

The Enforcement of Maintenance Decisions in the EU: *Requiem* for the Public Policy Exception?

An Italian perspective

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Setting the Scene - Maintenance

Regulation No 4/2009 → a **two-track system**

- Abolition of *exequatur* for the decisions given in a MS bound by the 2007 Hague Protocol (Art. 17; Rec. 24)
- Procedure for recognition for MS not bound by the 2007 Hague Protocol (Art. 23)
- → A decision shall not be recognised:
“(a) if such recognition is manifestly contrary to **public policy** in the Member State in which recognition is sought” (Art. 24)

Setting the Scene – In General

Abolition of Public Policy in:

- Reg. 805/2004 EC [2004] (uncontested claims)
- Reg. 1896/2006 EC [2006] (European order for payment procedure)
- Reg. 861/2007 EC [2007] (small claims)
- Brussels IIa (enforceability rights of access)
 - ECJ, 22/12/2010, C-491/10 PPU, *Aguirre Zarraga* (protection of human rights in the State of enforcement)

Setting the Scene

Brussels *Ibis* v Reg. No 4/2009

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- Brussels *Ibis* ↔ Reg. No 4/2009
- Art. 1.2(e) → exclusion from the scope of Brussels *Ibis* of the “maintenance obligations arising from a family relationship, parentage, marriage, or affinity”
- no autonomous definition of “family relationship”
- Characterisation of maintenance claims based on family patterns not recognized in the State requested
→ contractual maintenance claims?
→ application of Brussels *Ibis* (art. 45.1(a) public policy?)

Requiem

for the Public Policy Exception?

- the landscape of family law is extremely various
- new protection to couples outside traditional marriage (registered partnerships, same-sex marriages, etc.)
- new frontiers of the establishment of parenthood (surrogacy and adoption by an unmarried person)
- Public policy is actually weakening?



Trend towards a *laissez-faire* Approach

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Art. 6 Hague Protocol

- “In the case of maintenance obligations other than those arising from a parent-child relationship towards a child and those referred to in Article 5, **the debtor may contest a claim** from the creditor on the ground that there is no such obligation under both the law of the State of the habitual residence of the debtor and the law of the State of the common nationality of the parties, if there is one»
- «**privatisation**» of the public policy exception

(Kohler, *Liber Amicorum K. Siehr*, 2010, 286)

Trend towards a *laissez-faire* Approach

- A debtor residing in Italy, who has made a civil partnership in Germany could contest the maintenance claim of his/her partner, residing in Germany, before the German judge, due to the lack of this institution in the Italian system.
- **Paradox:**
- easier for the creditor to obtain the recovery of maintenance when the decision is given in a MS not bound by the Hague Protocol → Art. 37 - partial enforceability

Trend towards a *laissez-faire* Approach

- Art. 13 Rome III
- **Differences in national law.**
- “Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation”

Trend towards a *laissez-faire* Approach

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- **Family status as preliminary question**
- Art. 22 Reg. No 4/2009 and Art. 1 Hague Protocol:
 - decision on maintenance → no effect on the existence of family relationship
- Art. 11 Hague Protocol: *lex causae* "shall determine whether, to what extent and from whom the creditor may claim maintenance"
- Art. 1.2 (a) (b) (f) Rome III; Art. 1.3(a) of the two proposals on matrimonial property regimes (COM(2011)126) and on property consequences of registered partnerships (COM(2011)127); Art. 1.2 (a) Succession Regulation
 - exclude family status from their scope.

European Public Policy

Does the application of a possible
common concept of European
public policy play any specific
role?

European Public Policy

- ECtHR, *Schalk and Kopf v Austria*, No. 30141/04, 24/6/2010
- ECtHR, *Taddeucci v Italy*, No. 51362/09 (pending)
- ECJ, *Maruko and Römer* cases, C-267/06 [2008] , C-147/08 [2010]
 - **de facto and same-sex relationships**
- ECtHR, *E.B. v France*, No. 43546/02, 22/1/2008
- ECtHR, *Gas e Dubois v France*, No. 25951/07, 15/3/2012
- ECtHR, *X and others v Austria*, No. 19010/07, 19/2/2013
 - **second-parent adoption**

A More Open Approach in Italy

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- Corte d'Appello Bari, 13/2/2009 (surrogacy)
- Trib. Reggio Emilia, 13/2/2012 (same-sex marriage → residence permit)
- Corte Cassazione, 15/3/2012, No. 4184 →
 - a same sex couple living in stable relationship holds the right to "family life" and may sue in specific situations to claim a consistent treatment with respect to marriage couples.

THANK YOU!
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