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INTERNATIONAL MAINTENANCE LAW IN LEGAL RELATIONS BETWEEN SWITZERLAND AND THE EU¹

Abstract

Three new instruments, which have only recently entered into force, have changed the field of international maintenance law: the 2007 Maintenance Convention (the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance), the 2007 Maintenance Protocol (Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations) and the EU Maintenance Regulation (Council Regulation [EC] No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ [2009] L 7/1; EU Maintenance Regulation). Whereas the EU is bound by all of these instruments, Switzerland has not ratified nor acceded to the Hague instruments yet, nor have the provisions of the EU Maintenance Regulation been extended by means of a parallel instrument to cover Switzerland. This new legal situation raises questions regarding the applicability of these instruments in cross-border cases involving Switzerland and the EU.

The key issue discussed in this essay is the question of jurisdiction in cross-border cases involving Switzerland and the EU Member States, and in particular how to disentangle the scope of the 2007 Lugano Convention from the scope of the EU Maintenance Regulation. As none of these instruments regulates its applicability explicitly, the answer to this question has to be found by interpreting the relevant provisions. The authors conclude that whenever there are proceedings pending before a Swiss court, the 2007 Lugano Convention applies, whereas the courts of an EU Member State have to assume jurisdiction exclusively according to the EU Maintenance Regulation. As a result, different provisions apply, which leads to a conflict of jurisdiction regarding choice of court agreements.

If jurisdiction has been assumed by a court of an EU Member State, the applicable law is determined by the 2007 Maintenance Protocol, whereas in Switzerland, the 1973 Hague Maintenance Convention (the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations) applies. Again, the different provisions enable forum shopping, with undesirable consequences.

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Keywords

maintenance obligations – Lugano Convention – EU Maintenance Regulation – conflict of jurisdiction – forum shopping

I. INTRODUCTION

The law of maintenance has existed for a long time and is profoundly rooted in our society. During the times of the Roman Empire mutual maintenance obligations towards family members related by blood were already recognised². Today maintenance obligations are a fundamental pillar of our society, as the social safety and wellbeing of the weaker party is guaranteed. Besides, the importance of maintenance obligations is shown in its regulatory density in international agreements. Trying to provide an accurate overview for the reader, one sooner or later realises that literally jungle-like conditions exist: while some agreements regulate only jurisdiction or the applicable law, others contain provisions on the recognition and enforcement of decisions and legal assistance. Other agreements even fully regulate the legal relations. Yet the most significant agreements in legal relations between Switzerland and the EU can be counted on the fingers of one hand³:

- New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance (1956 New York Convention, SR 0.274.15)⁴,
- Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (1973 Hague Maintenance Convention on Applicable Law, SR 0.211.213.01),
- Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973 Hague Maintenance Convention on Enforcement, SR 0.211.213.02),
- Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007 Lugano Convention, SR 0.275.12).

² Codex 5, 25, 1 (*de alendis liberis ac parentibus*). M. Kaser, R. Knütel, *Römisches Recht*, München 2014, § 61 para 1 et seq.

³ Earlier conventions which have lost some of their relevance due to newer regulations are e.g. the Hague Convention of 24.10.1956 on the law applicable to maintenance obligations towards children (SR 0.211.221.431) and the Hague Convention of 15.04.1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (SR 0.211.221.432).

⁴ The New York Convention sets up a basis for international co-operation between parties on the enforcement of maintenance obligations. In the context of this paper the convention is not further discussed.

Recently the list of relevant agreements in the field of international maintenance law has been supplemented by three other conventions: The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (2007 Maintenance Convention)⁵, the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2007 Maintenance Protocol)⁶ and the EU Maintenance Regulation⁷.

1. THE 2007 MAINTENANCE CONVENTION

The Maintenance Convention was adopted on 23 November 2007 on the occasion of the 21st session of the Hague Conference on Private International Law and entered into force on 1 January 2013. Among the parties bound by the convention is the EU (without Denmark)⁸. Besides the EU, as a big player, the convention has furthermore been signed by the United States. Unfortunately, up until today the ratification is still pending⁹. Although Switzerland participated in the preparatory work, it has not yet signed the convention¹⁰.

The 2007 Maintenance Convention is based on its predecessor – the

⁵ The text of the convention is available under the following link: <https://assets.hcch.net/docs/ec45a3b3-8c8b-4fbd-90d2-0e3533602124.pdf> [last accessed: 1.02.2016].

⁶ The text of the convention is available under the following link: <https://assets.hcch.net/docs/ec45a3b3-8c8b-4fbd-90d2-0e3533602124.pdf> [last accessed: 1.02.2016].

⁷ Council Regulation (EC) No 4/2009 of 18.12.2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/1 of 10.01.2009, p. 1 (EU Maintenance Regulation).

⁸ An overview of the current Member States is available under the following link: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> [last accessed: 1.02.2016].

⁹ Under the leadership of president Barack Obama legislative work in view of the ratification is advancing. On 29.09.2014 the implementing legislation for the 2007 Maintenance Convention has been signed by the President. The legislation has been passed subsequent to the approval by Congress of the Preventing Sex Trafficking and Strengthening Families Act (available online: www.hcch.net/index_en.php?act=events.details&year=2014&varevent=381 [last accessed: 1.02.2016]). The Act requires all states to pass the Uniform Interstate Family Support Act (UIFSA) 2008 Amendments, which provide for a uniform process of establishment and enforcement of child support obligations across statelines, by 2015. The status of the current work process can be accessed under the following link: [www.uniformlaws.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20\(2008\)](http://www.uniformlaws.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20(2008)) [last accessed: 1.02.2016].

