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OBLIGATIONS ALIMENTAIRES
MAINTENANCE OBLIGATIONS

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OBLIGATIONS ALIMENTAIRES

Note sur l'opportunité de reviser les Conventions de La Haye
sur les obligations alimentaires
et d'inclure dans un nouvel instrument des dispositions sur la coopération judiciaire et administrative

établie par William Duncan
Premier secrétaire

* * *

MAINTENANCE OBLIGATIONS

Note on the desirability of revising the Hague Conventions
on Maintenance Obligations
and including in a new instrument rules on judicial and administrative co-operation

drawn up by William Duncan
First Secretary

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INTRODUCTION

1 In the Final Act of the Eighteenth Session, the Hague Conference requested the Secretary General –

> "a *to convene, before the Nineteenth Session, a Special Commission instructed to examine the operation of the Hague Conventions on maintenance obligations and the* New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance *and to examine, on the occasion of that meeting, the desirability of revising those Hague Conventions, and the inclusion in a new instrument of rules on judicial and administrative co-operation;*
>
> b *to keep an up-to-date list of the authorities provided for under the New York Convention of 1956 and to communicate this list, once or twice a year, to all those authorities in the Member States of the Hague Conference;*
>
> c *to convene an informal working group in order to draft model forms to accompany the requests and to ensure the acknowledgement of receipt of the latter in application of the New York Convention of 1956, it being understood that such draft forms would have to be examined and possibly adopted at the next Special Commission on the operation of the Conventions in regard to maintenance obligations*."[1]

2 This Decision was taken following discussion of the Recommendations of the Special Commission of November 1995 on the operation of the Hague Conventions relating to maintenance obligations and the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, which were (a) that the Secretary General should convene regularly, every 4 or 5 years, a Special Commission to examine the operation of the Conventions concerned, and (b) that the Secretary General should keep an up-to-date list of authorities provided for under the New York Convention of 1956.[2] However, the decision to examine the desirability of revising the Hague Conventions and including in a new instrument rules on judicial and administrative co-operation did not follow a recommendation of the Special Commission of 1995.

3 The Special Commission of November 1995, with the assistance of a Note on of the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance drawn up by Michel Pelichet,[3] examined in detail a large number of practical problems concerning the operation of the four Hague Conventions and the New York Convention. Moreover, the *Pelichet Note* described and discussed other Conventions relevant to certain parties to the Hague and New York Conventions, namely:

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[1] Final Act of the Eighteenth Session, 19 October 1996, under Part B, 7.

[2] *General Conclusions of the Special Commission of November 1995 on the operation of the Hague Convention relating to maintenance obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, drawn up by the Permanent Bureau, Preliminary Document No 10, May 1996, at paragraph 54. This document is hereafter referred to as "*General Conclusions*".

[3] *Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance*, drawn up by Michel Pelichet, Preliminary Document No 1 of September 1995. This document is hereafter referred to as "*Pelichet Note*".

a Montevideo Convention of 15 July 1989 on Support Obligations;[4]

b Rome Convention of 6 November 1990 between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments;

c Brussels and Lugano Conventions[5] *on jurisdiction and the enforcement of judgments in civil and commercial matters.*

4 The *Pelichet Note*, together with the *General Conclusions*, still provide an accurate general description of the existing Conventions and of the difficulties experienced in their operation. The reader's attention is also directed to the *Explanatory Report* to the 1973 Hague Conventions drawn up by Michel Verwilghen.[6]

5 A *Questionnaire on Maintenance Obligations*[7] has been drawn up and submitted to States Parties to the Hague and New York Conventions, and to non-Party States which are Members of the Hague Conference, with a view to identifying any continuing problems in the operation of the Hague and New York Conventions, as well as to elucidate the reasons why States which are not Parties to these Conventions have not so far ratified or acceded to them. It is intended that a further note will be drawn up in advance of the Special Commission, synthesising the responses to the Questionnaire in order to assist discussion in the Special Commission which is to take place from 13 to 16 April 1999.

6 The purpose of this Note is to assist in identifying the issues relevant to consideration by that Special Commission of any possible revision of the Hague Conventions, and the inclusion in any new instrument of rules on judicial and administrative co-operation. It is not the purpose of this Note to examine in detail the current operation of the Conventions. However, a broad description of the existing conventional arrangements, together with an overview of their limitations and operational difficulties, which draws on the *General Conclusions* of the last Special Commission, will be a necessary prelude to discussion of the need, if any, for reform.

7 It should be stated from the outset that the idea of revising any of the Hague Conventions (or the New York Convention) did not meet with the approval of the Special Commission of November 1995.

> "*The Special Commission acknowledges that, generally speaking, the four Hague Conventions on maintenance obligations and the New York Convention of 1956 are sound treaties. The difficulties in applying the Hague Conventions on the recognition and enforcement of decisions and the New York Convention are to a much greater extent due to differences in the standard of living*

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[4] The *Inter-American Convention on Support Obligations*, drafted under the auspices of the Organization of American States and concluded at Montevideo on 15 July 1989.

[5] *Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters*, *Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters*.

[6] *Acts and Documents of the Twelfth Session (1972)* Tome IV, *Maintenance Obligations, pp. 384-465*. This document is hereafter referred to as *"Explanatory Report"*.

[7] Preliminary Document No 1 (November 1998), drawn up by William Duncan, for the attention of the Special Commission of April 1999.

> *between the countries Parties to those Conventions, as well as to frequently incompatible religious or philosophical convictions and, above all, to the systematic bad faith of maintenance debtors. Hence the Special Commission considers that in the present state of affairs, it seems pointless to propose a revision of any of those Treaties.*"[8]

This was in line with the opinion expressed in the *Pelichet Note* which, in relation to the four Hague Conventions, stated the following:

> "*With the exception of certain problems to which they give rise and which we shall examine later on, those Conventions operate satisfactorily and have undoubtedly provided valid solutions in a domain which is not only sensitive, but frequently anarchic. The application of those Treaties by the courts appears to be in line with their purpose and to create the required harmony in this field. It consequently seems problematic for a Special Commission to overturn the structure of a system which appears so far to have been applied in a satisfactory manner by the courts. There would have to be really compelling reasons for the Special Commission, at the conclusion of its work, to reach a consensus in favour of revising one or other of those Conventions. It has to be borne in mind that a revision of the Hague Conventions would lead to the adoption of a new treaty, thereby lengthening the list indicated above and increasing the risk of a conflict of conventions.*" [9]

Moreover, with regard to the New York Convention, the Note pointed out that any redrafting would be "*the exclusive responsibility of the States Parties to that Convention, possibly with some encouragement from the United Nations*".[10]

8 It was not the purpose of the Special Commission of November 1995 to consider the need or otherwise for a new instrument. The Special Commission therefore did not consider in any detail matters which might be regarded as relevant to that issue, such as the reasons why many States have not become Parties to one or more of the existing Conventions.[11] On the other hand, the Special Commission recommended by the Eighteenth Session of the Hague Conference has expressly been given a broader remit, and must therefore address the wider considerations. Nevertheless, it is still wise to begin by recalling the caution that, because the revision of existing instruments or the introduction of a new instrument would, at least for an interim period, add even more complication to an already complex configuration of conventions, compelling reasons are needed to justify the introduction of any new instrument.

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[8] *General Conclusions*, *op. cit.* (*supra* footnote 2), paragraph 6.

[9] *Op. cit.* (*supra* footnote 3), paragraph 12.

[10] *Ibid.*, paragraph 11.

[11] The reasons for non ratification/accession are often difficult to ascertain, ranging from objections in principle to difficulties in finding legislative time. In fact several non-Party States remain open to the possibility of ratifying or acceding to certain of the Hague Conventions, particularly that of 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. Responses to the Questionnaire on Maintenance Obligations, which includes questions concerning reasons for non ratification/accession, should cast further light on this matter.

9 A quarter of a century has passed since the last two Hague Conventions on maintenance obligations were drawn up. It is worth noting certain trends in the development of domestic systems of family support which have been in evidence during the intervening years, and which may have some relevance in considering appropriate reforms at the international level. Some of the legal systems represented during the negotiations twenty-five years ago shared certain common features. Maintenance awards were for the most part determined by courts on an individualised basis, with the judge having a considerable degree of discretion in determining what constituted reasonable maintenance for a dependant having regard to the resources of the liable relative and the needs of the dependant. This system of individualised justice has come under increasing criticism in several jurisdictions on the basis that in its practical operation it tends to be very costly and ineffective. The amounts of maintenance awarded are often small, not justifying the expense of a detailed judicial inquiry, and problems of enforcement have tended to be chronic especially in the longer term. The burden on lone parents of instituting maintenance proceedings and taking measures to enforce judgements has been a heavy one, often undertaken with little prospect of obtaining an adequate or regular income in the long term. The problems of poverty surrounding single parent families has been met in part by increased public assistance. At the same time, many governments have become concerned by the consequent fiscal burden in so far as it arises from a failure by liable relatives to honour family commitments. The result has been the introduction of various reforms, some still at an experimental stage, designed on the one hand, to reduce the burden on individuals of pursuing maintenance claims and to secure a regular income for dependant family members, especially children, and on the other, to enforce more effectively and at lower cost private support obligations. Such measures, which tend to concentrate particularly on child support, may be roughly categorised as follows:

a In some countries there has been a change in the way in which maintenance is assessed from a broad discretionary basis to one (which has a longer history in certain States) in which calculation proceeds on the basis of a more or less refined formula, designed to increase predictability and certainty (and indirectly encourage agreement) and to reduce the length and costs of hearings.[12]

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[12] Generally speaking, child support formulae, whether judicially or legislatively established, involve a balance between the child's needs and the liable parent's ability to pay, but precise formulae differ from country to country and between states within certain federal systems. The following are examples.

In the United Kingdom, the *Child Support Act 1991* introduced a complicated formula, contained in algebraic form in the schedule to the Act, under which the liable parent could be required to pay at the rate of 50% of disposable income after tax and various allowances.

