

**First meeting of the Special Commission on the practical operation of the
 2007 Child Support Convention and on the 2007 Protocol on the Law Applicable to
 Maintenance Obligations - June 2020**

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 2 of August 2019
Title	Questionnaire on the practical operation of the <i>Protocol of 23 November 2007 on the Law applicable to Maintenance Obligations</i>	
Author	Permanent Bureau	
Agenda item		
Mandate(s)	C&R No 28 of the March 2019 meeting of the Council on General Affairs and Policy	
Objective	<ul style="list-style-type: none"> - To seek information as to the implementation and practical operation of the 2007 Protocol in Contracting Parties; - To identify challenges or questions that have arisen in the practical operation of the 2007 Protocol; and - To obtain views and comments, including from Non-Contracting Parties, about other issues for discussion at the upcoming meeting of the Special Commission 	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input type="checkbox"/> For Action <input checked="" type="checkbox"/>	
Annexes	n.a.	
Related documents	Prel. Doc. N° 1 of August 2019 - Questionnaire on the practical operation of the <i>Convention of 23 November 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance</i>	

INTRODUCTION

Objectives of the Questionnaire

This Questionnaire is being circulated in preparation for a possible meeting of the Special Commission on the practical operation of the *HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, the “2007 Convention”) and the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter, the “2007 Protocol”), tentatively to be held in The Hague in June 2020 (dates to be confirmed). The Questionnaire focuses on the 2007 Protocol; another Questionnaire will focus on the 2007 Convention.

This Questionnaire is addressed primarily to Contracting Parties to the 2007 Protocol, but certain questions (at the end of the Questionnaire) are also addressed to non-Contracting Parties. After 10 years of operation of the 2007 Protocol, the Questionnaire has the following broad objectives:

- a. To seek information as to the implementation and practical operation of the 2007 Protocol in Contracting Parties;
- b. To identify challenges or questions that have arisen in the practical operation of the 2007 Protocol; and
- c. To obtain views and comments about other issues for discussion at the upcoming meeting of the Special Commission.

The Questionnaire is designed to facilitate an efficient exchange of information on these matters prior to the meeting of the Special Commission and assist with the drawing up of an agenda for the meeting.

Scope of the Questionnaire

The Questionnaire covers all the provisions of the 2007 Protocol with the exception of Article 14 concerning the determination of the amount of maintenance and the general provisions and final clauses (Arts 20-30).

In considering the questions that follow, Contracting Parties may find it useful to refer in particular to the Explanatory Report (Bonomi) on the 2007 Protocol.

Instructions for completion

The Questionnaire is being sent to Central Authorities designated under the 2007 Convention as well as National and Contact Organs. Central Authorities are invited to co-ordinate as appropriate between themselves and other competent authorities. For Contracting Parties to the Protocol, Central Authorities are ultimately responsible for submitting the completed questionnaire to the Permanent Bureau.

In order to allow the Permanent Bureau to extract parts of the Questionnaire for a compilation and analysis of the responses, please use **this Word Version** of the document, and please **do not return a PDF version** of the completed Questionnaire.

We kindly request that replies to the Questionnaire be sent to the Permanent Bureau by e-mail to <secretariat@hcch.net > **no later than 30 November 2019** with the following subject matter captioned in the heading of the e-mail: “[name of State] Response to the 2007 Protocol

Questionnaire – 2020 Special Commission”. Any questions concerning the Questionnaire may be directed to < secretariat@hcch.net >.

We intend, except where expressly asked not to do so, to place all replies to the Questionnaire on the HCCH website (www.hcch.net). Please therefore clearly identify any responses which you do not want to be placed on the website.

Thank you for your kind co-operation as the Permanent Bureau prepares for the meeting of the Special Commission meeting in 2020.

**QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE
PROTOCOL OF 23 NOVEMBER 2007 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS**

Wherever your replies to this Questionnaire make reference to domestic legislation, rules, guidance or case law relating to the practical operation of the 2007 Protocol, **please provide a copy of the referenced documentation** in (a) the original language and, (b) wherever possible, accompanied by a translation into English and / or French.