¹⁰ The Federal Office of Justice has limited its efforts to internal examinations: Sandra John, *Überblick über die internationale Durchsetzung von Unterhaltsansprüchen aus dem Blickwinkel der Zentralbehörde für internationale Alimentensachen im Bundesamt für Justiz*, Die Praxis des Familienrechts (FamPra.ch) 2015, p. 559.

Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations dating from 1973 – and replaces this prior convention in relation to the contracting states¹¹. The convention provides for rules on the recognition and enforcement of judgments and introduces also rules on administrative co-operation. It aims to accelerate and simplify the recovery of maintenance abroad. Inspired by the 1980 Hague Child Abduction Convention, therefore, a system of central authorities is established¹².

The 2007 Maintenance Convention applies to maintenance obligations towards a person under the age of 21 years arising from a parent-child relationship as well as towards spouses and their claims for spousal support. Whereas child maintenance is the core maintenance obligation to which the convention as a whole applies, the spousal support is only then covered by the substantive scope when the claim is linked to child support¹³. The contracting states can declare the extension of the material scope of the Convention or any part of it to other maintenance obligations arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons¹⁴. Even though a core maintenance obligation, the states can preserve the application of the convention to children under the age of 18 years¹⁵.

The 2007 Maintenance Convention merely binds the contracting states and therefore is effective only *inter partes*¹⁶.

2. THE 2007 MAINTENANCE PROTOCOL

The 2007 Maintenance Protocol supplements the 2007 Maintenance Convention. While the agreements both have been drawn up and adopted simultaneously during the Hague Conference on Private International Law, the 2007 Maintenance Protocol can be signed independently from the Convention¹⁷. It has therefore entered into force belatedly on 1 August 2013

¹¹ Art. 48 2007 Maintenance Convention.

¹² Hague Convention of 25.10.1980 on the Civil Aspects of International Child Abduction (SR 0.211.230.02).

¹³ Art. 2(1) lit. a, b 2007 Maintenance Convention. Claims for spousal support alone are not entitled to certain benefits of administrative co-operation (Art. 2(1) lit. c 2007 Maintenance Convention).

¹⁴ Art. 2(3) 2007 Maintenance Convention.

¹⁵ Art. 2(2) 2007 Maintenance Convention.

¹⁶ Art. 9, 20(1) 2007 Maintenance Convention.

¹⁷ Art. 23 2007 Maintenance Protocol. At the beginning the Hague Conference aimed to adopt a "triple convention". The parties, especially the common law delegation, could not reach a consensus, wherefore the applicable law has been unified in a further convention,

and has 28 members nowadays¹⁸. One of the contracting parties is the EU (excluding Denmark and UK). Neither Switzerland nor the United States have signed the Protocol yet. A signature by the US is not to be expected any time soon¹⁹.

The 2007 Maintenance Protocol is the succeeding agreement to the 1973 Hague Maintenance Convention on Applicable Law and, as between the contracting Parties, replaces the Convention²⁰. It covers – like its predecessor – only the law applicable to maintenance obligations.

The material scope of the regulation applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of a child regardless of the marital status of the parents²¹. At the same time this is the very substance of the convention, which is to be guaranteed and cannot be restricted by any reservations made by the contracting parties²².

The 2007 Maintenance Protocol is anticipated as a „universal law“ which applies even if the law it designates is that of a non-contracting state or even if the situation has a close connection to one or more parties not bound by the Protocol²³. Therefore, the one and only condition for the application of the Protocol is that the State of the forum is a contracting party. The 2007 Maintenance Protocol 2007 is applicable *erga omnes* and, as already mentioned, applies even towards non-contracting states without regard for the principle of reciprocity.

the 2007 Maintenance Protocol. The designation as a protocol nevertheless indicates the fundamental bond with the 2007 Maintenance Convention: A. Bonomi, *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, Text adopted by the Twenty-First Session, Explanatory Report, para 4, 16, available online: <https://assets.hcch.net/upload/expl39.pdf> [last accessed: 1.02.2016].

¹⁸ An overview of the current Member States is available under the following link: www.hcch.net/index_en.php?act=conventions.status2&cid=133 [last accessed: 1.02.2016].

¹⁹ The reason therefore is the common law jurisdiction, because in most common law countries, maintenance decisions are traditionally made on the basis of the law of the forum. Thus a change of praxis is not to be anticipated: Bonomi, *supra* note 17, para 4.

²⁰ Art. 18 2007 Maintenance Protocol.

²¹ Art. 1(1) 2007 Maintenance Protocol.

²² Art. 27 2007 Maintenance Protocol. The 1973 Hague Maintenance Convention on Applicable Law does not contain any comparable provision.

²³ Art. 2 2007 Maintenance Protocol. This provision corresponds to Art. 3 of the 1973 Hague Maintenance Convention on Applicable Law.