Under the new German law on child maintenance (*Kindesunterhaltsgesetz*), which came into force on 1 July 1998 (BGBl [*Bundesgesetzblatt*/Official Gazette] 1998 I 666), maintenance may be requested either in the form of a *fixed amount* (*Individualunterhalt*), or a *percentage of the relevant standard amount* (*Regelbetrag*). A fixed amount is usually claimed on the basis of one of the various tables established by the courts in the past (the best known being the *Düsseldorfer Tabelle*) and which continue to be used. The standard amounts are determined in a statutory instrument (*Regelbetrag-Verordnung*) which is annexed to the new law so as to enable amendment by the executive (presumably on a two-yearly basis). The statutory instrument distinguishes three different age categories of the maintenance creditor; it also establishes specific amounts applicable to the Eastern part of Germany (the former GDR). The standard amounts serve essentially as an assessment basis for the issuing of a so-called 'dynamic maintenance title' (*Unterhaltstitel in dynamisierter Form*). *Example*: Let us assume the maintenance debtor has a net income of 4500 DM and the child is 15 years old; according to the *Düsseldorfer Tabelle*, the fixed amount of maintenance would be 713 DM, which equals to 142% of the relevant standard amount determined by the statutory instrument (*i.e.* 502 DM); since this is below the limit of 150% fixed by the law, the maintenance debtor is entitled to a 'dynamic maintenance title'. The particular benefit of a dynamic maintenance title lies in the fact that the amount to be paid by the maintenance debtor is *automatically adjusted* if the standard amounts are changed or if the maintenance creditor moves into the next age category.

b In some countries the function of determining the amount of maintenance to be paid, at least in the first instance, has become an administrative rather than a judicial function, not necessarily involving a hearing, with the objective again of reducing costs and improving efficiency. Administrative procedures are sometimes limited to claims for maintenance at or below a subsistence level.[13]

c Mechanisms for locating liable relatives, determining their resources, and enforcing maintenance orders have become more sophisticated. The use, for example, of orders providing for automatic deductions from wages at source have by now become common place. Government controlled databases (relating for example to revenue, social welfare or public licensing) are being employed more frequently both in gathering relevant information and in assisting with enforcement.[14]

Furthermore, a dynamic maintenance title is *immediately enforceable*. The standard amounts also serve as a decisive marker for the possibility of a simplified maintenance procedure (see footnote 13).

In the United States, in order to be eligible for Federal funding of child support enforcement programmes, individual states must adopt guidelines for child support. (See the Child Support Enforcement Program under Title IV-D of the *Social Security Act*.) Some states employ percentage tables based on the liable parent's net or gross income. Another formula begins with an assessment of the minimum needs of the liable parent.

In Sweden, maintenance support is based on a percentage of the annual income of the liable parent reduced by a basic allowance. The percentage rate depends on the number of children for whom the liable parent is responsible.

In Canada, judicially established formulae (see *Paras* v. *Paras* [1971] 1 *OR* 130 (Ont. C.A.) and *Levesque* v. *Levesque* [1994], 4 *R.F.L.* (4th) 373 (Alta C.A.)) have recently been replaced by federal Guidelines, based on Tables which establish monthly child support payments by reference to the liable parent's income, with the percentage increased for the number of children and modified slightly by income levels. The tables differ for each Province in accordance with different tax rates. The Guidelines are in the form of regulations made pursuant to legislation amending the *Federal Divorce Act 1985*.

In Austria, where maintenance payments continue to be assessed by the courts, guidelines established by the courts operate based on the statistically calculated average needs for children of a certain age and a certain percentage of the net income of the maintenance debtor.

[13] For example, under the new German law (see previous footnote), for maintenance claims below a certain level (150% of the standard amount), a simplified procedure applies conducted by a non-judicial officer (*Rechtspfleger*), involving in most cases no formal hearing, and the possibility of only a limited range of defences. In Australia the *Child Support Agency* (an administrative body) issues child support assessments which establish the amount of a debtor's liability according to a statutory formula. In the United Kingdom, a *Child Support Agency* is responsible for the assessment, collection and enforcement of child support. In the United States, states may use administrative procedures or other legal processes for establishing and enforcing orders more quickly than is usually possible with court proceedings.

[14] For example, under the new Canadian federal legislation (see footnote 12 above), certain federally controlled databanks, including that kept by Revenue Canada for income tax purposes, will be accessible to help locate defaulters. To assist with enforcement at the federal level, there is the possibility of suspension of a passport or a federally granted license, such as a fishing permit. Some provincial governments have also enacted similar legislation allowing, for example, suspension of the driver's license of a defaulting maintenance debtor.

In the United States, parent locator services in each state are equipped to search state and local records for information concerning the whereabouts of an absent parent, and may call upon the assistance of a federal service which has access to social security, internal revenue and other federal information resources. In order to be eligible for federal funding of child enforcement programmes, individual states must establish enforcement procedures such as wage withholding, tax refund intercepts and credit reporting. Various states have laws which allow them to use enforcement techniques such as liens on real or personal property owned by the debtor, posting of securities or bonds, reporting to consumer credit agencies and withholding state trade or professional licenses from defaulters. As with the United Kingdom, direct administrative enforcement by the support enforcement agency is provided for. (See *Uniform Interstate Family Support Act 1996*, Section 507, which permits such administrative enforcement on an interstate basis.)

d State involvement in securing private maintenance, motivated in part by a wish to reduce costs to the State, has in fact intensified in certain jurisdictions. There is a tendency in some States towards the integration of public and private support systems, and an acceptance that the effective enforcement of private obligations often requires the initiative of the State in bringing and enforcing claims against the recalcitrant maintenance debtors.[15] Systems of advance payment by the State of maintenance due to a maintenance creditor are sometimes used.[16]

10 These trends prompt certain questions concerning the existing rules of private international law, especially those embodied in the international instruments, and concerning the existing systems of administrative and judicial co-operation at the international level. For example, does the trend towards simplification in the procedures and the basis for assessing maintenance, especially in respect of children, have any implications for applicable law rules? Is the increasing involvement of public authorities in the process of claiming and enforcing maintenance adequately reflected in current systems of administrative and judicial co-operation? Do the existing provisions

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The new German law contains provisions designed to facilitate enforcement, including greater rights of access by the courts to personal data contained in the records of employers, insurance companies and financial authorities. These bodies are obliged to provide the information.

[15] In the United Kingdom, for example, it has been suggested that child maintenance should become one element of an integrated welfare service. New computer software is being tried out making it possible to deal with child support applications, income support applications and housing benefits all in one. (See Government Green Paper, *Children First: A New Approach to Child Support*, 1998, Department of Social Security.)

[16] The Committee of Ministers of the Council of Europe adopted on 4 February 1982 a *Recommendation on payment by the State of advances on child maintenance* (No R(82)2), under which "payments of advances on child maintenance will be made under a system set up by the State where a person who is under a legal obligation to pay maintenance, which has become enforceable by compulsory process, has failed to comply with his obligations". In Austria such a system, which is not linked to the social security system, was introduced earlier by an Act of 1976. In 1996, the Austrian State paid advances amounting to 935,4 million Schillings, 44% of which was repaid by maintenance debtors (information supplied by Dr Werner Schütz, Ministry of Justice, Austria).

In Sweden, an *Act relating to Advance Payments on Maintenance Allowances* (1964:143) combined a system of advance payment of child maintenance with a State-guaranteed minimum allowance for children, thus linking the system for enforcing private maintenance obligations with the public system of child support. The State, under this system, was entitled to seek reimbursement of that element of the maintenance allowance with constituted an advance payment. In 1993/1994 the cost to the State of advance payments amounted to over SEK 4,000 million, approximately 25% of which was reimbursed to the State by liable persons. This system has been abolished by a Maintenance Support Act of 1996 (1030), under which the child's entitlement to a maintenance allowance is not made dependent upon the determination of a support liability under civil law. The Social Insurance Office, following payment of the allowance, decides on the appropriate contribution by any liable person, based on a percentage of his or her annual income, reduced by a basic allowance. (See AKE SALDEEN, New Rules on Financial Support of Children Entitled to Maintenance, *The International Survey of Family Law* 1996, International Society of Family Law (1998 Kluwer Law International).)

concerning recognition and enforcement of decisions, as well as those concerning co-operation, take sufficiently into account the possibilities opened up by the new information technology?

It is not easy to predict where current trends in the reform of domestic systems will eventually lead.[17] However, it may be safe to assume that in any new international arrangements, governments will be concerned in particular with questions of cost effectiveness, as well as with the importance of making maximum use of the new technology.

[17] In the United Kingdom, for example, the reforms introduced by the *Child Support Act 1991* have been the subject of continuing review. A Government Green Paper (*Children First: A New Approach to Child Support*, 1998, *op. cit.*), while maintaining the basic structure of the 1991 Reform, has proposed a new more simple formula for assessing liability, based on a "simple slice" of the liable person's net income (15% for one child, 20% for two, 25% for three or more).

In Australia, a *Child Support Agency* began assessing child support under an administrative formula in 1989, with the possibility of appeal to the courts. A *Child Support Review Office* was established three years later to provide a quick, simple and cheap means of determining departures from the child support formula. The system has been under constant review since its inception. (For a recent comment, see BRUCE DOYLE, Confessions of a Child Support Review Officer, *Australian Family Lawyer*, Vol. 13, No 1 (1998), 32.)

CHAPTER I – THE HAGUE CONVENTIONS

A THE HAGUE CONVENTIONS OF 1958 AND 1973 ON RECOGNITION AND ENFORCEMENT OF MAINTENANCE OBLIGATIONS

1 *Current status and description*

11 The status of the two Conventions has changed little since 1995. The same 19 States are Parties to the *Hague Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children*.[18] The last ratifications, by Portugal and Spain, occurred twenty-five years ago in 1973, and the last accession was by Suriname in 1975, effectively continuing the application of the Convention following independence. The *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* has eighteen States Parties[19] which, with the accession of Poland in 1995 and Estonia in 1998, is two more than in 1995. Membership of the two Conventions overlaps to a considerable degree. Most States Parties to the 1958 Convention are also Parties to the 1973 Convention, the exceptions being Austria, Belgium (which has signed but not ratified the Convention), Hungary and Suriname. The States Parties to the 1973 Convention which are not Parties to the 1958 Convention are Estonia, Luxembourg (which has signed the 1958 Convention), Poland and the United Kingdom. It should be borne in mind that, under Article 29 of the 1973 Convention, this Convention replaces, as regards the States which are Parties to it, the 1958 Convention. Therefore, for most participating States, the 1973 Convention has in effect largely replaced the 1958 Convention. With the exception of Suriname, membership of the two Conventions is confined to European States.

12 The principal features of the Conventions may be summarised as follows. They provide for a system of reciprocal recognition and enforcement of decisions among Contracting States relating to maintenance obligations. The 1958 Convention was confined to obligations in respect of children, while the 1973 Convention applies to any maintenance obligation arising from a family relationship, parentage, marriage or affinity (Article 1). Neither Convention lays down uniform rules governing the exercise by an authority of jurisdiction to make a decision relating to maintenance. However, rules of indirect jurisdiction operate, in the sense of being conditions of recognition or enforcement. These conditions are:

(1) that the creditor or debtor had his habitual residence in the State where the decision was rendered at the time when proceedings were instituted (1958 and 1973 Conventions);[20] or

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[18] The following States are Party to the *Hague Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children*: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Liechtenstein, Netherlands, Norway, Portugal, Slovak Republic, Spain, Suriname, Sweden, Switzerland and Turkey.

[19] The following States are Party to the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*: Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

[20] Article 3, paragraph 1, and Article 7, paragraph 1, respectively.