Name of State or territorial unit:^[1]	Germany
<i>For follow-up purposes</i>	
Name of contact person:	Katharina Lohse/ Natalie Faetan
Name of Authority / Office:	German Institute for Youth Human Services and Family Law
Telephone number:	+49-6221-9818-0
E-mail address:	csw@dijuf.de

Please note:

- Contracting Parties to the 2007 Protocol are requested to complete ALL questions below.
- Non-Contracting Parties to the 2007 Protocol are requested to complete those sections at the end of the Questionnaire.

PART I – FOR THE ATTENTION OF CONTRACTING PARTIES

1. Scope of the Protocol (Art. 1):

1.1. Have issues arisen before the authorities and / or courts or tribunals of your State with respect to the definition of the relationships that are within the scope of the Protocol?

- a. As regards the definition of a family relationship?
- No
- Yes, please specify:
Please insert text here
- b. As regards the definition of a parentage relationship?
- No
- Yes, please specify:
Please insert text here
- c. As regards the definition of a marriage relationship?
- No
- Yes, please specify:
Please insert text here
- d. As regards the definition of a registered-partnership relationship?
- No
- Yes, please specify:

^[1] The term "State" in this Questionnaire includes a territorial unit, where relevant.

Please insert text here

e. As regards the definition of an affinity relationship?

No

Yes, please specify:

Please insert text here

f. As regards the definitions of other relationships?

No

Yes, please specify:

Please insert text here

1.2. Have issues arisen before the authorities and / or courts or tribunals of your State with respect to the definition of the maintenance obligations that are within the scope of the Protocol?

No

Yes, please specify:

1.3. Which law have the competent authorities of your State applied to preliminary / incidental questions relating to the existence of the family relationship raised in connection with a proceeding having the maintenance debt as its principal subject-matter?

a. The law designated by the Protocol as governing the principal issue relating to maintenance obligations?

No

Oui

b. The law designated as being applicable to the issue arising on a preliminary / incidental basis by the generally-applicable rules of conflict of laws in your State?

No

Yes, please specify:

This question is subject of discussions in the German doctrine and jurisprudence.

A clarification by the special commission could be helpful.

- see extract of comment from Heiderhoff, Beck OK BGB, HUP Art. 1, Rn. 48

- see also Looschelders, Boos, Das grenzüberschreitende Unterhaltsrecht in der internationalen und europäischen Entwicklung, FamRZ 2006, p. 374 (concerning Hague Convention 1973 but still actual, also in German)

Generally there is a clear preference to apply the national rules of conflict. Exceptions are admitted for child maintenance claims.

c. Others?

Please specify:

Please insert text here

2. Access to foreign law (Art. 2) :

2.1. Have the competent authorities of your State encountered difficulties in determining and applying the contents of the foreign law applicable to maintenance obligations designated under the Protocol?

No

Yes, please specify:

We regularly encounter difficulties in applying the contents of the foreign law applicable according to the protocol, particularly when the law of African or Asian states is applicable because it is very difficult to find information on the contents of the rules and even if we find it, it is even more difficult to find jurisprudence or guidelines in order to apply the law properly. This issue concerns however also European or other states as the implementation/application of maintenance systems is very often not accessible for practitioners.

In our practice problems occur particularly in the following situations (cf annotations Art. 11)

- The debtor is financially not able to comply with his maintenance obligations toward several children living in different countries. According to German law the payable amount has to be shared proportionally between the children. The question is which maintenance amount is going to be taken into account for each child in order to calculate each part?

- The debtor is living abroad and has a maintenance obligation towards family members, who's maintenance claim compared to the children's claim is secondary according to German law. The question is which ranking is going to be applicable given that the debtor is not able to comply with both maintenance obligations.