3. EU MAINTENANCE REGULATION

Since 1 February 1973 within the EU the jurisdiction and the recognition and enforcement of decisions in matters relating to maintenance obligations have been regulated uniformly by the Convention on Jurisdiction and Enforcement (1968 Brussels Convention)²⁴. On the other hand the relation between the Member States of the EU and the EFTA states (e.g. Iceland, Norway and Switzerland, without Liechtenstein) was regulated by the Lugano Convention of 16 September 1988²⁵. The Lugano Convention came into force in Switzerland on 1 January 1992. It follows the legal framework of the EU with the objective of achieving the same level of circulation of judgments between the EFTA Member States and the EU wherefore it is referred to as the „Parallel Agreement“. Together, this set of rules and their amendments comprise the „Brussels Regime“.

However, with effect from 1 March 2002, the Brussels I Regulation²⁶ superseded the 1968 Brussels Convention. The previously achieved parallelism of the different systems was again abolished. Fortunately, this condition did not last for long, and the moment that the revised Lugano Convention, which replaced the 1988 Lugano Convention, entered into force in 2007 the generally favoured parallelism was restored. As the 2007 Lugano Convention was substantially the same as the Brussels I Regulation, the provisions on jurisdiction and the recognition and enforcement of maintenance obligations were again regulated in parallel. In 2012, the EU institutions adopted a recast of the Brussels I Regulation, the Brussels I bis Regulation²⁷, which replaced the 2001 Regulation on 10 January 2015. The parallelism has been once again abolished. However, the parallelism regarding maintenance obligations had been repealed even before that.

Since 18 July 2011, cross-boarder maintenance obligations have been extensively covered by the European Maintenance Regulation²⁸. On the one

²⁴ Convention of 27.09.1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 27 of 26.01.1998 (consolidated version), p. 1 (1968 Brussels Convention).

²⁵ Lugano Convention of 16.09.1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, SR 0.275.11 (1988 Lugano Convention).

²⁶ Council Regulation (EC) no. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012/1 (2001 Brussels I Regulation).

²⁷ Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1 (2012 Brussels I bis Regulation).

²⁸ In the recast of the Brussels I Regulation, the Brussels I bis Regulation, the obsolete

hand, the regulation contains provisions on the jurisdiction, recognition, and enforcement of maintenance decisions and legal assistance. On the other hand, Article 15 regulates the applicable law, which shall be determined in accordance with the 2007 Maintenance Protocol. Not only this provision, but also the systematology on which the regulation is based, quickly reveal the tight connection to the new Hague Maintenance Conventions, which served the European legislators as model laws.

The material scope of the EU Maintenance Regulation covers cross-border maintenance applications arising from family relationships, parentage, marriage, or affinity – including maintenance obligations towards a child²⁹.

Regarding the geographical scope of the regulation, one has to distinguish between the individual provisions: in order for the Regulation to be applicable, a court in an EU Member State must have jurisdiction according to the Regulation. Unlike the 2007 Lugano Convention, where the defendant must have his domicile in a Member State of the convention, the EU Maintenance Regulation is applicable regardless of the parties' domicile, habitual residence, or nationality. In conclusion, it is possible that the EU Maintenance Regulation interferes with the national laws of states which are not bound by it³⁰. Article 15 of the EU Maintenance Regulation determines the application of the 2007 Maintenance Protocol. As mentioned before, the Protocol is a convention with *erga omnes* effect. It is applied universally, even if the applicable law is that of a state not bound by the EU Maintenance Regulation. The remaining provisions of the EU Maintenance Regulation as such regarding the recognition and enforcement of maintenance decisions³¹, or regarding the co-operation between the central authorities³², are only effective in relations between the contracting parties (*inter partes*).

provision of Art. 5(2) of the 2007 Brussels I Regulation, corresponding to Art. 5(2) 2007 Lugano Convention, has been omitted without substitution.

²⁹ Art. 1(1) EU Maintenance Regulation. Also here the parallelism to the 2007 Maintenance Protocol is evident (Art. 1(1) 2007 Maintenance Protocol).

³⁰ Thomas Rauscher (ed.), *Münchener Kommentar zum FamFG*, München 2013 (FamKomm-Lipp).

³¹ Cf Art. 16 EU Maintenance Regulation; Art. 16-43 EU Maintenance Regulation.

³² Cf Art. 55 EU Maintenance Regulation; Art. 49-63 EU Maintenance Regulation.

II. CONFLICTING AREAS BETWEEN THE APPLICABLE REGULATIONS IN SWITZERLAND AND THE EU WITH REFERENCE TO JURISDICTION

1. RELATIONSHIP BETWEEN THE 2007 LUGANO CONVENTION AND THE EU MAINTENANCE REGULATION

The relevant legal bases for determining jurisdiction in legal relations between Switzerland and the EU are the 2007 Lugano Convention on the one hand and the EU Maintenance Regulation on the other³³. But how do these two bodies of international law interact: will jurisdiction of a court of an EU Member State be determined always according to the EU Maintenance Regulation? Or, provided a connection to Switzerland is given (e.g. the defendant's domicile is in Zurich), can the 2007 Lugano Convention become relevant?

Neither the Maintenance Regulation nor the 2007 Lugano Convention regulates the relations between these two bodies expressly: Article 69(1) of the EU Maintenance Regulation refers to the relation with existing international conventions and agreements; but only to those to which the EU Member States at the time of adoption of the Regulation (on 18 December 2008) already belonged. The revised Lugano Convention entered into force later on, on 1 December 2010; the first contracting parties were Denmark, EU and Norway³⁴. Furthermore, the wording of Article 69 covers only conventions and agreements concluded by the Member States of the EU. However, the contracting party of the 2007 Lugano Convention is the EU and not the individual states³⁵.