(2) that both Parties were nationals of that State (1973 Convention);[21] or

(3) that the defendant submitted to the jurisdiction (1958 and 1973 Conventions);[22] or

(4) that the decision was given by reason of a divorce, legal separation or annulment by an authority of a State recognised as having jurisdiction in such matters (1973 Convention).[23]

The principal grounds for refusal of recognition or enforcement are:

(1) manifest incompatibility with the public policy of the State addressed (1958 and 1973 Conventions);[24]

(2) fraud in relation to procedure (1973 Convention);[25]

(3) the existence of prior proceedings between the same Parties and having the same purposes in the State addressed (1973 Convention);[26]

(4) incompatibility with a prior decision rendered in the State addressed (1958 and 1973 Conventions).[27]

Recognition and enforcement of decisions rendered by default are subject to certain notice requirements.

13 A number of features of the 1973 Convention indicate the breadth of its scope. The Convention includes obligations towards public bodies claiming reimbursement of benefits given to a maintenance creditor.[28] It applies to decisions made by judicial or administrative authorities,[29] and to settlements made by or before such authorities.[30] It applies to modification decisions or settlements,[31] and to any part of a broader decision or settlement which concerns maintenance obligations.[32] While there is a general principle that the decision concerned must no longer be subject to ordinary forms of review in the State of origin, this does not apply to provisionally enforceable decisions or provisional measures if similar decisions could have been rendered in the State addressed.[33]

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[21] Article 7, paragraph 2.

[22] Article 3, paragraph 3, and Article 7, paragraph 3, respectively.

[23] Article 8.

[24] Article 2, paragraph 5, and Article 5, paragraph 1, respectively.

[25] Article 5, paragraph 2.

[26] Article 5, paragraph 3.

[27] Article 2, paragraph 4, and Article 5, paragraph 4, respectively. Under the 1973 Convention, the principle is extended to decisions which are entitled to be recognised in the State addressed.

[28] See Chapter IV.

[29] Article 1.

[30] *Ibid.*

[31] Article 2.

[32] Article 3.

[33] Article 4.

14 The State addressed is bound by the findings of fact on which the State of origin based its jurisdiction[34] and there can be no review of the merits of the decision in the State addressed other than that provided for by the Convention.[35]

2 *Operational difficulties and limitations*

15 The following is a list of factors relevant in considering possible revision of the Conventions. They relate primarily to the 1973 Convention. It should be noted that the Special Commission of November 1995 found that the operation of the Convention was largely satisfactory. The matters mentioned here have to do mainly with certain difficulties experienced in the practical operation of the Convention or with the reasons why more States have not ratified or acceded to the Convention.

a The rules of indirect jurisdiction, though familiar to most European States, are not universally acceptable. For example, in the United States jurisdictional standards which do not require that the defendant should be subject to the personal jurisdiction of the court are generally unconstitutional, and jurisdiction based, without any limitations, on the habitual residence of the applicant may also present constitutional problems.[36]

b The Convention does not itself provide for a system of administrative co-operation which is an important feature of many of the more recent Hague Conventions. The prior existence of the New York Convention is obviously the main reason. However, it should be recalled that in one State the Hague Convention and the New York Convention do not operate on a complementary basis, and in some other States there are doubts as to whether certain orders enforceable under the Hague Convention, for example, those made in favour of public authorities, may benefit from the system of administrative co-operation provided for by the New York Convention. There are also certain disparities between the New York and Hague Conventions, such as those relating to provisions for legal aid, which may give rise to problems of co-ordination between the Conventions.

c The Conventions provide no solution or assistance in respect of the problem of locating a debtor who is avoiding his or her obligations.

d The Conventions have given rise to some debate on the question of the competence of the authorities of the State addressed to modify a maintenance decision made by the court of origin. While it is generally accepted that modification of the content of a decision by a court in the State addressed in the course of enforcement proceedings is contrary to the letter and spirit of the two Conventions, there remains the problem of determining in what circumstances a court, other than the court of origin, has jurisdiction to modify an existing order. The Conventions do not of course provide for rules of direct jurisdiction and are not therefore expressly designed to resolve this problem. However, it has been suggested that Article 7, paragraph 1, of the 1973 Convention, by recognising indirectly the jurisdiction of the authorities of the State where the maintenance debtor has his habitual residence, supports implicitly the

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[34] Article 9.

[35] Article 12.

[36] See *Kulko* v. *Superior Court of California* 436 US 84 (1978). For recent discussion, see GLORIA F. DEHART, Comity, Conventions and the Constitution: State and Federal Initiatives in International Support Enforcement, 28 *Family Law Quarterly* 89 (1994), and MARYGOLD S. MELLI, The United States and the International Enforcement of Family Support, in N. LOWE and G. DOUGLAS, *Families Across Frontiers* (1996 Kluwer Law International), 715-731.

exercise of a modification jurisdiction by those authorities.[37] Thus, whereas the primary intent of Article 7, paragraph 1, was to ensure that an order made on the application of the maintenance creditor in the State of the maintenance debtor's habitual residence would be enforceable in other Contracting States, the implicit effect is to support the proposition that the maintenance debtor has a right to seek a modification in the State of his/her own habitual residence, a principle that is contrary for example to that contained in the Brussels and Lugano Conventions.[38]

e Problems have arisen due to the absence of a provision relating to limitation periods concerning enforcement proceedings. The Conventions do not make it clear, for example, whether a limitation period on an action for enforcement is governed by the law of the State of origin of the decision or the law of the State where enforcement is sought.[39]

f Article 15 of the 1973 Convention, which concerns the provision of legal aid in recognition or enforcement proceedings, was thought to be progressive in 1972, in that it does not require the applicant to be a National of a Contracting State, and it entitles him or her to the "most extensive benefits" which the law of the State addressed knows, even though she/he was not granted complete legal aid or exemption from costs and expenses in the State of origin.[40] However, the provision may now be seen as somewhat limited in that it imposes no obligation on a State to provide legal aid or exemption for costs or expenses at the stage of recognition or enforcement either: (a) where the maintenance creditor had no such entitlements in the State of origin, or (b) where none is provided for by the State addressed. Given the reduced circumstances of most maintenance creditors the provision of adequate legal aid at the enforcement stage is a matter of great importance. As the Special Commission of November 1995 showed, it is not easy to reach agreement on the issues surrounding legal assistance and there is great diversity in existing practices. In those countries where legal aid is available, it may be calculated in different ways and it may be subject to different limitations. For example, when maintenance for a child is concerned, the amount of assistance may or may not be calculated solely in relation to the assets of the child.[41]

g The requirement of Article 17, paragraph 5, of the 1973 Convention that the party seeking recognition or applying for enforcement of a decision should furnish a translation, certified as true, of various documents including "*a complete and true copy of the decision*", has been a source of some friction. The *General Conclusions* suggest that some limits should be placed on the current requirements and that, with regard to the decision itself, the requirement should apply only to the essential part of a judgment, "*the operative clause and the reasoning,* i.e. *the part which solely concerns the maintenance obligation …*".[42]

h Particular problems have occurred in relation to the temporal application of the 1958 Convention. These need not concern us here.[43]

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[37] See *Pelichet Note*, paragraph 95, and *General Conclusions*, paragraph 24.

[38] See below at paragraph 49.

[39] See discussion in *General Conclusions,* paragraphs 25-27.

[40] See *Explanatory Report*, paragraph 82.

[41] See *General Conclusions*, *op. cit.* (*supra* footnote 2), paragraphs 7-12.

[42] *Ibid.,* paragraph 14.

[43] *Ibid.*, paragraph 21 and *Pelichet Note*, *op. cit.* (*supra* footnote 3), paragraphs 62-66.

It is important to note that some of the problems arising under the Convention of 1958 were resolved in the drafting of the 1973 Convention. The omission of settlements between maintenance creditors and debtors from the 1958 Convention was remedied by Article 21 of the 1973 Convention. The 1973 Convention contains a specific chapter on public bodies which makes it clear that the recognition and enforcement provisions apply both to decisions rendered against a maintenance debtor on the application of a public body, and to decisions rendered between a maintenance creditor and a maintenance debtor giving rise to an entitlement in the public body to seek recognition or enforcement in place of the creditor. As has been pointed out, the scope *rationae personae* of the 1973 Convention is broader than that of the 1958 Convention, even though such scope may be limited by reservations. Many such reservations have in fact been made which in their practical effect restrict recognition and enforcement under the 1973 Convention to maintenance decisions in respect either of children under a certain age or those made pursuant to a divorce or legal separation.

B THE HAGUE CONVENTIONS OF 1956 AND 1973 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

1 *Current status and description*

16 The status of the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* has not changed since 1995. There are thirteen States Parties to the Convention,[44] and two States which have signed, but have not ratified it.[45] There are now eleven States Parties to *the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*,[46] the only addition since 1995 being Poland. Belgium has signed, but not ratified the 1973 Convention.

17 Three States are Parties to the 1956 Convention, but not to the 1973 Convention, namely Austria, Belgium and Liechtenstein. All the States Parties to the 1973 Convention are also Parties to the 1956 Convention. With the exception of Japan, the States Parties to both Conventions are European. For the ten States Parties to the 1973 Convention, the rules of that Convention replace those of the 1956 Convention, save in relation to the three States Parties to the 1956 Convention which have not ratified the 1973 Convention.

18 The main features of the two Conventions, which are described more fully in the *Pelichet Note*,[47] may be summarised as follows. The two Conventions differ in two important respects. First the 1956 Convention determines the law applicable to maintenance obligations only in respect of children, while the 1973 Convention applies to maintenance obligations "*arising from a family relationship, parentage, marriage or*

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[44] The following States are Parties to the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children:* Austria, Belgium, France, Germany, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland and Turkey.

[45] The following two States have signed, but not ratified the 1956 Convention: Greece and Norway.

[46] The following States are Parties to the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations:* France, Germany, Italy, Japan, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland and Turkey.

[47] *Op. cit.* (*supra* footnote 3), Chapter I, A.

affinity, including a maintenance obligation in respect of a child who is not legitimate."[48] Second, the rules under the 1956 Convention apply only when the law designated is that of a Contracting State, while the rules under the 1973 Convention are universal in the sense that they apply even if the applicable law is that of a non-Contracting State.

19 In many important respects the two Conventions adopt similar approaches. Both Conventions give first priority to the law of the child's/dependant person's habitual residence. Where a change of habitual residence occurs both Conventions apply the law of the new habitual residence from the time that the change occurs. Both Conventions permit a Contracting State to make a reservation that it's internal law shall apply if the creditor and the debtor are both Nationals of that State, and if the debtor has his habitual residence there. Both Conventions accept subsidiary connecting factors in the interests of the child/dependant person. But here similarities end.

20 Under the 1956 Convention the law designated by the national conflict rules of the authority seised is applicable if the law of the child's habitual residence gives no right to maintenance.[49] The 1973 Convention, on the other hand, provides for a cascade of subsidiary connecting factors, in the event of the creditor being unable to obtain maintenance by virtue of the law of his or her habitual residence. The first alternative is the law of the common nationality of the creditor and debtor. If under that rule the creditor is still unable to obtain maintenance from the debtor, the internal law of the authority seised applies.

