(2) of the 2007 Hague Protocol. A temporary limitation of the choice of applicable law seems therefore justified because the court requires legal certainty of which law will be applicable to resolve this case. Thus, Polish literature takes an assumption that the designation of law should be possible no later than on entering a defence on the merits. Especially, a disclosure of the fact that the agreement on the designation of law was entered into at the later stage of the proceeding has a significant implications on the proceeding itself.[40] The 2007 Hague Protocol states that the parties should enter into a written agreement at the same time designating the applicable law; on the other hand, Article 67^4(2) of the UA PIL is more strict in this area and inserts a condition for notarisation if such an agreement was concluded on the territory of Ukraine. Article 8(2) of the 2007 Hague Protocol specifies that such an agreement has to be in writing and signed by both parties or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference. There is no need for notarisation of such an agreement, a handwritten or electronic signature is sufficient. An inconsistency between the wording of the 2007 Hague Protocol and the wording of the UA PIL on the form of the agreement designated by the applicable law may distort the provisions of the Protocol in the future. The Ukrainian courts may presume that the provisions of the UA PIL are consistent with the provisions of the 2007 Hague Protocol and instead of referring to the text of the Protocol, they will rely on the provisions of the UA PIL.

The statutory regulation can differ from the convention regulation; however, in this case it is not consistent with the rationale for the UA PIL amendment. *De facto*, the differences should be avoided wherever possible. Consequently, even assuming that the purpose of the amendment was not to implement, but only harmonise the provisions of the UA PIL with the provisions of the 2007 Hague Protocol, the procedure applied by the Ukrainian legislator poses a risk that the implemented text will be distorted. In my opinion, the most concerns arise around

[40] Piotr Mostowik, 'Prawo właściwe dla rozwodu i separacji w świetle rozporządzenia unijnego nr 1259/2010', Kwartalnik Prawa Prywatnego 2011/2, 366–367.

the replacement of the habitual residence utilized by the 2007 Hague Protocol with the place of residence (UA PIL). These connecting factors have different meaning and substance, as well as firm interpretation in the EU law. The habitual residence is the most important connecting factor determining the law applicable to the maintenance obligation. It is, therefore, all the more surprising that such connecting factor was not included in the UA PIL amendment.

Furthermore, the scope of the applicable law is influenced by the regulations set forth in the general part of the UA PIL. This is particularly evident with regard to the institution of the *renvoi* principle. Article 12 of the 2007 Hague Protocol precludes the application of this principle with respect to the designation of the applicable law governing maintenance. Nevertheless, in accordance with Article 9(2) of the UA PIL,[41] with respect to personal and family-related legislation, a return reference to Ukrainian law is permitted. In comparison to the 2007 Hague Protocol, there is a notable discrepancy in the scope of application of the conflict-of-laws rules on maintenance under the UA PIL. Despite the Amendment Act of 1 December 2022 introducing the wording 'or an international agreement' into the wording of Article 9(1) *in fine* of the UA PIL, it is this author's opinion that this change is counterproductive. In accordance with paragraph 1 of Article 9, 'Any reference to the law of a foreign state should be construed as a reference to the norms of substantive law regulating the relevant legal relations excluding the application of its conflict-of-law rules, unless otherwise established by law or international agreement'. In contrast, the content of paragraph 2, which states, 'In cases on personal and family status of an individual, *renvoi* to the law of Ukraine is accepted', has remained unchanged. Given that the Ukrainian legislature excludes referral in principle, the introduced amendment at most allows for the admission of referral on the basis of an international agreement. In order to ascertain the desired effect of excluding the use of a *renvoi* reference for maintenance, it would be prudent to include the wording 'unless otherwise established by international agreement' in paragraph 2 of Article 9 of the UA PIL.

We cannot risk losing sight of the mandatory uniform interpretation of the provisions of the 2007 Hague Protocol (Article 20). In Poland, as well as in the EU, the 2007 Hague Protocol has been in force for more than 12 years and its uniform interpretation is guaranteed by the Court of Justice of the EU. Even though the Ukrainian authorities are not bound by the Court of Justice case law, nevertheless, each State acceding to the Protocol should observe the previous practice and follow the current interpretation. Otherwise, the uniform interpretation of the Protocol becomes a fiction. It is, therefore, justified that the Polish authorities

[41] <https://zakon.rada.gov.ua/laws/show/en/2709-15?lang=uk#Text> accessed 25 August 2024.

employ the well-established practice on applying the 2007 Hague Protocol with regard to the non-EU countries, which in the future will be bound by this Protocol.

The documentation legislation process indicates that the amendment of the UA PIL should contribute to the harmonisation process of the Ukrainian legislation with the legislation of the EU Member States.[42] Furthermore, the additional purpose of this amendment is to harmonise the provisions of the international private law, as well as to unify the application of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance[43] (the 2007 Convention). However, it is worth emphasizing the fact that entering the 2007 Convention into force would not entail changes to the UA PIL. The unification of the law applicable to the maintenance obligation is only a small fracture of the complex issue of the cross-border maintenance. For this reason, the consent to be bound by the 2007 Convention does not entail the obligation to be bound by the 2007 Hague Protocol.

In conclusion, the amendment of the UA PIL should not play any role in the Polish-Ukrainian relationships. According to the priority rule of the 2007 Hague Protocol, the demands presented in the justification to the amendment on the need to implement the 2007 Hague Protocol into the Ukrainian legislature as necessary to ensure the correct application of these provisions by the courts of Ukraine and obtaining the full rights of the maintenance obligations by the Ukrainian citizens are entirely unfounded.

6. SUMMARY

The accession to the 2007 Hague Protocol by Ukraine opens a new chapter in the Polish-Ukrainian relationships. Due to this accession, both States will be able to resign from the ways of determining the law applicable to the maintenance which, however, do not meet the current requirements sufficiently. It is worth emphasizing the fact that the law applicable to the maintenance obligation from parents on behalf of children will no longer be determined by the connecting factor of citizenship but by the habitual residence. The habitual residence is the most appropriate connecting factor to determine the form and the amount of maintenance in a given situation. Furthermore, the selection of the law applicable to the maintenance for children will be based on the correcting technique, targeted in

[42] ВИСНОВОК щодо проекту Закону про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання (реєстр. No 6107 від 27 вересня 2021 року) 1539972 (<https://rada.gov.ua>) accessed 25 August 2024.

[43] ibid.

particular at receiving the maintenance. In such a way, the child's interest is protected against the applicable law which does not guarantee such child the maintenance. Finally, the parties' choice to designate the applicable law is limited; however, such limitation does not apply to the maintenance on behalf of children and vulnerable adults. The designation of law may have a major contribution to the maintenance between (ex-)spouses.

The Supreme Court of Ukraine decided that the amendment of the UA PIL due to and in conjunction with the ratification of the 2007 Hague Protocol, together with the justification of the proper implementation and execution by the Ukrainian authorities was unnecessary. The justification of the amendment is denial of the role and position of the international agreements in the legal system of Ukraine.

Furthermore, the discrepancies between the provisions of the Hague Protocol and the UA PIL may result in the inadvertent distortion of the 2007 Hague Protocol's provisions if a judge erroneously applies the UA PIL in lieu of the 2007 Hague Protocol.

Notwithstanding the flawed rationale, the amendment of the UA PIL also presents some positive aspects. For instance, it could potentially result in the harmonisation of the legal framework governing alimony through the implementation of the UA PIL in relations with countries that are not parties to the Hague Protocol, provided that it does not give way to the provisions of other international agreements, e.g., bilateral ones.

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