3. General rule relating to applicable law (Art. 3):

3.1. Have issues arisen before the authorities and / or courts or tribunals of your State with respect to the definition of the creditor's habitual residence?

- No
 Yes, please specify:

3.2. If applicable, how have the competent authorities of your State defined the concept of habitual residence?

Please specify :

Please insert text here

3.3. Have the competent authorities of your State encountered an impossibility in determining the creditor's habitual residence, or encountered the creditor's lack of a habitual residence?

- No
 Yes, please specify:

Maintenance situations where the multiple habitual residences of maintenance creditors or debtors living in border regions or having time shared residences provoke the question where the emphasis of a person's ties and thus the habitual residence is given. German jurisprudence and literature refuse rather the idea of multiple residences with the consequence that different maintenance systems are applicable (Staudinger/Mankowski, Haager Unterhaltsprotokoll, revised edition 2016, Art. 3 Fn. 64)

Above that, for international maintenance cases it would principally be helpful if the Special Commission could confirm a uniform concept for the habitual residence of children in family law (child's wishes, habitual residence of younger children, abduction cases).

4. Special rules relating to applicable law (Arts. 4 and 5):

As regards application of Article 4:

4.1. Have the competent authorities of your State encountered challenges in the application of Article 4(1)? Have issues arisen in this respect?

- No
 Yes, please specify:

No German jurisprudence found.

4.2. Have the competent authorities of your State encountered challenges in the application of Article 4(2)? Have issues arisen in this respect?

- No
 Yes, please specify:

A decision of the CJEU is given consideration in German maintenance practice: The question if Art.4 sec 2 is applicable was relevant in a case in which time limits for commencing proceedings had expired and no maintenance for the past could be claimed according to the maintenance system of the creditor's initial habitual residence.

The perspective of the Special Commission in relation to the interpretation of Art. 4 sec 2 would be appreciated in this respect.

As regards application of Article 5:

4.3. Have the competent authorities of your State encountered challenges in the application of Article 5? Have issues arisen in this respect?

- No
 Yes, please specify:

Please insert text here

4.4. Have the competent authorities of your State encountered difficulties in the determination of the criteria defining the "closer connections" with the marriage required by those provisions?

- No
 Yes, please specify:

Please insert text here

- Please specify, in practice, the connecting factors required by the competent authorities of your State for the implementation of these provisions:

Please insert text here

4.5. Has the express, though non-exclusive, mention of the spouses' last common habitual residence given rise to issues in the implementation of these provisions?

- No
 Yes, please specify:

Please insert text here

5. Special defence of the debtor (Art. 6):

5.1. Have the competent authorities of your State encountered challenges in the application of Article 6? Have issues arisen in this respect?

- No
 Yes, please specify:

The provision's scope is very limited. So DIJuF has not encountered a practical case in which this provision has got relevance - besides a converse case: A German debtor lived in Germany and had to pay maintenance for stepchildren in the Netherlands as well as for a child living in Germany. The debtor was however not interested in bringing an objection pursuant to Art. 6 against the children in the Netherlands. So, in case that the provision is kept, it could be

discussed if the objection pursuant to Art. 6 could also be granted to the creditor.

5.2. More specifically, has the concurrent existence of the rules in Article 4 and in Article 6 caused difficulties in the implementation of these provisions?

- No
 Yes, please specify:
[Please insert text here](#)

6. Designation of the applicable law by the parties for the purposes of a particular proceeding (Art. 7):

6.1. Have the competent authorities of your State encountered challenges in the application of Article 7? Have issues arisen in this respect?

- No
 Yes, please specify:
[Please insert text here](#)

6.2. In this respect, when the law of the forum is designated by the parties, is the parties' choice interpreted as being based on Article 7(1) (with effects restricted to a particular proceeding) or on Article 8(1) (with effects for the future as well)?

- No
 Yes, please specify:
[Please insert text here](#)

6.3. Do the competent authorities of that State make the validity of that procedural agreement contingent upon specific formalities under domestic law in excess of the minimum requirements of Article 7(2)?