21 By way of exception Article 8 of the 1973 Convention lays down a special rule governing maintenance obligations between divorced spouses and the revision of decisions relating to such obligations. In any Contracting State in which the divorce is granted or recognised, the applicable law is the law applied to the divorce. The same rule applies to legal separations, and cases where a marriage has been declared void or annulled. Article 9 of the 1973 Convention contains a special rule concerning the right of a public body to obtain reimbursement of benefits provided for a maintenance creditor. The governing law is that to which the body is subject.

22 Article 10 of the 1973 Convention specifies some of the matters which are determined by the applicable law, as follows:

> "*(1) whether, to what extent and from whom a creditor may claim maintenance;*
>
> *(2) who is entitled to institute maintenance proceedings and the time limits for their institution;*
>
> *(3) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor.*"

23 Under both Conventions the application of the law designated under the Convention may be refused if it is manifestly incompatible with public policy (*ordre public*). In addition, the 1973 Convention contains a substantive requirement that, in determining the amount of maintenance, the needs of the creditor and the resources of the debtor must be taken into account.[50]

24 Article 7 of the 1973 Convention makes an exception to the normal applicable law

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[48] Article 1.

[49] Article 3.

[50] Article 11.

rules by allowing the maintenance debtor to object to a request for maintenance by a person related collaterally or by affinity if no such obligation exists under the law of the parties' common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence. The 1973 Convention, by Article 13, permits a reservation limiting the scope of the Convention to maintenance obligations between spouses and former spouses, or in respect of a never married person below/under 21 years of age.

2 *Conclusions of the Special Commission of 1995*

25 The *Pelichet Note*, on the basis of a survey of case law, concluded that "*the application of the two Conventions on the law applicable to maintenance obligations has not given rise to major difficulties*,"[51] and that, despite the large number of court rulings, "*the vast majority of them merely confirm what is clearly stated in the text of the Conventions*".[52] The cases discussed in the Pelichet Note[53] concern, *inter alia*, the temporal application of Article 8 of the 1973 Convention, determination of the habitual residence of a child, the capacity particularly of public bodies to introduce proceedings for maintenance, and whether the right to an advance for the costs of divorce proceedings is embodied in the concept of maintenance obligations. Two subjects, those of the incidental question and party autonomy, received particular attention and are discussed further below.

26 The *General Conclusions* deal first with the law applicable to the incidental question, and in particular the question of whether a parent/child relationship exists. The conclusion drawn was that the incidental question is governed by the law applicable to the maintenance obligation,[54] and that this remains the case even if the designated law itself requires that the question of status should be decided as a main issue.[55] The practice in certain States of refusing recognition to maintenance orders on the grounds of irregularity in the settlement of the incidental question was said to be ascribable, not to the text of the Convention, but to a reluctance in certain States to accept that a natural or even supposed parent/child relationship should have maintenance effects.[56]

27 Next the *General Conclusions* address Article 8 of the 1973 Convention. While acknowledging that this Article had been the subject of some criticism, the Special Commission approved the basic principle that questions of maintenance obligations between divorced spouses should be governed by the law which governs their divorce. The rule was seen as "*guaranteeing the foreseeable nature of maintenance relationships between the former spouses in the long term*."[57] The concern that the rule might result in the application of a law which makes little or no provision for maintenance between former spouses was acknowledged, but attention was drawn to corrective mechanisms within the Convention itself, notably the public policy exception of Article 11, paragraph 1, and the substantive rule contained in Article 11, paragraph 2, requiring a court to take account of the needs of the creditor and the resources of the debtor in determining the amount of maintenance.[58]

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[51] *Pelichet Note*, paragraph 23.

[52] *Ibid.*, paragraph 36.

[53] *Ibid.*, paragraphs 36-57.

[54] *General Conclusions*, paragraph 29.

[55] *Ibid.*, paragraph 30.

[56] *Ibid.*, paragraph 31.

[57] *Ibid.*, paragraph 33.

[58] *Ibid.*, paragraph 32.

28 Finally, on the question of party autonomy, there was recognition of "*the considerable degree of opinion in favour of the freedom of parties to settle the consequences of the dissolution of their marriage*."[59] However, there was no majority in favour of proposing a revision of Article 8 of the 1973 Convention in this respect. There was also concern expressed by some delegates "*to ensure that any law of autonomy, were it to be adopted, would not have a negative impact on the protection of the weaker party*."[60]

3 *Article 8 and party autonomy*

29 The question of party autonomy and, in relation to it, the correct interpretation of Article 8 of the 1973 Convention has been addressed in an important decision of the Netherlands Supreme Court of 21 February 1997.[61] The parties were both Iranian nationals, the husband also having Dutch nationality. They had married in Iran in 1976 and moved in 1984 to the Netherlands where they continued to have their domicile at the time of the proceedings. They had separated in 1991, and in 1992 the husband had instituted divorce proceedings in the Netherlands. Applying Iranian law as the national law of both the husband and the wife (applicable under Article 1, Section 1 of the Dutch Act of 25 March 1981 on the law applicable to divorce and legal separation and to the recognition of foreign decisions thereof), the Hague Court of Appeal granted the divorce. In an appearance before the court the parties jointly agreed that Dutch law should govern the wife's application for maintenance. Dutch law was therefore applied. The husband appealed to the Supreme Court (*Hoge Raad*) *inter alia* on the ground that, in accordance with Article 8 of the 1973 Hague Convention, the Appellate Court should have applied Iranian law, the law governing the divorce, to the maintenance claim. The Supreme Court ruled that Article 8 of the 1973 Hague Convention, in the light of its history and that of the Convention as a whole, was not incompatible with the admission of a choice by divorced spouses of the governing law, the law chosen being that of the country of their common habitual residence for a long period and of the forum.

30 The decision of the Netherlands Supreme Court has been criticised on a number of grounds. It has been suggested that the rules of interpretation of treaties contained in Articles 31 and 32 of the Vienna Convention were not properly applied, that the decision does not accord with the practice of other States,[62] that it frustrates the overall objective of unifying conflict principles and securing legal certainty, that the reasoning of the Court conflicts with the clear intentions of the drafters of the Convention, and that the decision constituted an unwarranted exercise of powers which should be reserved to the legislature.[63] However, the effect of the decision, by severing the link between the law applicable to the divorce and the law applicable to the maintenance obligation, is to ameliorate the apparent rigidity of Article 8 of the 1973 Convention which for long has

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[59] *Ibid.*, paragraph 34.

[60] *Ibid.*, paragraph 35.

[61] Supreme Court (*Hoge Raad*), 21 February 1997, *RvdW*, 56C.

[62] See, for example, OLG Karlsruhe 24 August 1989, *FamRZ* 1990, 313, 314.

[63] See, in particular, M. SUMAMPOUW, Article 8 Hague Maintenance Convention 1973 Set Aside in Favour of Party Autonomy: One Step Too Far, *Netherlands International Law Review* 1998, Vol. XLV, Issue I, 115-128; PETER MANKOWSKI, Wahl des auf den Scheidungsunterhalt anwendbaren Rechts, FuR 11-12/97, 316-318. For further discussion, see KATHARINA BOELE-WOELKI, Artikel 8 Haags Alimentatieverdrag 1973 staat op de tocht, *FJR*, Nummer 6, June 1997, 133, and Artikel 8 Haager Unterhaltsübereinkommen steht einer Rechtswahl wird entgegen, *IPRax* 1998, 492; L.TH.L.G. PELLIS, Enige aspecten van rechtskeuze in het internationale alimentatierecht, *WPNR* 97/6280, 527-530; P. VLAS, Rechtskeuze op postdivortiële alimentatie: een Hollandse verlegenheidsoplossing, *Ars Aequi* 46 (1997) 11 820-827; P.M.M. MOSTERMANS, Het toepasselijke recht op internationale alimentatie-overeenkomsten, *FJR*, Nummer 6, June 1997, 155-159.

been the subject of some criticism, particularly on the ground that it may subject ex-spouses for many years to a law with which, as a result of a change in their circumstances, they are no longer connected. On the other hand, it may be argued that this apparent rigidity can be ameliorated by use of the public policy clause within the Convention itself, as well as the substantive provision of Article 11, paragraph 2, requiring account to be taken of the needs of the maintenance creditor.[64]

31 The decision has left many questions unanswered.[65] Is the choice by the spouses of the applicable law admissible only when the law chosen is the law of the forum and/or of a State with which one and/or both spouses have a substantial connection? What exactly is the meaning of a substantial connection in this context? Is the choice acceptable when it results in the application of a law which denies maintenance in circumstances in which such maintenance could not be denied under the law otherwise applicable under Article 8? Does the principle of *perpetuatio juris* apply also to the law chosen by the parties? What are the formal requirements attaching to the party's choice? Can the choice only be made by request of the parties in the course of the divorce proceedings? Is it possible for the parties to choose the applicable law in proceedings to modify a decision already made in accordance with the law governing the divorce?

32 Whatever conclusions are drawn concerning the merits of the decision of the Netherlands Supreme Court, it may be realistic to regard it as a symptom of the increasing unease which has been felt for some years in relation to two aspects of the 1973 Convention, (1) the absence from the Convention of any clear provision in relation to party autonomy (as well as the uncertainty which exists as to whether the Convention principles do or do not cover maintenance agreements), (2) dissatisfaction with the apparent rigidity and to some extent even the underlying rationale of Article 8 of the 1973 Convention. This raises the question of whether it is now opportune to revise the Convention or to consider the drafting of a protocol. Quite apart from questions of principle, the uncertainty occasioned by the decision of the Netherlands Supreme Court is a matter of concern. It may, therefore, be helpful to list some of the issues which may need to be addressed if such a review were to take place.

4 *Choice of law – some issues*

33 The complex issues raised by the injection of the principle of party autonomy into the private international law aspects of maintenance obligations have never been addressed in detail by the Hague Conference. The issue was not in fact a live one at the time of the drafting of the 1973 Convention, and the *Explanatory Report* makes no mention of the possibility of choice of a governing law by the parties. In the *Pelichet Note*, there is recognition of the limited degree to which party autonomy has been recognised in other areas of family law, for example in the domain of matrimonial property and in respect of the law applicable to succession to the estate of a deceased.[66] There is also recognition of the extent to which parties make, and indeed increasingly are encouraged to make, agreements with respect to the consequences of divorce, including financial arrangements, and of the difficulties relating to the private international law aspects of such agreements. (The law governing the agreement may be different from that designated under the 1973 Convention, and there is uncertainty as to the right of the parties to choose a governing law which is different from the law applicable under the Convention.) The *Pelichet Note* also acknowledges that courts tend

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[64] See, for example, K. BOELE-WOELKI, *op. cit.* (*supra* footnote 63). But see *infra*, paragraph 34 *b*.