On the other hand, the relation to the Council Regulations and other specific instruments of EU law is determined by Article 64 2007 of the Lugano Convention. The first paragraph upholds the principle that the courts of the EU Member States shall determine their jurisdiction only in the application of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, including its amendments³⁶. But there is no rule without an

³³ The provisions on jurisdiction in the EU Maintenance Regulation are applicable in particular for Denmark, Ireland and UK.

³⁴ Jan Kropholler, Jan von Hein, *Europäisches Zivilprozessrecht*, Frankfurt am Main 2011, beginning Brussels I Regulation para 103.

³⁵ FammKomm-Lipp, supra note 30, Art. 69 EU Maintenance Regulation para 5.

³⁶ Art. 64(1) 2007 Lugano Convention: "This Convention shall not prejudice the application by the Member States of the European Community of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as any amendments thereof".

exception: if a connecting factor indicates any relation to a Non-Member State of the EU, and if this state is at the same time a contracting party of the 2007 Lugano Convention, the Convention becomes applicable, and jurisdiction is determined according to the provisions of the 2007 Lugano Convention³⁷.

Unfortunately, this is not yet the final solution of the problem: Article 64 of the 2007 Lugano Convention determines only the relationship to the instruments mentioned in the first paragraph. Neither the revised Regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, nor the EU Maintenance Regulation is mentioned expressly in the provision, as they were adopted more recently. Admittedly one can argue, that Regulation no. 1215/2012 is the successor of the Brussels I Regulation and as its amendment, Article 64 2007 of the Lugano Convention remains applicable, but this cannot be so easily said regarding the EU Maintenance Regulation³⁸. Article 64 of the 2007 Lugano Convention is limited by Article 67: The later provision determines the relationship between the 2007 Lugano Convention and conventions on a particular matter. Article 67(2) states that the 2007 Lugano Convention shall not prevent a court from assuming jurisdiction in accordance with the convention on a particular matter, even if a relevant connecting factor (e.g. domicile) indicates a connection to a Non-Member State of the EU. Provisions which govern jurisdiction and which are contained in acts of the institutions of the European Communities are treated in the same way as conventions on a particular matter³⁹.

The question remains as to whether the EU Maintenance Regulation is to be associated on a particular matter with such conventions, which are superior to the provisions of the 2007 Lugano Convention, or if the Regulation is to be subsumed under the provision of Article 64 2007 of the Lugano Convention. According to our view, the first interpretation

³⁷ E.g. the defendant X has his domicile in Swiss territory and the court proceedings are initiated in Germany according to Art. 5(1)(a) 2007 Lugano Convention. Alexander R. Markus, *Internationales Zivilprozessrecht*, Bern 2014, § 6 para 658; Christian Oetiker, Thomas Weibel, Felix Dasser, Paul Oberhammer (eds), *Basler Kommentar zum Lugano-Übereinkommen*, Basel 2011, Art. 64 2007 Lugano Convention para 6; F. Dasser, P. Oberhammer (eds), *Kommentar zum Lugano-Übereinkommen (SHK)*, Bern 2011, Art. 64 2007 Lugano Convention para 3 et seq.; Jolanta Kren Kostkiewicz, *Kommentar IPRG/LugÜ*, Zürich 2015, Art. 64 2007 Lugano Convention para 2.

³⁸ This interpretation is based on the spirit and purpose of the 2007 Lugano Convention which strives for consistency with the Brussels Regulations. See also B. Hess, *Europäisches Zivilprozessrecht*, Heidelberg 2010 § 5 para 36; FamKomm-Lipp, supra note 30, Art. 69 EU Maintenance Regulation para 11; Kropholler, von Hein, supra note 34, Beginning Brussels I Regulation para 103.

³⁹ Protocol 3(1) 2007 Lugano Convention.

is the correct one: The EU Maintenance Regulation newly designates the applicable law and contains – next to its provisions on jurisdiction and recognition and enforcement of maintenance decisions – provisions on co-operation in matters relating to maintenance obligations among the EU Member States. It cannot be assumed that the new EU Maintenance Regulation is just a revised act of the provision of the Brussels I Regulation; rather it must be called a „new legal act“ which pursues other aims. Furthermore, this opinion is confirmed by the origins of the EU Maintenance Regulation: both Hague Conventions – the 2007 Maintenance Convention and the 2007 Hague Protocol – served the EU as a role model. Additional proof of the interdependence of the above mentioned regulations can be found in Article 15 EU Maintenance Regulation, which states that the applicable law should be determined in accordance with the 2007 Maintenance Protocol, and in the fact that the provisions on cooperation were transferred to the Regulation in almost the same words as in the 2007 Maintenance Convention.

Last but not least, a further point that proves that the EU Regulation has to be considered as a convention on a particular matter is found in Article 4(4) of the EU Maintenance Regulation, which determines expressly the relation towards the 2007 Lugano Convention regarding the choice of court agreements.

