Civil judicial cooperation: law applicable to maintenance obligations. 2007 The Hague Protocol

2009/0023(CNS) - 23/02/2009 - Legislative proposal

PURPOSE: to conclude the Protocol on the Law Applicable to Maintenance Obligations.

PROPOSED ACT: Council Decision.

BACKGROUND: in December 2008 the Council adopted Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. Under the Regulation, the law applicable to maintenance obligations must 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.

Application of the Protocol in the Community will guarantee the application within the Member States of uniform and harmonised rules on applicable law in maintenance matters.

In addition, harmonised rules on applicable law are a precondition for abolishing exequatur for decisions concerning maintenance obligations. As a result, decisions issued in Member States which are bound by the Protocol will circulate freely in other Member States without any form of control on the substance in the Member State where enforcement is sought. This will achieve the political objective that has been on the agenda since the meeting of the European Council in Tampere in 1999.

CONTENT: the proposal concerns the conclusion by the Community of the Protocol on the Law Applicable to Maintenance Obligations concluded on 23 November 2007 under the Hague Conference on Private International Law. The Protocol is designed to offer greater legal certainty and predictability to maintenance creditors and debtors. Since the vast majority of maintenance claims involve children, the Protocol is first and foremost a measure to protect children.

The objective of the Protocol is to improve legal certainty and predictability by creating common provisions on the law applicable to maintenance obligations. The main aim of harmonisation of applicable law rules is to enable creditors to act in full knowledge of the situation, without being subject to diverse national systems. The Protocol seeks to strike a balance between the rights of the maintenance creditor and of the debtor.

The Protocol determines the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including any maintenance obligation in respect of a child regardless of the marital status of the parents. It provides that, as a general rule, maintenance obligations shall be governed by the law of the State of habitual residence of the creditor. Special rules provide protection for the maintenance creditor in situations where he or she is unable to obtain maintenance under the law of the State of his or her habitual residence. In the case of spousal maintenance, either of the parties may request application of the law of another State that has a closer connection with the marriage. A special rule on defence gives the debtor the possibility, in certain circumstances, of contesting a claim for maintenance on the ground that there is no such obligation under both the law of the State of habitual residence of the debtor and the law of the State of the common nationality of the parties, if they have one.

Lastly, parties may choose the law applicable to a maintenance claim either for the purpose of a particular proceeding or in general.

Application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum State. In determining the amount of maintenance, the needs of the creditor and the resources of the debtor must be taken into account, even if the applicable law provides otherwise. The Protocol includes the possibility for Regional Economic Integration Organisations to become a party.

Because of the close link between the objective of the Regulation (EC) No 4/2009 and the rules on applicable law, the Protocol should apply in the Community at the latest on the date of application of the Regulation, i.e. on 18 June 2011.

BUDGETARY IMPLICATION: the proposal has no implication for the Community budget.