[65] See, in particular, P. VLAS, *op. cit.* (*supra* footnote 63).

[66] *Op. cit.* (*supra*, footnote 3), paragraph 54.

readily to ratify such agreements without going into questions of the applicable law.[67]

34 A more detailed analysis of the issues will need to consider at least the following:

a To whom should party autonomy extend and in respect of which maintenance obligations? Should autonomy be limited to the maintenance obligations of adults (spouses or otherwise) *inter se*, or should it also extend to maintenance arrangements made between adults in respect of children? If so, what special provisions are needed to prevent adults from using their autonomy in a way which would limit the obligations which they have towards their children under the law which would otherwise apply to their maintenance obligations?

b What, if any, should be the limits on party autonomy? Should the parties be limited in their choice to a law with which they have some substantial connections? Or should their choice be made subject to the mandatory provisions of any legal system, such for example as that of the State of the habitual residence of the maintenance creditor, which may have an interest in ensuring that certain minimal maintenance obligations are met? The challenge here is to devise appropriate techniques for ensuring that party autonomy is not employed in a manner which reduces the maintenance entitlements to which a dependant might, were it not for the exercise of choice, be entitled to an unacceptably low level. The use of the public policy exception to enable the forum to apply its own law in a particular case may be a necessary last resort, but it is a blunt instrument to employ in resolving a problem which is clearly foreseeable. The introduction of a substantive principle, such as that contained in Article 11, paragraph 2, of the 1973 Convention, which requires the court seised, whatever the applicable law, to take account of the needs of the creditor and the means of the debtor in determining the amount of maintenance, is an alternative technique. However, a requirement that a court must take into account certain factors is not a particularly strong guarantee for a vulnerable dependant. Nor could Article 11, paragraph 2, as currently drafted, allow a maintenance right to be constructed where none at all exists under the applicable law, for example where a dependant spouse is disqualified on the basis of "fault". Yet it may be very difficult to achieve agreement on any greater precision in defining in substantive terms, within a private international law instrument, the minimum entitlements of a dependant.

35 It may also be argued that, if limits are placed on choice, they should be proportionate in the sense of being no more than is necessary to ensure the essentials of support for dependants. This would imply that, where maintenance is being considered up to the level of meeting the basic or minimum needs of dependants, choice needs to be limited; but where provision for a dependant beyond subsistence level is at issue, there should be more scope for the exercise of free choice.

36 Which law governs the formal and essential validity of the choice of law agreement? Given the potential for fraud and the unequal bargaining position in which divorced spouses often find themselves, questions concerning the validity of a choice of law to govern maintenance obligations are likely to arise in practice. It is also important to bear in mind that spousal agreements concerning maintenance are, in many legal systems, subject to special rules which limit the usual freedom of contract and which sometimes give courts powers to vary the terms of a maintenance agreement in the light

[67] *Ibid.*, paragraph 55.

of unanticipated circumstances or newly discovered facts. The specific questions which arise include: Which law governs the formalities of the choice of law agreement? Which law governs its essential validity, including issues such as fraud, mistake, misrepresentation or unconscionability? Which law governs the question of whether the choice of law agreement may itself be subject to modification by a court or other authority?

5 *Maintenance agreements*

37 Any review of the 1973 Convention will need to consider not only the question of the effect of choice of law agreements, but also the separate and related question of the law which should govern maintenance agreements and the obligations arising under them. The two questions are distinct in that a maintenance agreement will not necessarily contain a choice of law clause, and equally a choice of law agreement will not necessarily form part of a broader maintenance agreement. They are related in the sense that they both raise issues concerning autonomy, including the limits on contractual freedom necessary to protect vulnerable dependants. Again, it is hardly necessary to point out that maintenance agreements are common. Most legal systems encourage them and have procedures whereby agreements can be registered with or ratified by a court or other authority.

38 It is clear from the *Explanatory Report* that no agreement was reached during negotiations on the 1973 Convention on the question of whether maintenance obligations which arise out of contract should be included within the scope of the Convention. The Convention neither includes nor excludes them.

> "*After some very lively debates, the Special Commission decided to keep to the solution adopted in October, 1972, in the Convention on the recognition and enforcement of decisions, which was to make no precise mention in the actual text of the treaty. It can be deduced from this intentional silence that a court hearing any particular case will have a large degree of latitude; it will either interpret the clauses of the Convention as covering the case of maintenance obligations arising out of contract and, therefore, apply the treaty provisions; or, on the other hand, it will apply the generally applicable rules of private international law. Thus, the discretion left to the court is a gap in unification. The complexity of the problem – which can be seen in the minutes of the Special Commission's discussions – prevented the Delegates from bridging this gap. It is to be hoped that uniformity in the case law on this point will remedy the silence of the law. There is reason to believe, also, that this difficulty will only arise in a limited number of cases.*"[68]

Despite the hopes expressed in the *Explanatory Report*, it appears that there is continuing uncertainty on the question of the law applicable to maintenance obligations arising out of contract. Doubts continue to exist as to whether the rules of the 1973 Hague Convention, and in particular Article 8, should be applied.[69]

39 Leaving aside the question of the extent to which a choice of law clause in the agreement itself should be respected, the implications of which have been discussed above, one of the main issues is whether a rule such as that contained in Article 8 of the 1973 Convention is acceptable, *i.e.* a rule which requires that obligations under a

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[68] *Op. cit.* (*supra* footnote 6), paragraph 120.

[69] See P.M.M. MOSTERMANS, *op. cit.* (*supra* footnote 63).

maintenance agreement made by divorcing spouses should be referred to the law which governs their divorce. The rule has the advantage of certainty. But it has the potential disadvantage that the parties' agreement may be governed by the law of a system with which they have little real connection. The mandatory rules of the country in which they in fact live may be ignored, or may even be evaded, if the parties are allowed some choice in relation to the law applicable to the divorce. If the State in which the parties live is also the forum, this result can of course be avoided by the clumsy and unpredictable device of the public policy exception, *i.e.* to ensure the application of protective rules of the domestic law of the forum. However, it is possible that the forum will be the State where the maintenance debtor resides and that the agreement offends mandatory rules of the State where the maintenance creditor resides. These rules may be specifically designed to protect maintenance creditors living in that State.

40 The circumstances described here suggest, not only that Article 8 may in its operation be unsatisfactory, but that there is perhaps a need for a more general rule guaranteeing to a maintenance creditor, regardless of the contents of any agreement (including any choice of law clause that it may contain), the protection of any mandatory rules of the State in which he or she resides. This idea is of course a familiar one in relation to other contracts involving persons who may require special protection, such as consumer or employment contracts.[70]

41 Finally, it is worth mentioning that, if the view were to prevail that the 1973 Convention rules are not appropriate to maintenance agreements, a "Declaration" to this effect could be employed to remove any element of doubt. Such a Declaration was, for example, adopted on 6 October 1980 by the Fourteenth Session of the Conference in relation to the scope of the *Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods*. That Declaration, which was designed to protect consumers, after acknowledging that their interests were not taken into account when the 1955 Convention was negotiated, confirmed that States Parties were not prevented from applying special rules on the law applicable to consumer sales.[71]

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[70] See, for example, Articles 5 and 6 of the *European Community Convention of 19 June 1980 on the Law Applicable to Contractual Obligations* (the so-called "Rome Convention") which, as regards respectively consumer and employment contracts, prevents (under certain conditions) a choice of law from depriving the consumer/employee of the protection afforded by mandatory rules of his or her habitual residence (in the case of consumers) or of the law which would be applicable in the absence of choice (in the case of employees).

[71] *Acts and Documents of the Fourteenth Session (1980)*, Tome I, *Miscellaneous Matters*, p. 62.

CHAPTER II – THE NEW YORK CONVENTION AND OTHER INTERNATIONAL INSTRUMENTS

A THE NEW YORK CONVENTION

1 *Current status and description*

42 It is wise, when considering the possible revision of the Hague Conventions, to take account of the techniques and solutions adopted in other international instruments – multilateral, regional and bilateral – which deal with maintenance obligations. In view of the express mandate given by the Eighteenth Session of the Hague Conference that the Special Commission, convened by the Secretary General, should examine "*the inclusion in a new instrument of rules on judicial and administrative co-operation*", special attention needs to be paid to the New York Convention which is currently the principal international instrument regulating these matters.

43 The *United Nations Convention on the Recovery Abroad of Maintenance* of 20 June 1956 has (as at December 1998) 56 States Parties, 4 more than in May 1995.[72] The Convention sets up a system of administrative co-operation between authorities established under the Convention in different States, offering assistance to a maintenance creditor in one State who wishes to pursue his or her claim against a maintenance debtor in another. The operation of the Convention was summarised in the *Pelichet Note*[73] as follows:

> "*98 … The Convention institutes a system enabling a maintenance creditor, living in State A, before petitioning any court in the foreign State, to put into operation the administrative machinery in State B (State of the debtor's residence), by means of the usual pre-trial procedures,* i.e. *reminder of the debt, summons, determination of the time for enforcement, voluntary reduction from the debtor's salary, possible criminal charges for abandonment of the family, etc. The system adopted in the New York Convention is the following: each signatory State designates an administrative or judicial authority to receive claims from a maintenance creditor in its territory against a person resident abroad (the so-called Transmitting Agency, Article 2, paragraph 1). The Contracting State also has to designate an administrative authority to act as receiver of claims coming from abroad (the so-called Receiving Agency, Article 2, paragraph 2). These agencies correspond directly with each other, without passing either through an administrative hierarchy or through diplomatic channels. The receiving agency having been informed of the case, and having the file in its hands, takes all appropriate steps on behalf of the claimant for the recovery of the maintenance: in particular, it will try to settle the case or bring pressure to bear upon the debtor, but when necessary will institute or prosecute an action for maintenance or for the enforcement of the judgment obtained in the State of the creditor (Article 6).*
>
> *99 The Convention accords a certain number of facilities to the creditor: in particular, legal aid will be given to him to the same extent as it would be granted to a creditor residing in the State where the proceedings were*

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[72] The four additions are Ireland (1995), Uruguay (1995), Belarus (1996) and Estonia (1997). For the full list see Annex II.

[73] *Op. cit.* (*supra* footnote 3), paragraphs 98 and 99.

instituted, the exemption from any requirement to make any payment or deposit as security for costs is expressly provided for; lastly, the services both of the Transmitting and Receiving Agencies are free of charge and facilities are provided for the transfer of funds payable as maintenance or to cover expenses in respect of proceedings under the Convention (Articles 9 and 10 of the Convention)."

2 *Operational problems and limitations*

44 The operation of the New York Convention varies from State to State. There are many States Parties in which the Convention does not operate at all, or operates unilaterally (*i.e.* with respect to outgoing cases only), or operates with great difficulty. The primary cause is that, for a variety of reasons associated usually with economic difficulties, the States concerned have not established, or properly resourced, efficient administrative structures to carry out the obligations imposed by the Convention.[74]

45 Among those States in which the Convention operates reasonably well, there remain a number of specific problems, many of which were discussed in detail at the Special Commission of 1995. They are listed here in summary form.

(i) While State Parties generally agree that the New York Convention and the Hague Conventions should be regarded as complementary, the United Kingdom continues to take the view that the New York Convention and the Hague Convention of 1973 on recognition and enforcement should be operated in the alternative.

(ii) There remains disagreement between States as to whether the procedures of the New York Convention are available only to the creditor or may be utilised also by a public body to whom the rights of the maintenance creditor have in some way been delegated. There is no express authorisation within the Convention for its use by public authorities.[75] The Special Commission of 1995 recommended that "*any application addressed by a public body through the channels instituted by the New York Convention should be accompanied by a power of attorney furnished by the maintenance creditor, even if the latter has already received allowances and the public body has been legally subrogated to his rights*".[76] Despite this recommendation, it remains a problem for certain States (for example Germany) to process applications by public authorities for reimbursement even where a power of attorney is provided.

(iii) The almost unanimous opinion of the Special Commission of 1995 was that the operation of the Convention system does not require that there be an existing decision rendered in the State of origin. However, two States, Belgium and France, continue to apply this requirement. The great majority of States take the view that the Convention system can be utilised to assist a creditor to obtain *de novo*, by judicial or other means, maintenance in the State addressed.

(iv) The Preamble to the New York Convention states that its provisions are designed to assist "*persons in need dependent for their maintenance on persons abroad*". No further definition is given of the Convention's scope *rationae personae*. This may give rise to difficulties, though the Special Commission of 1995 unanimously considered that the Convention "*applies to maintenance obligations in 'family relationships', within the broad*

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[74] For a detailed explanation see the *Pelichet Note*, paragraphs 103-117.

[75] See especially Article 1.

[76] *General Conclusions*, paragraph 47.

meaning of the term, as envisaged in the travaux préparatoires *of the Convention, including maintenance payments after divorce*".[77]

(v) Practices regarding payment of costs and the provision of legal aid vary. Article 9 of the New York Convention lays down (1) a principle of equal treatment between claimants and residents or nationals of the State where proceedings are pending in relation to the payment of costs and charges and exemptions therefrom, (2) a requirement that claimants may not be required as aliens or non-residents to furnish a bond or provide other security for costs, and (3) a rule that fees may not be charged by the transmitting and receiving agencies. The issue of legal assistance as such is not addressed. There are different views as to the extent of the responsibilities in this regard of the transmitting and receiving agencies. A strict interpretation confines their responsibility to the free provision only of those services which they are obliged to provide under the Convention. It should be recalled in this regard that, under Article 6, the receiving agency is itself authorised, *inter alia*, to institute and prosecute an action for maintenance. There is concern among some agencies in relation to the actual and potential costs which they do or may incur under the Convention, and in relation to the unequal burdens which result from divergent State practice.

(vi) A particular problem is that of translation. This has already been discussed above[78] in the context of the Hague Conventions on recognition and enforcement. A strict application of the New York Convention procedures requires the transmitting agency to have translated all the relevant documents and, under Article 9, to bear the costs. This may be very expensive and is not always done. The Special Commission of 1995 recognised a need to modify the translation requirements to cover only those documents, and only those elements of any judgment concerned, which are absolutely essential. However, the Special Commission did not decide upon any specific method of achieving this result.

(vii) The requirement of Article 3, paragraph 3, of the New York Convention that the application should be accompanied by a photograph of the claimant and, where available, of the respondent, was viewed by the Special Commission of 1995 as constituting in some cases an unnecessary hindrance for the applicant. In fact, the Special Commission concluded that "*files should no longer have to be systematically accompanied by a photograph*".[79]

(viii) The Special Commission of 1995 drew attention to the difficulties for dependants which arise when the creditor, who is a staff member of the United Nations, invokes immunity as an international official to avoid his or her maintenance obligations.

(ix) An attempt was made by a Working Group in the course of the Special Commission of 1995 to draft model forms to accompany the files transmitted under the New York Convention, and to ensure their receipt.[80] The Secretary General was requested by the Eighteenth Session of the Hague Conference to convene an informal Working Group to prepare a further draft for examination and possible adoption by the next Special Commission. The model forms proposed by the original Working Group are appended as an annex to this Note. States are invited to submit written observations on them to the

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[77] *General Conclusions*, paragraph 49.

[78] At paragraph 15 *g*.

[79] *General Conclusions*, paragraph 51.

[80] See Working Document No 15, Special Commission of November 1995 on Maintenance Obligations, Proposal of the Working Group on Model Forms.

Permanent Bureau, in advance of the Special Commission to be held in April 1999, in order to assist that Commission in reaching a conclusion.

(x) Finally, the problem of the absence of an up-to-date list of the national authorities provided for under the New York Convention has now been remedied by the Hague Conference, which from time to time circulates among authorities an updated list, together with contact details.[81]

3 *Review of the Convention*

46 Most of the problems concerning the operation of the New York Convention have to do more with the manner of its implementation in particular States than with any intrinsic defects in the Convention itself. A major outstanding problem remains the unwillingness or inability of a large number of States Parties to devote the resources necessary to establish administrative machinery which has the capacity to carry out with reasonable speed and efficiency the functions which the Convention gives to transmitting and receiving agencies.

47 The Convention offers a flexible structure for administrative co-operation, which undoubtedly has been one of its strengths, enabling it to operate reasonably successfully among some of the States Parties for more than forty years. On the other hand, this flexibility has given rise to variations in practice on a number of important issues. For example, given the increasing extent to which public authorities are involved in pursuing and enforcing claims against maintenance debtors, and the tendency in some States towards some degree of integration of public and private maintenance systems, it is a matter of concern that there should remain doubts as to the applicability of the New York Convention to applications made by public authorities. It is also a serious limitation that some States will only process applications under the New York Convention where there already exists a decision on maintenance in the State of origin.

48 Consideration of any possible review of the New York Convention must bear in mind the procedures for its revision which are set out in Article 20 of the Convention, under which any party may request a revision of the Convention, and a conference to consider any proposed revision must be convened by the Secretary General of the United Nations if a majority of the Contracting Parties so approve. Revision of the New York onvention is not a function of the Hague Conference. It would be possible for the Hague Conference to consider the question of administrative co-operation in the context of a new instrument, perhaps one designed to link in more closely with the Hague Conventions on recognition and enforcement. The danger of embarking on this course, without there being a very clear added value to any new co-operation provisions, is illustrated by the fate of the European Union Rome Convention of 6 November 1990,[82] the basic objective of which is similar to that of the New York Convention, that is to facilitate the recovery of maintenance through a system of co-operation based on Central Authorities. Its scope is narrower than that of the New York Convention, applying only to maintenance judgments falling within the scope of Article 1 of the Brussels Convention of 1968. Despite certain improvements on the New York Convention, and in particular a clear entitlement for persons (such as public bodies) exercising the creditor's rights of redress to benefit from the Convention procedures, it has not yet come into

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[81] The latest Circular was sent out on 22 May 1998 (Ref. No L.c. ON 25 (98)). A revised list appears in Annex II of this Note.

[82] *Convention between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments.*

operation. One of the reasons no doubt is that, because all Member States of the European Union are now Parties to the New York Convention, the Convention offers relatively little by way of added value.

B SOME REGIONAL CONVENTIONS

49 Chapter III of the *Pelichet Note* summarises three regional Conventions dealing either wholly or partially with maintenance obligations. These are:

a the *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, concluded on 27 September 1968, together with the parallel Lugano Convention, concluded on 16 September 1988 (hereafter referred to as the Brussels/Lugano Conventions);

b the *Inter-American Convention on Support Obligations*, drafted under the auspices of the Organization of American States, and concluded at Montevideo on 15 July 1989 (hereafter called the Montevideo Convention); and

c the *Convention between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments*, concluded at Rome on 6 November 1990 (hereafter called the Rome Convention).

50 These Conventions are mentioned here only for the purpose of highlighting certain special features which distinguish them from the Hague and New York Conventions and which may be relevant in considering the need for any new worldwide instrument. Four features in particular are worth mentioning.

(i) The Brussels/Lugano and Montevideo Conventions differ from the Hague Conventions in that they provide rules of direct jurisdiction. The rules provided for in the Brussels/Lugano Conventions favour the maintenance creditor by giving him or her a choice of proceeding against the debtor either in the State of the debtor's domicile or habitual residence,[83] or in the State where the creditor is himself or herself domiciled or hbitually resident.[84] The maintenance debtor, on the other hand, for example if modification of the original order is being sought, may only bring proceedings (under the principal rule in Article 2) in the State of the defendant's (*i.e.* the creditor's) domicile or habitual residence. The Montevideo Convention goes further by offering[85] the claimant three choices of forum. These consist of the two provided for under the Brussels/Lugano Conventions, and in addition jurisdiction is given to the authorities of the State with which the "support debtor" has personal links, such as property or income.

(ii) The Montevideo Convention approaches definition of the scope *rationae personae* of the Convention in a manner different from that of the Hague Conventions. The Hague Conventions of 1973 define their scope broadly to include maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate. They then offer the possibility to States Parties of limiting this scope by reservations. The Montevideo

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[83] Article 2.

[84] Article 5, paragraph 2.

[85] Article 8.

Convention by contrast,[86] confines its scope to obligations towards children or those between spouses on grounds of marriage or subsequent to divorce, but then permits individual States to make a declaration at the time of signature or ratification extending the scope of the Convention to other support obligations based on family law or other legal relationships.

(iii) The Montevideo Convention, in contrast to the Brussels/Lugano Conventions, also contains applicable law provisions. These, like those of the Hague Conventions of 1956 and 1973, are intended to operate to the advantage of the maintenance creditor. The authority seised is required to apply either the law of the domicile or habitual residence of the "support creditor", or that of the domicile or habitual residence of the "support debtor", in accordance with which of these is more favourable to the claimant.

(iv) As regards the Rome Convention, as has already been observed,[87] this deals primarily with administrative co-operation and it contains at least one feature which distinguishes it from the New York Conventions. It clearly authorises public bodies, when exercising a maintenance creditor's rights of redress or representing the creditor, to make use of the Convention procedures.

C BILATERAL ARRANGEMENTS

51 In addition to the multilateral and regional conventions, there exist a plethora of bilateral arrangements governing maintenance obligations. For example, States such as Australia, Canada and the United States, which are not Parties to any of the Hague Conventions on maintenance obligations, have considerable experience in negotiating with individual States such arrangements. The approach of the United States to such bilateral arrangements is worth highlighting because it offers a particularly flexible model of co-operation which deserves to be taken into account in considering any possible new international instrument.

52 The United States is not Party to the Hague or to the New York Conventions. Prior to 1996 most individual states had reciprocal enforcement arrangements with some 20 countries (and, in the case of Canada, with individual Provinces), but not all states had arrangements with all of these countries. Since 1996, various bilateral arrangements have been negotiated at the Federal level. There have been two agreements (with Ireland and the Slovak Republic) made by parallel unilateral policy declaration, with several more close to conclusion. Negotiations for two formal agreements which may be adaptable to many countries are nearly completed, and a "model" agreement has been prepared. All of these arrangements are with countries which have existing arrangements with one or more individual states. Talks have been held with a total of 35 countries. The relevant federal legislation[88] authorises the Secretary of State to declare any foreign country a reciprocating country provided that country establishes procedures for the establishment and enforcement of support owed to United States residents which satisfy a limited number of mandatory requirements:

a there must be a procedure for establishment of paternity and for the establishment and enforcement of orders of support for children and custodial parents;

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[86] Article 1.

[87] See paragraph 47 above.

[88] 42 *USC* § 659A.

b such procedures must be provided to United States residents at no cost;

c a Central Authority must be appointed with responsibility for facilitating support enforcement and ensuring compliance with the mandatory requirements.

Reciprocal obligations are assumed by the United States, including the provision of cost-free support enforcement services in the United States to persons resident abroad.

53 In so far as these arrangements provide for mutual recognition and enforcement of maintenance decisions, uniform rules of indirect jurisdiction are not applied. Instead, each State is permitted to apply its own standards. In other words, a foreign decision will be recognised and enforced if, on the same facts, the exercise of jurisdiction would have been possible in the requested country. If, applying these standards, enforcement is not possible, the country addressed is obliged to facilitate proceedings to obtain an enforceable order in that country.[89]

54 Two features of these arrangements deserve special emphasis. First, the approach to recognition and enforcement is relaxed by comparison, for example, with the Hague Conventions on recognition and enforcement. This is compensated for by the obligation on the State addressed, if enforcement is not possible, to facilitate fresh proceedings. This pragmatic approach underscores the ultimate objective of the arrangement, which is to assist the creditor by one means or another to obtain enforcement in the foreign country. It also offers a way out of any problems which may arise in the United States from the constitutional restraints on the exercise of jurisdiction in respect of non-residents.[90]

55 The second feature is the emphasis that the arrangements place on certain key issues, such as legal assistance and the establishment of paternity, which are viewed as essential to an effective system of international enforcement, but which under the Hague Conventions are addressed only partially or not at all.

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[89] For further background information, see "Parallel Unilateral Policy Declarations – Bilateral Arrangements as an Alternative to Conventions on the Enforcement of Support (Maintenance) Obligations", Working Document No 2 submitted by the delegation of the United States, Special Commission of November 1995 on Maintenance Obligations. See also GLORIA F. DEHART *op. cit.* (*supra* footnote 36).

[90] See above, paragraph 15 *a*.

CHAPTER III – TOWARDS A NEW INTERNATIONAL INSTRUMENT?

56 "*States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements as well as the making of other appropriate arrangements.*"

These principles, which are contained in Article 27, paragraph 4, of the *United Nations Convention on the Rights of the Child* of 20 November 1989,[91] indicate some of the underlying objectives in the area which is under review. While child support is the major problem, it should not be forgotten that we are also concerned with maintenance in respect of other dependant family members.

57 We must now consider whether there exists a case for any new or revised multilateral instrument or instruments in respect of the international recovery and enforcement of maintenance. It has already been suggested that, given the large number of existing instruments in this area, a compelling case needs to be established for the introduction of any new instrument.

58 The review, in the preceding chapters, of the four Hague Conventions, and of the New York Convention, has concentrated on their practical operation and, with the exception of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, the position today is similar to that pertaining in 1995 at the time of the last Special Commission. There are, as might be expected, various practical problems surrounding the operation of the Conventions. Otherwise the Conventions are operating reasonably successfully among States Parties or, in the case of the New York Convention, among those States Parties which have been able to make a serious effort to implement its provisions. Many of the operational problems are ones which might be addressed by the development, possibly within the Special Commissions, of agreed practices or common understandings concerning interpretation.[92] It is only the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* which has begun to reveal flaws that may require more than cosmetic surgery.

59 This review of the Conventions has, however, been carried out largely in the light of their own objectives set between 26 and 43 years ago. As has already been observed, there have been important developments in domestic laws and procedures relating to family maintenance obligations since that time. These reforms have concentrated on achieving greater efficiency and cost effectiveness, especially in child support systems, and in reducing for the maintenance creditor some of the burdens of prosecuting a claim. It needs to be considered whether some of these changes should be reflected or otherwise

[91] Ratified by 191 States.

[92] However, the fact that many of these operational problems persist four years after the last Special Commission is not encouraging.

accommodated at the international level. Also to be taken into consideration are the reasons why a good many States have not felt inclined to ratify or accede to the Hague Conventions.

60 The present situation is extraordinarily complex, with a mixture of multilateral, regional and bilateral arrangements and conventions which attempt to deal, either comprehensively or piecemeal, with the various elements involved in the machinery of international enforcement of maintenance obligations. In a single State there may be as many as five multilateral and a regional convention operating alongside several bilateral arrangements. For the lawyer or the administrator working within the system or providing advice, the problems of legal navigation are difficult enough; for maintenance creditors and debtors the picture must appear incomprehensible. If one were dealing with domestic law, the case for consolidation would be overwhelming. However, in the international sphere the addition of a further convention, even though one of its purposes might be consolidation, may, because some States may be unwilling or slow to ratify, complicate the position further. In order to improve the situation, any new instrument would need to command widespread support and be seen to offer significant advantages to States Parties to existing instruments, and indeed to offer clear incentives to ratification to those States which have so far preferred not to join any of the multilateral conventions.

61 One way of proceeding with a review of this kind is to imagine for the moment that no multilateral instruments exist, and to consider in that case what would be the ideal components of an entirely new, modern and perhaps comprehensive instrument. Next, it would need to be considered how much of the ideal is in fact achievable in the context of the different national systems. The results of such speculation might then be compared with the existing international arrangements, and a judgment would then be possible as to whether the improvements which appear to be achievable would justify the considerable time and effort necessary to develop any new instrument. We might begin this process of review by considering the matter of jurisdiction.

JURISDICTION

62 Rules of direct jurisdiction in respect of maintenance obligations operate at the regional level, but do not exist on a wider international basis. Has the time come to consider whether this situation should be remedied? The difficulties in achieving uniformity in rules of direct jurisdiction on any subject-matter at a worldwide level are well known and are at this time being considered by the Hague Conference in the context of international jurisdiction and the effects of foreign judgments in civil and commercial matters.[93] In the area of maintenance obligations, the problems surrounding

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[93] There have so far been three Special Commissions on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial maters, in June 1997, in March 1998 and in November 1998. See, in particular, Preliminary Document No 7 of April 1997, "International jurisdiction and foreign judgments in civil and commercial matters", Preliminary Document No 8 of November 1997, "Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters", and Preliminary Document No 9 of July 1998, "Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters", all drawn up by Catherine Kessedjian.

From the first of these Special Commissions a trend took shape which would exclude maintenance obligations from the scope of the future Convention. (See Prel. Doc. No 9, paragraph 9.) The Proposal of the Drafting Committee (Work. Doc. No 144 of 20 November 1998) confirms this trend by excluding maintenance obligations from the substantive scope of the projected Convention.

"Maintenance obligations" are also excluded from the scope of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental*

direct jurisdiction may be less complex than in the commercial area. For example, the problem of competing jurisdictions is less likely to arise. There would probably be general agreement on at least two principles: (1) that the authorities of the habitual residence of the maintenance debtor should have jurisdiction, and (2) that the appearance of the maintenance debtor without protest should also found jurisdiction. The main problem of principle is to define those circumstances in which the maintenance debtor may be made subject to the jurisdiction of the authorities of the country where the maintenance creditor resides.

63 Arguably it is time, at the international level, to work towards a principle which is already accepted in certain regions, guaranteeing that dependant family members may, at least in the great majority of cases, institute proceedings in the State where they have their habitual residence. This principle is already explicit in the two regional instruments which have been examined above, and is implicit in the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. The constitutional difficulties which such a rule may present, particularly for the United States, should perhaps not be regarded as an insuperable obstacle but rather as a challenge to devise a rule which minimises any potential unfairness to maintenance debtors. It seems likely that in the great majority of cases in which creditors institute proceedings in the State in which they have their habitual residence, the link between the debtor and that State will be such as to justify the exercise of personal jurisdiction.[94] It is significant that the United States *Uniform Interstate Family Support Act of 1996* has instituted a number of new rules "*to provide a tribunal in the home state of the supported family with the maximum possible opportunity to secure personal jurisdiction over an absent respondent*".[95] Even if it were not possible to achieve agreement on a simple principle giving jurisdiction in all cases to the State where the creditor habitually resides, it may well be possible to devise a rule which reduces to a minimum the circumstances in which such jurisdiction could not be exercised, *i.e.* in circumstances where there is no link whatsoever between the debtor and that State. An alternative approach would be to accept the general principle, and to allow individual States to reserve the right to refuse jurisdiction (and enforcement) in narrowly defined circumstances.

64 A further advantage of developing rules of direct jurisdiction would be the opportunity to clarify jurisdiction to modify an existing enforceable order. This important matter, although not directly addressed by the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, has been confused by it. It is not a straightforward matter. One problem would be to decide whether the basic principle should be one of continuity, with some degree of continuing jurisdiction in the State where the original order is made, or whether on the other hand

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Responsibility and Measures for the Protection of Children (Article 4) and "maintenance obligations between spouses" are excluded from the scope of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* (Article 1).

[94] See DAVID CAVERS, International Enforcement of Family Support, 81 *Columbia Law Review* 994 (1981), and MARYGOLD S. MELLI, *op. cit.* (*supra*, footnote 36).

[95] See Preparatory Note to the Act, Section II, paragraph 3. Section 201 of that Act includes, among the factors necessary to establish personal jurisdiction of a State over a non-resident "individual", that the individual resided with the child in that State, that the individual resided in that State and provided prenatal expenses or support for the child, that the child resides in that State as a result of the acts or directives of the individual, that the individual engaged in sexual intercourse in that State and the child may have been conceived by that act of intercourse, and any other basis consistent with the constitution of the State concerned and the United States for the exercise of personal jurisdiction.

the solution adopted should reflect more closely any changes in the residence of the parties, in particular that of the maintenance creditor.

APPLICABLE LAW

65 Arguably the time is ripe for a more fundamental appraisal of the correct approach towards the law applicable to maintenance obligations. There exist in relation to the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* substantial problems concerning choice of the applicable law by the parties themselves, the law applicable to maintenance agreements, the rule in the Convention which applies the law governing the divorce to the maintenance obligations of divorced spouses, as well as the question of the law applicable to any incidental question, particularly that of paternity.

66 Indeed there may even be a case for reconsidering the role of the law of the forum. There is an argument, for example, that at a time when States are seeking cost-effective and speedy mechanisms for determining maintenance, and are increasingly using administrative procedures for that purpose, the application of foreign law is not only costly and time-consuming but may not always be feasible. This last matter is of course linked to the issue of jurisdiction. The application of forum law would be less objectionable if there is a guarantee that in most cases the creditor may bring an application before the authorities of the State of his or her habitual residence.

67 If the view nevertheless is that forum law should not apply where the applicant is a non-resident, and indeed that the appropriate choice of law rule should in some way lean in favour of the creditor, there may yet be some doubts as to whether the rules of the 1973 Convention are the most appropriate. Would a rule similar to that in the Montevideo Convention offer the creditor more significant advantages? (Also, should the principle of giving the creditor the benefit of the most favourable law among those available not also be applied to matters such as limitation periods applicable to the enforcement of maintenance obligations?)

68 One of the difficulties in devising uniform applicable law rules is that they are unlikely to be attractive to those common law jurisdictions which traditionally apply forum law. It will also be the view of some States that the development of uniform principles concerning applicable law is not a centrally important issue within the overall context of improving the international machinery for the recovery of maintenance. If a new Convention were to be drafted in which applicable law rules constituted one element, the issue of reservations would probably arise.

RECOGNITION, ENFORCEMENT AND CO-OPERATION

69 In many respects the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* was a farseeing and flexible instrument, which has been able to accommodate to some of the principal developments which have occurred in domestic systems over the last 25 years. Examples are its application to the decisions of administrative as well as judicial authorities, and the special provisions relating to applications brought by public bodies which are either seeking reimbursement of benefits provided to the maintenance creditor or are exercising, by subrogation, the rights of the maintenance creditor. Some of the operational difficulties which have already been discussed may be ameliorated by simple changes in practice, though it has to be admitted that the review conducted by the

Special Commission of 1995 has not resulted in much progress on many of these fronts. The Convention does contain certain elements which may have inhibited wider ratification. For example, as already indicated, the rules of indirect jurisdiction may cause some difficulties for the United States. But these may not be insuperable.[96] Also, for States which may have difficulty in accepting the broad scope of the 1973 Convention *rationae personae*, the reservations provided for by Article 26(2) offer considerable flexibility.

70 If there are criticisms of the Convention they may relate more to what the Convention does not do than to what it does. Perhaps the fundamental question to address is whether, in the light of developments in the last quarter century, the Convention continues to do all that it might to promote efficiency, speed, cost effectiveness and fairness in the international enforcement of maintenance obligations.

71 Take, for example, a simple case in which a modest order for child support is made on the application of a mother resident in State A against a father resident in State B. The order has been made quickly following an administrative assessment based on a statutory formula. The father has not lodged any objections, and the mother or the authority concerned seeks enforcement of the order in State B. In State A enforcement is possible with minimum formality through direct deductions from the maintenance debtor's salary or wages.

72 There is a strong case here for permitting a rapid enforcement procedure in State B, possibly one which simply allows the recognition and application in the State B of the income withholding order made in State A.[97] The procedures for recognition and enforcement of decisions under the 1973 Convention are governed, under Article 13, in general by the law of the State addressed. Whether a simple and rapid enforcement procedure is to be available is left, under the Convention, to be decided by the individual States Parties. It may be asked whether it might not be possible for the appropriate international instrument itself to provide for a "fast track" enforcement procedure in simple cases of this sort. The objection may be raised that this would impose an obligation on States to make available "fast track" methods of enforcement where they are not already available in domestic cases. Even if this is accepted, there could nevertheless be an obligation to make "fast track" procedures available in the State addressed where they already exist. This general approach might also apply to other aspects of enforcement. If enforcement in both of the States concerned is possible through a special administrative process, such as a child support agency, the Convention itself might guarantee access to such a procedure on the basis of reciprocity.

73 The next question is whether the 1973 Convention identifies and offers a solution to the major stumbling blocks which may inhibit successful enforcement. One of these is undoubtedly the question of legal aid. This has already been discussed above,[98] and, while it is acknowledged that this is an area in which it is difficult to achieve satisfactory uniform provisions, the effort to do so in respect of the enforcement of maintenance obligations, where adequate legal assistance may be of such vital importance, may be worthwhile.

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[96] See paragraph 62 above.

[97] For an example of such a system operating among States with a federal system, see the US *Uniform Interstate Family Support Act* (1996), Section 501.

[98] At paragraph 15 *f*.

74 One set of problems which besets the 1973 Convention arises from the absence from it of any provisions relating to administrative co-operation. No doubt the prior existence of the New York Convention is part of the explanation. The result, however, is that under the 1973 Convention there is no obligation on States Parties to establish a system of co-operation based on central or other authorities which have an explicit duty to co-operate, to achieve the purposes of the Convention, to facilitate communications or to assist in the collection of relevant evidence. Even though the New York Convention fills some of these gaps, complementarity between it and the 1973 Convention is not complete. One State has not allowed the two Conventions to operate in tandem. Certain other States do not accept that the procedures of the New York Convention, in contrast to those of the 1973 Convention, may be utilised by public bodies.

75 Moreover, there are certain elements of co-operation which might usefully be added to the flexible and practical, though somewhat rudimentary, system established by the New York Convention. An obligation to give assistance in locating a maintenance debtor in the requested State is an obvious example. There is no provision (apart from that contained in Article 7) for a simple procedure whereby an authority determining maintenance in the State where the maintenance creditor is resident may obtain information from or through an authority in a State where the maintenance debtor is resident, relating for example to the latter's earning or other resources.

76 These areas of co-operation are not necessarily directly related to recognition and enforcement. In fact, they highlight the need for co-operation provisions which facilitate access to relevant information in another State, whether for the purposes of making an original maintenance decision or for the purposes of recognition or enforcement. In this context, thought might also be given to the feasibility, in international cases, of provisions concerning the use of, or access to, information which is held in the automated databases which are in some national systems made accessible to the maintenance creditor, either for the purpose of locating the liable parent or to obtain information concerning income or resources (for example, databases established by revenue or social welfare authorities).[99]

INTEGRATION AND ALTERNATIVE APPROACHES

77 A new instrument would provide the opportunity for a degree of integration which is lacking in the present international system. This is partly a matter of achieving better co-ordination between the existing elements – jurisdiction, recognition and enforcement, applicable law and co-operation – which at present are dealt with by separate instruments. It is next a matter of filling in the kind of gaps which have been identified in the previous section. It is also a matter of ensuring that there are built into the system alternative approaches to achieving the overall objectives.

78 The basic purpose of international regulation is to facilitate the recovery of maintenance for the support of children and other dependants in circumstances where the maintenance debtor resides in a different country. The ideal for the dependant family members is to be able to obtain a maintenance decision in the country where they live and to have it enforced in the country where the liable person lives. This should perhaps be the primary objective of the system. However, the ideal is not always attainable and in certain States it may not in all cases be possible to guarantee enforcement of foreign decisions made against resident maintenance debtors. In such a

[99] See footnote 14 above. It is appreciated that this is an area in which different national and regional approaches to data protection will need to be considered.

situation an integrated system requires provision, if possible, for an alternative mechanism or a back-up system. The most obvious is one which facilitates the dependant in obtaining an original decision in the country where the liable person is resident. This is not an ideal solution but, if the appropriate assistance is furnished, it is a great deal less painful for dependants than a situation in which the international order, having failed to secure enforcement of a foreign decision, provides no alternative. It is this pragmatic approach which in fact underlies the New York Convention system. The problem lies in the fact that its implications are not spelled out in any detail. A new instrument would provide the opportunity to do this.

79 In some States rules which facilitate the maintenance creditor in pursuing a claim in the debtor's country of residence already exist, in effect adding "flesh" to the "bones" of the New York Convention system. A new instrument would provide the opportunity to establish specific uniform rules in this area. Provisions concerning legal aid and assistance might be one aspect. A guarantee of access to any special procedures might be another.[100] In a case where the creditor is receiving support from a public authority in the State of his or her habitual residence, and the public authority is pursuing the claim against the debtor, a new Convention might facilitate direct co-operation between that authority and any similar authority operating in the country where the debtor is resident. Rules which facilitate the obtaining and communication of information relevant to the assessment of maintenance, and rules concerning the taking and transmission of evidence, are also relevant. A provision requiring the authorities of the State in which the debtor is resident to provide assistance in relation to the establishment of paternity might also be included.

SUMMARY

80 The potential advantages of working towards a new integrated international instrument concerning maintenance obligations may be summarised as follows:

(1) the development of a set of uniform rules of direct jurisdiction specifying which State's authorities have jurisdiction to decide upon a question of maintenance or to modify an existing decision;

(2) the revision of certain of the provisions concerning the law applicable to maintenance obligations contained in the Hague Conventions of 1956 and 1973;

(3) the reinforcement of the Hague Conventions of 1958 and 1973 on recognition and enforcement, by the addition (*inter alia*) of "fast track" enforcement procedures, integrated provisions concerning administrative co-operation, and provision to encourage the use of automated databases and electronic means of communication;

(4) the improvement of existing machinery for administrative co-operation, by giving more precision to the role and functions of responsible national organs;

(5) the development of a more uniform approach to the provision of assistance in proceedings initiated in the State where the debtor has his or her habitual residence.

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[100] This is not always the case at present. For example, the administrative procedure established by the United Kingdom *Child Support Act* 1991 is not available where either of the parents or the child live outside Great Britain and Northern Ireland. In Australia also, international cases tend to be dealt with by the courts rather than the *Child Support Agency*.

81 The Special Commission may therefore wish to consider –

a whether these are appropriate goals;

b to what extent any of these goals are likely to be achievable through the development of a new international instrument;

c whether the improvements which appear to be feasible would justify the efforts necessary to develop any new instrument.

82 If a view does emerge that a new instrument is needed, many of the matters which have been addressed only in outline above will need to be explored in more detail. The Permanent Bureau would then embark on the preparation of a more detailed report. Various matters which have not been mentioned in this Note may also need to be addressed. For example, is there need for a definition of "maintenance" to ensure the inclusion of all financial orders (*i.e.* not solely periodical payment orders) whose purpose is to provide for the support of dependent family members?[101] Should the scope *ratione personae* of any new instrument take account of changes in the national laws of certain countries extending the range of partnerships which give rise to maintenance obligations?[102] The Special Commission may wish to identify other areas which may require further study.

[101] See, for example, the jurisprudence of the European Court on the term "maintenance" in Article 5(2) of the Brussels Convention. Case 120-79: *De Cavel* v. *De Cavel* (No 2), [1980] *ECR* 731; Case C-220/95: *Van den Boogaard* v. *Laumen*, [1997] *ECR* 1-1147.

[102] See, for example, the Netherlands *Registered Partnership Act* 1997 which entered into force on 1 January 1998, and the Swedish *Registered Partnership [Family Law] Act* 1994.