That having been said, the initial question as to whether the EU Maintenance Regulation or the 2007 Lugano Convention shall apply must be resolved as follows: If there is a proceeding pending with the courts in Switzerland, the courts must assume their jurisdiction exclusively according to the 2007 Lugano Convention. However, if there is a proceeding pending with the courts of a Member State of the EU, the courts must assume their jurisdiction exclusively according to the EU Maintenance Regulation, notwithstanding the existence of a relevant connecting factor.

2. JURISDICTION ACCORDING TO THE 2007 LUGANO CONVENTION

Within the scope of the Lugano Convention according to Article 2(1) of the 2007 Lugano Convention the Member State in which the defendant is domiciled has general jurisdiction. Furthermore, Article 5(2) 2007 of the Lugano Convention provides for a special ground of jurisdiction. This, however, applies only, if jurisdiction lies with the courts of another

member state⁴⁰.

Pursuant to Article 5(2)(a) 2007 of the Lugano Convention, in matters relating to maintenance, a person domiciled in a state bound by the Convention can be sued in the courts of the place where the maintenance creditor is domiciled or habitually resides. Articles 5(2)(b) and (c) provide for accessory jurisdiction in proceedings concerning the status of a person (e.g. divorce proceedings; lit. b) and to proceedings concerning parental responsibility (lit. c). In such cases, the claimant can bring proceedings concerning maintenance directly in the court having jurisdiction regarding the main proceedings.

Besides, jurisdiction can be conferred on a court by an agreement (Article 23 2007 Lugano Convention) or if the defendant enters an appearance before a court of a Member State (Article 24 2007 Lugano Convention).

3. JURISDICTION ACCORDING TO THE EU MAINTENANCE REGULATION

Under the heading of Article 3 of the EU Maintenance Regulation entitled general provisions, not less than four grounds of jurisdiction are provided for, which all have equal authority. A restriction to courts located in another member state as under the 2007 Lugano Convention does not exist under the EU Maintenance Regulation. Article 3 of the EU Maintenance Regulation allocates jurisdiction alternatively to the court of the defendant's habitual residence (lit. a), the court of the creditor's habitual residence (lit. b) or to the court of the main proceedings (accessory jurisdiction; lit. c and d).

Also within the scope of the EU Maintenance Regulation, parties may agree that a court of a Member State shall have jurisdiction to settle any dispute between them (Article 4 EU Maintenance Regulation). Furthermore a court shall have jurisdiction in case a defendant enters an appearance before a court of a Member State (Article 5 EU Maintenance Regulation).

New amendments are, on the one hand, subsidiary jurisdiction (Article 6 EU Maintenance Regulation), and, on the other, the *forum necessitatis* (Article 7 EU Maintenance Regulation).

The most striking asset of the EU Maintenance Regulation is that – contrary to the 2007 Lugano Convention – domicile does not function as the main connecting factor any more. In fact, the concept of domicile has been replaced by the concept of habitual residence (see Article 3 of the EU

⁴⁰ Art. 5 2007 Lugano Convention: "A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be «sued»".

Maintenance Regulation). A further example of this tendency is that the connecting factor employed by the subsidiary grounds of jurisdiction is the common nationality of the parties, and not the domicile (see Article 6 EU Maintenance Regulation). The new legislation is no longer guided by the motive of *actor sequitur forum rei*, which guarantees the defendant's protection. It can be said that the EU Maintenance Regulation completely abolishes this requirement and that the principle of *favor defensoris* becomes irrelevant for the sake of the creditor's protection.

4. CONFLICT OF JURISDICTION DUE TO CHOICE OF COURT AGREEMENTS

Both the Lugano Convention and the EU Maintenance Regulation enable the parties to confer jurisdiction on a particular court in advance⁴¹. Unlike Article 23 of the 2007 Lugano Convention, the forums available under Article 4 of the EU Maintenance Regulation are restricted and the formal requirements raised. This actually is the crux of the legal relationship between Switzerland and the EU.

According to Article 4(4) of the EU Maintenance Regulation the parties can agree to attribute exclusive jurisdiction to a court or courts of a Member State of the Lugano Convention, which at the same time is not a Member State of the EU (e.g. Switzerland). The relevant laws are then the provisions of the 2007 Lugano Convention and not the one of the EU Maintenance Regulation. Pursuant to the final clause Article 4(4) of the EU Maintenance Regulation this freedom of choice is immediately restricted: The choice of court agreement is invalid when disputes relating to a maintenance obligation towards a child under the age of 18 are the subject thereof. Inevitably this may lead to greater difficulties:

Example 1: A father (F, domiciled in Zurich) concludes an agreement with a mother (M), who is the legal guardian of the seven-year-old son (S, habitually resident in Munich), that F shall be required to make monthly payments of his son's legally owed maintenance contribution⁴². Any disputes arising from the agreement shall be brought before the ordinary courts in Zurich.

⁴¹ The Hague Convention of 30.06.2005 on Choice of Court Agreement, which entered into force recently on 1.11.2015, excludes maintenance obligations from its material scope (Art. 2(2)(b)). The text of the Convention is available under the following link: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> [last accessed 1.02.2016].

⁴² Eventhough the subject is a maintenance agreement the EU Maintenance Regulation is applicable as a legal right is concretised. The matter would fall out of the material scope of the Regulation if the maintenance obligation was established only by contractual agreement. FamKomm-Lipp, supra note 30, Art. 1 EU Maintenance Regulation para 22.

In the case that shortly afterwards M, as her son's legal representative, files complaints to the prorogated court in Zurich, the court verifies its own jurisdiction under the requirements of Article 23 of the 2007 Lugano Convention. If the formal and material validity of the choice of court agreement is given, the court accepts its jurisdiction. But what if the father decides to file his restitution claim with the courts in Munich, which is the place of his son's habitual residence? The Munich courts too accept their jurisdiction in application of Article 3(b) of the EU Maintenance Regulation because from their point of view the aforementioned agreement is not valid as the final clause of 4(4) of the EU Maintenance Regulation prohibits a choice of court agreement with an underaged person. A positive conflict of jurisdiction results.

How can this conflict be resolved? The crucial question is which court was the first seised. The EU Maintenance Regulation does not provide any solution as the provision of Article 12 determines only the *lis pendens*, if the same cause of action and between the same parties are brought in courts of different Member States. The solution of the problem can be found in the 2007 Lugano Convention: The convention applies in a subsidiary way if the issue in question is not subject to a convention on a particular matter⁴³. The *lis pendens*-rule stated in Article 27 of the 2007 Lugano Convention resolves the conflict in so far as any other court shall decline jurisdiction if the jurisdiction⁴⁴ of the court first seised is established⁴⁴.

The different rules on validity lead to other conflicts which cannot be solved easily:

Example 2: A mother (M, domiciled in Munich) and legal guardian of the seven-year-old son (S, habitually resident in Villars/CH) concludes a maintenance agreement with the father of S (F, domiciled in Zug/CH), so that F shall be obliged to monthly maintenance payments (alimony). Any disputes arising from the agreement shall be brought before the ordinary courts in Munich.

In the event that M, as her son's legal representative, claims payment

⁴³ Oetiker, Weibel (eds), supra note 37, Article 67 2007 Lugano Convention para 15. See also Kropholler, von Hein, supra note 34, Article 71 para 16 and Tanja Domej, *Effet utile der EuGVVO und Vorrang von Spezialübereinkommen*, [in:] C. Jabloner, G. Kucsko-Stadlmayer, G. Muzak, B. Perthold-Stoitzner, K. Stöger (eds), *Vom praktischen Wert der Methode*, Wien 2011, p. 58, both addressing the CMR.

⁴⁴ This fact was already stated in the memorandum on the federal decision concerning the accession to the 2007 Lugano Convention (Botschaft vom 18.02.2009 zum Bundesbeschluss über die Genehmigung und die Umsetzung des revidierten Übereinkommens von Lugano über die gerichtliche Zuständigkeit, die Anerkennung und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, BBl 2008, 1798, 1777 et seq.). See also FamKomm-Lipp, supra note 30, Art. 12 EU Maintenance Regulation para 4.

on behalf of her son before the courts in Munich, the courts will not assume jurisdiction. From their point of view the choice of court agreement is invalid as the maintenance creditor has not yet reached the age of 18⁴⁵. If M files the action at the place of residence of F⁴⁶, the Swiss courts will not assume jurisdiction either, as no such restriction is known by Article 23 of the 2007 Lugano Convention, with the result that the prorogation of jurisdiction of the courts of Munich is valid. Provided that no other ground of jurisdiction according to the EU Maintenance Regulation can be determined, a negative conflict of jurisdiction results⁴⁷.

Unlike the case of a positive conflict of jurisdiction, the 2007 Lugano Convention cannot be consulted for a solution of the problem, as Article 4 of the EU Maintenance Regulation determines the legal admissibility of a choice of court agreement and its relation with the 2007 Lugano Convention exclusively – even if it may be insufficient. The provisions of the Convention must, therefore, not be applied.

The problem was already known at the time the 2007 Lugano Convention came into force. To put this right, an additional Protocol to the Convention should have been issued⁴⁸. Although badly needed for reasons of legal certainty, the idea of a Protocol was not further pursued at the last meeting of the Standing Committee of the Lugano Convention held on 25 September 2013⁴⁹.

But is an additional Protocol the only key to the solution of a negative conflict of jurisdiction? Contrary to the 2007 Lugano Convention, the EU Maintenance Regulation provides for a *forum necessitatis* in Article 7: If no court of a Member State has jurisdiction pursuant to Articles 3-6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted, or if proceedings cannot be brought in a third state, given that the dispute has a sufficient

⁴⁵ Final clause of Art. 4(4) EU Maintenance Regulation.

⁴⁶ Art. 79(1) CPIL (Switzerland's Federal Code on Private International Law, SR 291) in conjunction with Art. 2(1) 2007 Lugano Convention.

⁴⁷ Besides the general provisions in Art. 3 of the EU Maintenance Regulation, the subsidiary jurisdiction of Art. 6 EU Maintenance Regulation is to be considered, which determines that if no court of a Member State has jurisdiction pursuant to Art. 3, 4 and 5 and no court of a state party to the Lugano Convention which is not a Member State has jurisdiction pursuant to the provisions of that Convention, the courts of the Member State of the common nationality of the parties shall have jurisdiction.

⁴⁸ Botschaft 2007 Lugano Convention, supra note 44, 1798. See also: Kropholler, von Hein, supra note 34, *Beginning Brussels I Regulation para 103*, supra note; SHK-Domej, supra note 37, Art. 64 2007 Lugano Convention para 2.

⁴⁹ No recommendation was given on the subject of a possible amendment of the 2007 Lugano Convention and no new steps are going to be taken: www.bj.admin.ch/bj/de/home/wirtschaft/privatrecht/lugue-2007.html [last accessed: 1.02.2016].

connection with the Member State of the court seized.

The right to access to justice enshrined in Article 6(1) of the ECHR⁵⁰, which is expressed in the *forum necessitatis* provided by the EU Maintenance Regulation, requires in the above mentioned example that there is jurisdiction of the court seized. That said, a negative conflict of jurisdiction must be solved in favour of the courts of an EU Member State⁵¹.

III. CONFLICT AREAS BETWEEN THE APPLICABLE REGULATIONS IN SWITZERLAND AND THE EU REFERRING TO THE APPLICABLE LAW

1. THE 1973 HAGUE MAINTENANCE CONVENTION ON APPLICABLE LAW

Once jurisdiction has been established in Switzerland, the 1973 Hague Maintenance Convention is applicable⁵². The applicable law is regulated by Articles 4-11 of the Convention: Pursuant to Article 4(1) of the 1973 Hague Maintenance Convention, maintenance obligations shall be subject to the internal law of the state of habitual residence of the maintenance creditor. In the case that the creditor is unable to obtain maintenance – either not at all or just in a specific case (e.g. due to expiry or time limitation), according to Article 5 of the 1973 Hague Maintenance Convention the law of the creditor's and the debtor's common nationality shall subsidiarily apply. If the creditor is unable to obtain maintenance either according to the internal law of the state of his habitual residence or according to the internal law of the state of the common nationality, Article 6 of the 1973 Hague Maintenance Convention determines that the internal law of the authority seized (*lex fori*) is applicable. It can be assumed that this provision will apply only rarely as the *lex fori* in most cases already corresponds to the law of the habitual residence of the maintenance creditor according to Article 4(1) of the 1973 Hague Maintenance Convention. Are the maintenance obligations resulting from divorce, legal separation, marriage annulment, its declaration of invalidity, or is a revision of decisions relating to these obligations subject to the claim? Article 8 of the 1973 Hague Maintenance Convention provides – notwithstanding Articles 4-6 – for a special rule: These maintenance obligations are governed by the law applicable to this

⁵⁰ SR 0.101.

⁵¹ FamKomm-Lipp, supra note 30, Art. 7 EU Maintenance Regulation para 1.

⁵² The provisions of Art. 49 and Art. 83 CPIL have only a declaratory effect. The 1973 Hague Maintenance Convention would even without the reference be applicable due to the principle of supremacy of international agreements (Art. 1 (2) CPIL).

change of status⁵³. In the case that a public body has provided benefits for the maintenance creditor (e.g. advance payment of alimony), the reimbursement from the debtor is governed by the law to which the body is subject Article 9 of the 1973 Hague Maintenance Convention.

The 1973 Hague Maintenance Convention does not allow the parties to choose the applicable law.

2. THE 2007 MAINTENANCE PROTOCOL

If jurisdiction has been assumed by a court of an EU Member State, the applicable law is determined by the 2007 Maintenance Protocol (Article 15 of the EU Maintenance Regulation) – which is the follow up agreement to the 1973 Hague Maintenance Convention. Like the Convention, Article 3(1) of the 2007 Maintenance Protocol states as a general rule that the applicable law is governed by the law of the state of the creditor’s habitual residence. Contrary to the 1973 Hague Maintenance Convention, the Protocol’s connection cascade, which becomes relevant when maintenance cannot be obtained according to the internal law of the state of the creditor’s habitual residence, is restricted to certain persons – namely children and parents as well as persons who have not yet attained the age of 21 years. Article 4 of the 2007 Maintenance Protocol determines two different methods of assessment: On the first level, if the creditor has brought the matter before the competent authority or court, which at the same time is not the one of the state of the debtor’s habitual residence, the general rule of Article 3(1) applies, and subsidiarily the principle of *lex fori*⁵⁴. However, if the creditor’s claim is pending before a court of the state of his debtor’s habitual residence, the principle of the *lex fori* applies. If the creditor, by virtue of this law, is unable to obtain maintenance, in a subsidiary matter, the law of the state of the creditor’s habitual residence is applicable – which at the same time corresponds to the general rule⁵⁵. If the creditor cannot obtain maintenance in accordance with either of these laws, Article 4(3) of the 2007 Maintenance Protocol applies on the third level and the law of the state of the creditor’s and debtor’s common nationality becomes relevant. If a public body is seeking reimbursement from the debtor, the 2007 Maintenance Protocol in Article 10 also refers to the law to which that body is subject.

⁵³ BGer 5A_267/2010 E. 2 concerning post-marital maintenance and alimony.

⁵⁴ Art. 4(2) 2007 Maintenance Protocol.

⁵⁵ Art. 4(3) 2007 Maintenance Protocol.

One of the most striking features of the new 2007 Maintenance Protocol is the movement away from the rigid special connection concerning the conflict rule with respect to divorce⁵⁶. Both matrimonial and post-matrimonial maintenance are subject to Article 3(1) of the 2007 Maintenance Protocol. According to the special rule regarding spouses and ex-spouses, one party can demand that Article 3 shall not apply, as the law of another state (in particular the state of their last common habitual residence) has a closer connection to the marriage⁵⁷. Another major innovation is the possibility of choosing the applicable law, which at the same time takes account of the international tendencies towards emphasising party autonomy in family matters. Pursuant to Article 7(1) of the 2007 Maintenance Protocol, the parties can expressly choose the *lex fori* for the purpose of a particular proceeding. Article 8 of the 2007 Maintenance Protocol allows for a broader, but still restricted, choice of law – not only limited to a particular proceeding.

3. IMPACT ON THE APPLICABLE LAW DUE TO FORUM SHOPPING

The choice of forum determines the law applicable to a dispute. If the courts in more than one state have jurisdiction to hear a case, the claimant can bring to hear the law most favourable to him by his choice of court. The following situation proves that the new conventions allow *forum shopping* within the legal relations between Switzerland and the EU with undesirable consequences:

Example 3: A husband A (Swedish citizen) and his wife B (Swedish citizen) have been domiciled in Zurich for more than 20 years. After A has been offered an excellent job in Sweden, and B has found very good employment as well, they both decide to move to Stockholm. However, the spouses cannot put their differences aside and therefore shortly after moving to Sweden file for divorce in Stockholm. The moment B loses her employment because her company is restructured, she decides to return to her familiar environment in Switzerland. Finding a new job proves to be more difficult than expected, and without post-matrimonial maintenance,

⁵⁶ Art. 8 1973 Hague Maintenance Convention on Applicable Law. The special connection with respect to divorce and its timely invariable connecting factor is rigid and nowadays no longer justifiable. The provision does not sufficiently take the ex-spouses' situation and their respective interests into account. Furthermore, as the conflict of rules in respect to divorce have not been harmonised at the international level, *forum shopping* is inevitably favoured. For all these reasons, this connection to the law has been revised in the 2007 Maintenance Protocol: Bonomi, *supra* note 17, para 80.

⁵⁷ So-called escape clause: Art. 5 2007 Maintenance Protocol.

to which she is not entitled under Swedish law, she cannot provide for her needs. Meanwhile, the relationship with her ex-husband has deteriorated.

If the creditor is domiciled in Switzerland and the debtor has his permanent residence in a Member State of the EU, more than one court has jurisdiction: Pursuant to Article 5(2)(a) of the 2007 Lugano Convention, on the one hand, the claimant can file proceedings against the debtor in the creditor's domicile in Switzerland, and on the other hand, according to Article 3(a) of the EU Maintenance Regulation, the courts at the debtor's permanent residence in a EU Member State have jurisdiction (in this case Sweden). Owing to multiple available fora, the conflict of laws concerning the revision of divorce decree is determined in another way: The Swiss courts with jurisdiction have to apply Article 8 of the 1973 Hague Maintenance Convention, whereby the maintenance obligations between divorced spouses are governed by the law applicable to the divorce proceedings. According to the domestic system in Sweden, no maintenance is granted, and therefore the spouse is not entitled to maintenance. However, if the proceedings are pending in Sweden, pursuant to Article 3(1) the law of the habitual residence of the creditor applies. According to the designated internal Swiss law, on the contrary, B would be entitled to maintenance⁵⁸.

IV. CONCLUSION

The EU Maintenance Regulation revolutionises the international law of maintenance for the legal relations between Switzerland and the EU. One question remains unanswered: Progress or regress? Evidently, this new legal instrument of the machinery of the EU raises more issues than it is able to solve. The results are only legal fragmentation and the increase of competences which are resulting, with the effect that *forum shopping* is greatly enabled. But the new EU Regulation is also a thorn in the consumer's side, as its cumbersome wording is a problem for lawyers who are not experts in the field of international law. Mostly it will be the court's task to finally clarify the legal relation between the EU Maintenance Regulation and the 2007 Lugano Convention⁵⁹.

As shown in the latest example, this situation is unsatisfactory and carries great dangers for the practitioner. A slight glimmer of hope emerges:

⁵⁸ Art. 125 Swiss Civil Code (SR 210). In this constellation the escape clause of the provision in Art. 5 2007 Maintenance Protocol cannot be applied as the Swiss law is already the legal system with the closest connection.

⁵⁹ Agrees in opinion concerning the problem of the negative conflict of jurisdiction: FamKomm-Lipp, supra note 30, Art. 69 EU Maintenance Regulation para 10.

The danger of forum shopping might be alleviated with Switzerland approving the 2007 Maintenance Protocol⁶⁰. Unlike the EU Maintenance Regulation, which seems to be a patchwork of various legal sets of rules, the 2007 Maintenance Protocol is a „Up-to-date“ Convention which to a great extent satisfies the need for flexibility.

⁶⁰ Agrees in opinion: Ivo Schwander, *Gutachten zu Fragen des Internationalen Privat- und des Internationalen Zivilprozessrechts im Zusammenhang mit der Modernisierung des Familienrechts*, 18, 1 et seq., available at: www.bj.admin.ch/dam/data/bj/aktuell/veranstaltungen/familienrecht/gutachten-schwander-d.pdf [last accessed 1.02.2016]; Marco Levante, *Die Reform des Internationalen Unterhaltsrechts*, [in:] F. Lorandi, D. Staehelin, *Innovatives Recht*, Zürich 2011, p. 745, 729 et seq.

