HCCH
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PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

OUTLINE

HAGUE PROTOCOL ON LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

The *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*

Introduction

The Twenty-First Session of the Hague Conference on Private International Law on 23 November 2007 adopted both the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (the "2007 Convention"), and the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (the "Protocol").[1]

Primary purpose of the Protocol

The primary purpose of the Protocol is to introduce uniform international rules for the determination of the law applicable to maintenance obligations. It was decided that making applicable law rules a part of the 2007 Convention was unrealistic due to key differences in national legal systems. For example, in many States of common law tradition or in States operating administrative systems for the recovery of maintenance the law of the forum is systematically applied to maintenance decisions.

The 2007 Protocol replaces the existing 1956 and 1973 Hague Conventions on law applicable to maintenance obligations[2] by making important reforms to these prior rules while retaining some of their still very relevant features. In comparison with the prior Hague Conventions, the Protocol provides three main innovations. First, while maintaining the habitual residence of the creditor as the main connecting factor, and extending it to maintenance obligations between spouses and ex-spouses, the Protocol reinforces the role of the *lex fori*, which is promoted, for claims made by certain "privileged" classes of creditors, to the rank of principal criterion, with the law of habitual residence of the creditor in such cases playing only a subsidiary role.[3] Next, an escape clause based on the idea of close connection was introduced for obligations between spouses and ex-spouses.[4] Finally, a measure of party autonomy was introduced, in two variations: the possibility of procedural agreements enabling the parties, with respect to any maintenance obligation, to select the law of the forum for the purposes

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[1] See Final Act of the Twenty-First Session, The Hague, 23 November 2007, at <www.hcch.net> under "Conventions", then Convention No 39, then "Final Act of the Twenty-First Session". The Final Act was signed by seventy States. Both of the new instruments were agreed by consensus. The completion of the two new instruments is the culmination of work which had begun in the 1990's with two formal reviews by Special Commissions of November 1995 and April 1999 on the operation of the Hague Conventions relating to maintenance obligations and, in consultation with the United Nations, of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.

[2] *Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* and *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, available on the Hague Conference website <www.hcch.net> under "Conventions," then Convention No 8 and Convention No 24.

[3] Art. 4(3).

[4] Art. 5.

of a specific proceeding;[5] and, an option regarding the applicable law that may be exercised at any time, subject to certain conditions and restrictions.[6]

The term "Protocol" was chosen to designate the instrument with a view to emphasizing its functional connection with the 2007 Convention, and also its common goal with the 2007 Convention to facilitate the effective international recovery of family maintenance. The Protocol provides solutions favourable to maintenance creditors, designed to facilitate the rendering of maintenance decisions in cross-border circumstances.

While intended to complement and supplement the 2007 Convention, the Protocol is an autonomous instrument and it is open to ratification and accession by any State, including States not party to the 2007 Convention.[7]

Universal application

The Protocol, unlike the 2007 Convention which only applies in relations between Contracting States, has an *erga omnes* effect.[8] That is, its rules will apply in a Contracting State to the Protocol even if the applicable law is that of a non-Contracting State. For instance, a creditor resident in a non-Contracting State who initiates proceedings in a Contracting State (*e.g.*, in the State of the debtor's domicile) will enjoy the benefit of the application of uniform rules favourable to the creditor set out in the Protocol.

Scope of the Protocol

The scope of maintenance obligations of the Protocol is wider than the 2007 Convention, and determines the law applicable to maintenance obligations based on any family relationship.[9] Included in its scope are any maintenance obligations which arise from a family relationship, parentage, marriage or affinity.[10]

A special defence rule has been included in the Protocol to partially mitigate its broad scope.[11] A debtor may contest a creditor's claim on the basis that there is no such obligation under both the law of the State of the debtor's habitual residence and the law of the State of the common nationality of the parties, if there is one. This defence is applicable to any maintenance obligation other than those to children arising out of a parent-child relationship or those between spouses or ex-spouses.

Finally, the application of the law determined under the Protocol may be refused if "its effects would be manifestly contrary to the public policy of the forum."[12]

Scope of applicable law

The Protocol enumerates a non-exhaustive list of issues to which the relevant applicable law will be applied, including: whether, to what extent and from whom the creditor may claim maintenance; the extent to which the creditor may claim retroactive maintenance; the basis for calculation of the amount of maintenance, and indexation; who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation in the proceedings; prescription or limitation periods; and the extent of the obligation of a

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[5] Art. 7.
[6] Art. 8.
[7] Art. 23(3).
[8] Art. 2.
[9] Further, contrary to the 1956 and 1973 Hague Conventions (see *supra*, note 2), no reservation is allowed under the Protocol (Art. 27).
[10] Art. 1(1). The Protocol does not define "family relationship" or other terms. When interpreting these terms and the Protocol, regard should be had by competent authorities to the international character of the Protocol and to the need to promote uniformity in its application (Art. 20).
[11] Art. 6.
[12] Art. 13.

maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in place of maintenance.[13]

General rule on applicable law

The main applicable law rule employed by the Protocol is the law of the creditor's habitual residence.[14] This general rule has the advantages of allowing a determination of the existence and amount of the maintenance obligation with regard to the legal and factual conditions of the social environment in the country where the creditor lives, of securing equal treatment among creditors living in the same country, and of designating applicable law that will often coincide with the law of the forum.

Special rules favouring certain creditors

The Protocol provides certain "cascading" subsidiary applicable law rules, designed to favour certain maintenance creditors.[15] These special rules are designed to ensure that the creditor has the greatest possibility of obtaining maintenance.

The types of creditors who will benefit from these additional rules include children who are owed maintenance by their parents (regardless of the age of the child), any person who has not attained the age of 21 years who is owed maintenance by persons other than parents (with the exception of maintenance obligations arising between spouses, ex-spouses and parties to a marriage which has been annulled), and parents owed maintenance by their children.[16]

A creditor in one of the above-listed categories, who is unable to obtain maintenance by virtue of the law applied under the main rule, will benefit from the application of the law of the forum.[17] Additionally, if such a creditor seizes the competent authority of the State where the debtor has habitual residence, the law of that forum will apply, unless the creditor is unable to obtain, by virtue of this law, maintenance from the debtor, in which case the law of the State of the habitual residence of the creditor shall again apply.[18] Finally, it is provided that if the creditor is unable to obtain maintenance from the debtor under the general rule or the supplementary rules, the law of the State of the debtor and creditor's common nationality, if there is one, will apply.[19]

Special rule with respect to spouses and ex-spouses

The Protocol provides a special rule for maintenance obligations between spouses, ex-spouses, and parties to a marriage which has been annulled.[20] In principle, in a break from the immutable connection to the law applied to the divorce under Article 8 of the 1973 Convention, the law of the State of the habitual residence of the creditor applies, subject, however, to an escape clause.

Either party may raise an objection to the application of the law of the State of habitual residence of the creditor, after which point the court or authority seized will have to conduct an inquiry into whether the marriage has a closer connection with a law other than that of the creditor's habitual residence (for example, *inter alia* the spouses' habitual residence or domicile during the marriage, their nationalities, the location where the marriage was celebrated, and the location of the legal separation or divorce). The Protocol in particular gives

[13] Art. 11.
[14] Art. 3.
[15] Art. 4.
[16] Art. 4(1).
[17] Art. 4(2).
[18] Art. 4(3).
[19] Art. 4(4).
[20] Art. 5.

a leading role to the State of the last common habitual residence to be considered in such an inquiry.[21]

Choice of the applicable law by the parties

The Protocol includes novel features that enshrine the possibility for the parties, with some restrictions, to choose the applicable law to maintenance obligations.

Firstly, parties are permitted to make "procedural agreements" to designate the law of the forum for the purposes of a specific proceeding.[22] This provision only applies when a maintenance creditor has brought or is about to bring a maintenance claim before a specific court or authority.

Secondly, parties are permitted to make agreements designating the law applicable to a maintenance obligation at any time, including before a dispute arises, until such time as they choose to cancel or modify their agreement.[23] Parties are only permitted to designate the law of any State of which either party is a national, the law of the State of the habitual residence of either party, or the law previously chosen or actually applied to their property regime or to their divorce or legal separation.[24]

With a view to protecting the maintenance creditor, such general agreements are restricted in important ways. Choice of law agreements covering maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties is not in a position to protect his or her interest, are prohibited.[25]

The parties' choice of applicable law is also restricted when it bears on the creditor's ability to renounce his or her right to maintenance.[26] The law of the State of the creditor's habitual residence at the time of designation of applicable law shall govern the possibility of renunciation of maintenance and the conditions of such renunciation.

The Protocol also requires that parties to an agreement on applicable law must be "fully informed and aware" of the consequences of their designation. Otherwise a court or authority seized may set aside the application of designated law if its application "would lead to manifestly unfair or unreasonable consequences for any of the parties."[27]

Public bodies

The Protocol provides that the right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject.[28]

Determining the amount of maintenance

Finally, the Protocol contains a substantive rule[29] that must be applied by the authorities of a Contracting State regardless of whether the applicable law is foreign law or the law of the forum. The rule stipulates that the needs of the creditor and the resources of the debtor, as well as any compensation which the creditor was awarded in place of periodical maintenance payments (*i.e.,* a "lump sum" payment), shall be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise.

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[21] Art. 5.
[22] Art. 7.
[23] Art. 8.
[24] Art. 8(1).
[25] Art. 8(3).
[26] Art. 8(4).
[27] Art. 8(5).
[28] Art. 10.
[29] Art. 14.