- No
 Yes, please specify:
[Please insert text here](#)

6.4. Have issues arisen with respect to the terms and the timing of the choice when it is made in the course of the proceeding, as these matters are not determined by the Protocol?

- No
 Yes, please specify:
[Please insert text here](#)

6.5. Have the competent authorities of your State considered that for the purposes of Article 7, initiation of the proceeding is required to occur within a specific time after the parties' designation of the applicable law?

- No
 Yes, please specify:
[Please insert text here](#)

7. Designation of the applicable law by the parties at any time (Art. 8):

7.1. Have the competent authorities of your State encountered challenges in the application of Article 8(1), and in particular Article 8(1)(c) and (d)?

- No
 Yes, please specify and mention the relevant sub-paragraph:
[Please insert text here](#)

7.2. Have the competent authorities of your State encountered challenges in the application of Article 8(2) to (5)? Have issues arisen in this respect?

- No
 Yes, please specify and mention the relevant paragraph if applicable:
[Please insert text here](#)

7.3. More specifically, how do the competent authorities of your State ensure that the parties are fully informed and aware of the consequences of their choice?

Please specify:
[Please insert text here](#)

7.4. Has the determination of manifestly unfair or unreasonable consequences for any of the parties raised difficulties before the competent authorities of your State, including in particular inconsistencies in case-law?

- No
 Yes, please specify:
[Please insert text here](#)

8. Interpretation of the concepts of "nationality" and "domicile" for the purposes of Articles 4(4), 6 and 9 of the Protocol:

8.1. Have the competent authorities of your State encountered challenges connected with the existence of several nationalities common to the debtor and creditor (Arts. 4(4) and 6):

- No
 Yes, please specify:
[Please insert text here](#)

- If so, please specify the criteria applied to determine the prevailing nationality:
[Please insert text here](#)

8.2. Have the competent authorities of your State made use of the provisions of Article 9?

- No
 Yes

8.3. If so, does your State generally make use of the concept of domicile in matters of conflict of laws, even on an accessory basis, in accordance with the spirit of these provisions?

- No
 Yes

9. Public bodies (Art. 10):

9.1. Have the competent authorities of your State encountered challenges in the application of Article 10? Have issues arisen in this respect?

- No
 Yes, please specify:

10. Scope of the applicable law (Art. 11):

10.1. Have the competent authorities of your State encountered challenges in the application of Article 11? Have issues arisen in this respect?

- No
 Yes, please specify:

Concerning the scope of the applicable law, the German jurisprudence follows the large jurisprudence issued with respect to the old instruments, particularly the Hague Convention 1973.

As under the Hague Convention 1973 conflicts can for example arise in case that different maintenance systems are applicable with different proposals for solution (cf issues mentioned under point 2 or also issues of retroactive maintenance).

2014 the German High Court (Bundesgerichtshof) had for example to make a decision about a modification application filed by a minor child concerning a maintenance decision obtained in Ireland by his mother (BGH, 10.12.2014, XII ZB 662/13, BGHZ 203, 372). It was decided that the child was entitled to apply for the modification as according to the lex fori in Germany he was the one entitled to claim (and not his mother). Furthermore the court considered that the law applicable to the modification's requirements was German law, as the habitual residence of the child was Germany when he applied for the variation of order. Maintenance law of the child's new residence does however not apply in case that the child/the child's parents have instituted maintenance proceedings and the child changed residence after the last hearing.

Above that currently a discussion is existing in the German jurisprudence and practice as to the question how differences of standards of living can be taken into account in the calculation of maintenance. Basically the German High Court requires a concrete calculation taking the concrete needs of the child and the concrete financial possibilities of the debtor into account on a case by case basis. This being said, in most cases the necessary information to proceed to such a calculation is not provided. This is why the practice is asking for general rules of conversion in order to make foreign income "compatible" to the German calculation system. In this regard the German High Court has authorised a conversion of a Swiss income according to the Eurostat factor (<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00120&plugin=1>). See: BGH FamRZ 2014, p. 1536; OLG Karlsruhe FamRZ 2017, p. 282.

Regarding states situated outside of the Eurostat zone, considerations were made using the factors published by the World Bank but even this statistic does not contain information about all states.

Finally, the main challenge for applying Art. 11 are practical issues as for example

- the establishment of financial circumstances and obligations to take into considerations,
- under which conditions a child is in need in other States in case it has own income,
- maintenance calculation in case of insufficient means of the debtor,
- relevance of child and family benefits and their amounts,
- calculation of child support in other systems

An harmonisation of practice for example through the publication of country reports, maintenance tables and schemes as well as of case law would be helpful. Highly appreciated would also be the elaboration of guidelines for the assessment of maintenance in cross border cases.

11. Exclusion of renvoi (Art. 12):

11.1. Have the competent authorities of your State encountered challenges in the application of Article 12? Have issues arisen in this respect?

- No
 Yes, please specify:
 Please insert text here

12. Public policy (Art. 13):

12.1. Have the competent authorities of your State encountered challenges in the application of Article 13? Have issues arisen in this respect, in particular as regards interpretation of the term "manifestly"?

- No
 Yes, please specify:

12.2. If applicable, in your State, what situations have resulted in the implementation of these provisions?

Please specify:

13. Internal conflicts and non-unified legal systems (Arts. 15, 16 and 17):

13.1. Have the competent authorities of your State encountered challenges in the application of Articles 15, 16 and 17? Have issues arisen in this respect?

- No
 Yes, please specify and mention the Article or Articles concerned:
[Please insert text here](#)

14. Coordination with earlier Hague Conventions and other instruments (Arts. 18 and 19):

14.1. Have the competent authorities of your State encountered challenges in the application of Articles 18 and 19? Have issues arisen in this respect?

- No
 Yes, please specify and mention the Article or Articles concerned:
[In the German doctrine there is a discussion on the question as to the coordination of the protocole time scope with the Hague Convention 1973 \(cf: Heiderhoff, Beck OK BGB, HUP Art. 1, point 28\).](#)

PART II – FOR THE ATTENTION OF NON-CONTRACTING PARTIES

1. Are there particular reasons for your State not having ratified / acceded to the Protocol?
 No
 Yes, please specify:
[Please insert text here](#)

2. Is your State currently contemplating signing, ratifying or acceding to the 2007 Protocol?
 No
 Yes, please specify:
[Please insert text here](#)

3. Are there any amendments / improvements of the Protocol that would make its ratification / accession more attractive to your State?
 No
 Yes, please specify:
[Please insert text here](#)

PART III – FOR THE ATTENTION OF CONTRACTING PARTIES AND NON-CONTRACTING PARTIES

1. Are there particular issues relating to the Protocol that your State wishes to address during the meeting of the Special Commission?
 No

Yes, please specify and rank by priority:

From our perspective the Protocol is in most cases easily to apply and does not furnish any relevant legal difficulty to handle with. The assessment of maintenance is however impeded by the lack of information in relation to other maintenance systems. This information is relevant in order to reach appropriate maintenance solutions as far as different maintenance systems are concerned. As a result maintenance titles risk not to be accepted by all parties involved (= obligor).. It should not be issue of upcoming variation proceedings. In so far we would appreciate if the next Special Commission could focus on practical issues as

- the elaboration of maintenance profiles for countries,
- establishment of a database for case law/jurisprudence.

We would further appreciate if under Art. 11 the issue of how different standard of livings in different states can be balanced would be dealt with. Another issue is the conflict of different maintenance systems with creditors in different states combined with different rankings and the debtor's insufficient financial means.

Miscellaneous: respondents are also requested to make known their comments about any other matter they regard as being relevant to the practical application of the Protocol and to make known, if applicable, any other particular difficulties that have arisen when their courts have been called upon to apply or interpret the Protocol: