MAINTENANCE OBLIGATIONS[1]

Note on the operation
of the Hague Conventions relating to maintenance obligations
and of the New York Convention
on the Recovery Abroad of Maintenance

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INTRODUCTION

1 In the Final Act of the Seventeenth Session, under Part B, 5, the Hague Conference instructed the Secretary General to convene a Special Commission to study the operation of the Hague Conventions on the law applicable to maintenance obligations and of those on the recognition and enforcement of decisions relating to maintenance obligations, as well as of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. This decision represented the culmination of the discussions which had taken place during the Special Commission of June 1992 on general affairs and policy of the Conference; those discussions were taken up again by the First Commission of the Seventeenth Session in connection with the operation of the Conventions on civil procedure and international administrative judicial co-operation. It should be recalled in this connection that, for the past few years, the Conference has institutionalized follow-up to some of its Conventions by regularly setting up Special Commissions to examine the practical operation of Conventions, primarily dealing with problems of procedure and necessitating close administrative and judicial co-operation through the intermediary of Central Authorities which have to be appointed by each State Party to those Conventions. Hence, regular meetings were held in The Hague of the officials responsible in their respective countries for the smooth operation of the Conventions on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, on the Taking of Evidence Abroad in Civil or Commercial Matters but, above all, on the Civil Aspects of International Child Abduction. The frequently spectacular results of those meetings provided ample evidence of their usefulness: generally speaking, they were conducive to creating a climate of confidence between the persons responsible for implementing those Conventions and to eliminating any friction due to misapprehension regarding certain provisions; more selectively, they also encouraged certain administrations to abandon the practice of imposing unjustified and often petty charges, as well as to draft texts contributing to a more rapid implementation of the goal of such Conventions.

2 It was during preparations for the Seventeenth Session, in the course of discussions confirming the usefulness of such meetings, that certain experts considered it would be highly advantageous to subject the operation of the international Conventions relating to judicial and administrative co-operation in regard to maintenance obligations towards minors or adults to a similar examination. Those experts were not solely concerned with the Hague Conventions in that domain – the latter, moreover, were not conventions for judicial or administrative *co-operation* – but also had in mind the New York Convention on the Recovery Abroad of Maintenance, which in fact makes provision for collaboration between the authorities set up under the Treaty. The Special Commission of June 1992 ultimately accepted the idea that the Permanent Bureau should hold a meeting on the operation of all the universal instruments in force concerning maintenance obligations, including in particular an examination of the operation of the New York Convention, inviting countries which are Parties to this Convention, but which are not Parties to the Hague Conventions, to participate in the discussions.
This conclusion reached by the Special Commission was endorsed by the Seventeenth Session and led to the aforesaid Decision being included in the Agenda of the future work of the Conference.

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1 N.B.: In some countries the equivalent term ‘support obligations’ is used. This term is also used in the Inter-American Convention signed at Montevideo on 15 July 1989.

3 It should also be mentioned that this Decision on the part of the Conference was to a great extent inspired by the principles underlying the *United Nations Convention on the Rights of the Child*, adopted by the General Assembly on 20 November 1989 and currently ratified by more than 165 States. In particular, it is closely modelled on Article 27, paragraph 4, of that Convention, which reads as follows:

> '*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.*'

4 This reference to the Convention on the Rights of the Child is all the more appropriate in that at the same Seventeenth Session, the Conference – in the presence of the Ministers of Justice and high-level representatives of its Member States – adopted a Resolution in which it recognized, in particular, that 'the Conference also is developing into a worldwide centre in the service of international judicial and administrative co-operation in the field of private law, and particularly in the area of child protection'.[2] Of course, the multilateral Conventions on maintenance obligations, with two exceptions, do not solely relate to children, but to any maintenance creditor. However, quantitatively and statistically, requests for maintenance obligations on the part of children are by far the most numerous and fully justify the Conference – in the spirit of the Convention on the Rights of the Child and in accordance with the Resolution adopted at the Seventeenth Session – widening its centre of interest and the domain of its work to include an examination of the problems created by maintenance obligations in all multilateral treaties, subject to the reservations indicated below.

5 It has to be acknowledged that in regard to maintenance obligations, the number of multilateral conventions may seem over-abundant, if one takes into account not only specific instruments, but also general conventions which are also applicable to maintenance obligations. In certain countries, and more particularly in the European ones, a maintenance creditor will shortly find his application governed, either alternatively or cumulatively, by seven conventions in that domain. Although there is a proverb to the effect that 'an abundance of goods does no harm', that can none the less give rise to serious difficulties for the litigants, particularly when the fields of application of the various conventions overlap and applicants and defendants are liable to be in confrontation on this purely procedural ground, to the detriment of the merits of the problem.

6 Let us first of all list those instruments, the mechanism of which we shall subsequently have to describe in connection with the discussions of the Special Commission. The following are the multilateral Conventions relating, either specifically or in general terms, to maintenance obligations:

a *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations Towards Children;*

b *Hague Convention of 15 April 1958 Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children;*

c *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations;*

d *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;*

e *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance;*

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2 Final Act of the Seventeenth Session, under part D.

f *Montevideo Convention of 15 July 1989 on Support Obligations;*

g *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;*

h *Brussels-Lugano-San Sebastian Conventions on jurisdiction and the enforcement of judgments in civil and commercial matters.*

7 Although the experts participating in the Special Commission of June 1992 on general affairs had intended that the future Special Commission on the operation of the Conventions on maintenance obligations should examine all the multilateral conventions in that domain, the Conference finally decided to confine the study to the operation of the Hague Conventions and the New York Convention of 20 June 1956, as is clearly apparent from the Final Act of the Seventeenth Session. This limitation is fully justified: firstly, even if the Hague Conventions on maintenance obligations – unlike the other Conventions, the operation of which is regularly examined by Special Commissions – are not conventions for administrative assistance and co-operation between Central Authorities, it is quite natural for an organization to wish to follow up the text it has drafted and hence that the future Special Commission should examine the problems or difficulties to which those four Hague Conventions may give rise. Furthermore, the New York Convention of 20 June 1956, which specifically provides for collaboration between authorities appointed by each State Party, seems to give rise to certain problems as regards its application and has been basic to the concerns of the experts who suggested the convening of a Special Commission. Of course, this Convention was not drafted under the auspices of the Hague Conference, but under that of the United Nations, and it may at first glance seem strange that the Conference should assume the right to examine the operation of a convention which it had not drawn up. But it should be recalled at this point that the United Nations has not followed up on the operation of this Convention and that consequently, in the interest of fruitful collaboration between international organizations, expressly encouraged by the United Nations itself, and also in view of the spirit stressed in the Resolution adopted at the Seventeenth Session and mentioned above,[3] as well as the coverage of the Convention on the Rights of the Child, there appears to be no obstacle to the Conference examining the operation of the New York Convention – naturally extending an invitation to all the States Parties to this Convention, which are not Members of the Conference, to participate in the work.

8 On the other hand, there seems to be no reason why the future Special Commission should dwell on the other Conventions listed above: the Inter-American Convention of Montevideo, although it does not say so in so many words, is shown in the scope of the very organization which drafted it – the Organization of American States (OAS) – as a locally applicable convention, that is to say one confined to the States which are Members of this Organization. Should difficulties in its application arise during the operation of this Convention which, moreover, is not in force for the time being, it would seem to be the responsibility of the OAS to organize any follow up geared to finding a solution to difficulties caused by a convention drafted by that Organization itself.

9 In regard to the Rome Convention, which is intended to be applied between Member States of the European Union, the latter is not yet in force and the chances of it eventually coming into operation are hardly encouraging, to judge by the criticism to which it has given rise.[4]

10 Lastly, an examination of the operation of the Brussels-Lugano-San Sebastian Conventions falls outside the terms of reference of the future Special Commission: those Conventions, generally applicable to the recognition and enforcement of civil and commercial decisions, the scope of which also covers maintenance obligations, are the subject of continual decisions by the courts of the various States Parties to those Treaties, but above all by the Court of Justice of the European Communities; this means that an examination of the operation of those Conventions is clearly outside the competence of a Special Commission of the Hague Conference.

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3 *Cf.* above, paragraph 4.

4 *Cf.* M. Sumampouw 'The EC Convention on the Recovery of Maintenance: Necessity or Excess?', *Law and Reality, Essays in Honour of C.C.A. Voskuil*, The Hague, 1992, pp. 213-336.

None the less, later on in this Note we shall mention the Conventions which do not require examination by the Special Commission, giving an outline of the main characteristics of those treaties, in order to provide as complete a picture as possible.

11 One final word on the purpose of the Special Commission: it was never the intention of the delegations at the Seventeenth Session that the work of this Commission on the operation of the Conventions on maintenance obligations should culminate in the drafting of a new convention. With reference first of all to the New York Convention of 20 June 1956, such a decision could not fall within the terms of reference of the Hague Conference, but is the exclusive responsibility of the States Parties to that Convention, possibly with some encouragement from the United Nations.

12 In regard to the Hague Conventions, they have one special feature by comparison with the other Conventions whose operation is subject to discussion: those Conventions on maintenance obligations are not treaties of co-operation, nor do they institute Central Authorities called upon to apply those Conventions and to collaborate among themselves. On the contrary, they are conventions which are directly addressed to the litigants, but above all to the courts. 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.

On the other hand, if one or other of the treaty texts gave rise to a genuine difficulty or was unclear on certain specific points, it would be possible for the Special Commission to suggest that the Conference should adopt a recommendation, either so as to clarify a text on the interpretation of which the Parties had failed to agree, or to widen a domain which had not been envisaged at the time when the Conventions were drafted.

14 In actual fact, the meeting of the Special Commission will no doubt be of greater interest to the officials responsible for applying the New York Convention of 20 June 1956, since that Convention – like those the implementation of which has already been discussed in previous meetings – is a treaty providing for administrative collaboration; consequently those responsible for its application have a fundamental interest in certain practical difficulties being settled.

We shall first of all examine the Hague Conventions and then give an account of experiences in applying the New York Convention. Lastly, we shall conclude with a brief outline of the essential features of the Conventions of Montevideo, Rome and Brussels-Lugano-San Sebastian.

15 As we mentioned in the introduction, the Hague Conference drafted four Conventions on maintenance obligations, two concerning the determination of the applicable law and the other two facilitating the recognition and enforcement of decisions in this domain.[5]

16 The two Conventions drafted at the Eighth Session are restricted in their scope *ratione personae*, since they only apply to maintenance creditors who are *children*, the latter being defined in both Conventions as any legitimate, illegitimate or adopted child who is unmarried and under the age of twenty-one. On the other hand, the two Conventions of 1973 do not contain any limitation *ratione personae*, but on the contrary apply to any maintenance creditor, hence also to children. It should be borne in mind in this connection that initially, when the Member States of the Conference decided at the Tenth and Eleventh Sessions to resume work on maintenance obligations, such work was to be confined 'to maintenance obligations not governed by the Conventions of 1956 and 1958 (maintenance obligations in respect of adults)'.[6] In the course of the discussions of the Special Commissions, at the proposal of several delegations, in particular that of Belgium,[7] it was decided to revert to the subject-matter of maintenance obligations as a whole and to constitute two new treaties, one dealing with the determination of the applicable law, the other facilitating the recognition and enforcement of decisions in respect of all maintenance creditors, including children, who had already been covered by the Conventions drafted at the Eighth Session. However, the two Conventions of 1973 contain a series of reservations enabling the scope of the two Conventions to be exclusively restricted to certain categories of creditors.

We shall first of all examine side-by-side the two Conventions on the applicable law, followed by those on the recognition and enforcement of decisions.

A *The Conventions on the applicable law*

17 Thirteen States are at present Parties to the 1956 *Convention on the Law Applicable to Maintenance Obligations in Respect of Children*, namely: Austria, Belgium, France, Germany, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland and Turkey; furthermore, Greece and Norway have signed the Convention, but without ratifying it.

18 On the other hand, only ten States are Parties to the new *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, namely: France, Germany, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Switzerland and Turkey; Belgium is the only State which has signed the Convention, but without ratifying it.

19 With regard to the two Conventions whose scope is exclusively confined to the determination of the applicable law, it might be expected that no conflict of conventions would exist for the States which had successively ratified the two instruments, as the rules of the 1973 Convention merely replaced those of 1956 for the new States Parties to this second instrument. There is a tradition – but in fact it has only existed since the Second World War – that the Hague Conventions for the settlement of conflict rules should be applied *erga omnes*, *i.e.* that the rules apply, even if the law declared applicable is that of a non-Contracting State. Those Conventions are in fact similar to model rules, the provisions of which are intended for incorporation into the domestic law of the States ratifying the Convention; furthermore, those provisions may also be adopted by a State without it ratifying the Treaty.[8]

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5 *Cf.* above, paragraph 6.

6 *Cf.* Final Act of the Tenth Session, B, ch. IV, 1, *litt. (c)*, and Final Act of the Eleventh Session, C, *litt (c).*

7 *Cf.* Michel Verwilghen, 'Explanatory Report' to the 1973 Conventions, in *Actes et documents de la Douzième session*, Vol. IV, *Obligations alimentaires*, paragraph 7, p. 387.

8 *Cf.* P. Lagarde, 'La réciprocité en droit international privé', *Recueil des cours de l'Académie de droit international*, 1977.I, pp. 182-185; Verwilghen Report quoted above (fn. 6), pp. 439-440.

20 However, if the Convention of 1973 is indeed universally applicable, the same is not true of the 1956 one concerning maintenance obligations in respect of children. Article 6 of that Convention in fact provides that it will only be applied 'to cases where the law indicated by Article 1 is that of one of the Contracting States'. The reasons for this restriction of the scope of the 1956 Convention must undoubtedly be sought in the nature of the connecting factor accepted at the Eighth Session, which was somewhat revolutionary at the time, *i.e.* that of the habitual residence of the child maintenance creditor: the States saw it as a means of ensuring that internal laws radically different from those in force within the Member States of the Conference would not be applied, but, in particular, that the Member States of the Conference would not have to apply the law of a distant country to their own nationals.[9]

21 Nevertheless, in order to ensure that the Contracting States fulfilled their international obligations arising out of the law of treaties, it was necessary to incorporate into the 1973 Convention a provision replacing the one in the 1956 Convention, but within certain limitations. In actual fact, Article 18 of the 1973 Convention provides that the latter shall replace, 'in the relations between the States who are Parties to it', the *Convention on the Law Applicable to Maintenance Obligations in Respect of Children*. This means that if States A and B are both Parties to the 1956 Convention, but State B alone becomes Party to the 1973 Convention, the latter, although universally applicable, will not be applied in relations between States A and B with regard to maintenance obligations in respect of children, which will still be governed by the 1956 Convention. At the present time, as France, Germany, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Switzerland and Turkey have all ratified both Conventions, it is the 1973 Convention which will be applied to maintenance obligations in respect of children in their mutual relations. *A contrario*, in relations with Austria, Belgium and Liechtenstein – three States which have ratified the 1956 Convention but not the 1973 one – the States mentioned above will have to apply the 1956 Convention.

22 This relative difficulty due to the conflict of conventions has not given rise to any problems in practice. It is true that in view of the identical solutions embodied in the two Conventions, any possible difficulties are of a theoretical rather than a practical nature. A judgment of the Leeuwarden Court delivered in 1983 none the less raises an interesting point:[10] a child domiciled in the Federal Republic of Germany applied for maintenance from a man domiciled in the Netherlands. As this latter country had ratified the 1973 Convention, whereas Germany had not done so at the time of the judgment, the Court made a correct application of Article 18 of the 1973 Convention and applied the 1956 one. The balance between the requirements of the creditor and the resources of the debtor had accordingly to be determined by German law, since the Court was unable to apply Article 11, paragraph 2, of the 1973 Convention which introduces a rule of substantive law on this point. The Court found on that occasion that the applicability of German law could not entail, in the given case, the necessity to take as a point of departure the criteria in force in the Federal Republic of Germany, as would, however, have been in conformity with German law. The Court stated that, with regard to the means of subsistence of the maintenance debtor, the assessment could only be made in the light of the circumstances prevailing in the place where the debtor had his habitual residence, *i.e.* in this case on the basis of the Dutch criteria. But it also maintained that if the application of German law led to the fixing of a higher maintenance amount than if Dutch law had been applied, it was not to be concluded from this that the application of German law was contrary to Dutch public policy.

One solution to this problem would be to consider Article 11, paragraph 2, of the 1973 Convention as a mandatory rule which is applicable, even if the judge of the competent court has to apply the 1956 Convention.

23 Generally speaking, and despite numerous court rulings,[11] the application of the two Hague Conventions on the law applicable to maintenance obligations has not given rise to major difficulties.

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9 Verwilghen Report quoted above (fn. 6), p. 439; *Actes et documents de la Huitième session*, Vol. I, p. 185.

10 *Hof Leeuwarden* judgment of 21 December 1983, in *Nederlandse Jurisprudentie* 1984, p. 660.

11 *Cf.* in particular the summaries in French of these rulings in Dr Mathilde Sumampouw, 'Les nouvelles Conventions de La Haye. Leur application par les juges nationaux', T.M.C. Asser Instituut (Martinus Nijhoff Publishers), Vol. I (1976), Vol. II (1980), Vol. III (1984) and Vol. IV (1994).

One of the reasons is undoubtedly that, in general terms, the 1973 Convention espouses the philosophy of the tenets established in 1956, above all in regard to the principal connecting factor. Whereas this principal factor – the habitual residence of the child creditor – had rightly been considered revolutionary during the work of the Eighth Session, as it resolutely broke with all the conflicts systems in regard to personal status,[12] it was incorporated into the 1973 Convention without further ado in respect of any maintenance creditor, logic having prevailed over hesitation, since – as in 1956 – agreement had been reached to isolate the problem of maintenance obligations from any question concerning family relationships and thereby to confirm the autonomy of the connecting factor established in 1956.[13]

24 This fundamental parallelism between the two Conventions necessarily entailed other alignments:

a same settlement of mobile conflicts: the adoption in the two Conventions of a mobile connecting factor required provision to be made for a conflict engendered by the maintenance creditor moving his habitual residence from one country to another. The rule in Article 1, paragraph 2, of the 1956 Convention was in essence reproduced in Article 4 of the 1973 Convention, which provides that 'the internal law of the new habitual residence shall apply as from the moment when the change occurs'. But it is self-evident that the mobile conflict will never be resolved automatically, merely because of a change in the connecting factor: if one party does not make a claim against the other before the competent authority of the new habitual residence for variation of the maintenance allowance, then the situation of the parties will not undergo any change;[14]

b same reservation enabling States to depart from the general rule in favour of the internal law of the State making the reservation, if the creditor and debtor are both nationals of that State and if the debtor has his habitual residence in it. It is of interest to note that this possibility was viewed in the 1956 Convention as an *option* (Article 2) and that Belgium, Germany, Italy, Luxembourg, Switzerland, Turkey and Liechtenstein stated that they took advantage of this option. On the other hand, in the 1973 Convention, this possibility is considered as a *reservation* (Article 15) – which is highly questionable, in so far as recourse to such a reservation does not imply any reciprocity by the other States Parties to the Convention.[15] All States have made this same reservation, with the exception of France, Japan, Netherlands and Portugal.

25 On the other hand – and this is consistent with the logic of a new instrument to be applied to *all* maintenance creditors – it was natural for the negotiators of the 1973 Convention to offer, by a system of options and reservations, a possibility for States to limit *ratione personae* the scope of the Convention, so as to avoid endangering its ratification. Hence, under the terms of Article 13, any Contracting State may declare that it will only apply the 1973 Convention to maintenance obligations between spouses and former spouses or to children, whereby Article 13 adopts the same definition of a child to be found in the 1956 Convention. Furthermore, under the terms of Article 14, a State has the right not to apply the Convention to maintenance obligations between persons related collaterally, persons related by affinity, divorced or legally separated spouses or spouses whose marriage has been declared void, if the decision of the court was rendered by default in a State in which the defaulting party did not have his habitual residence.

26 Through the interplay of Articles 13 and 14, which make provision for every possible variation by combination, a State may accordingly adopt the 1973 Convention with a flexible scope. It should immediately be pointed out that for the time being, Article 13 has never been applied; with regard to Article 14, only Luxembourg has reserved the right not to apply the Convention in the case

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12 *Cf.* De Winter Report, in *Documents relatifs à la Huitième session*, p. 127; Jean Déprez, 'Les conflits de lois en matière d'obligation alimentaire', *Revue critique de droit international privé*, 1957, p. 389 *et seq.*

13 Alfred E. von Overbeck, 'La contribution de la Conférence de La Haye au développement du droit international privé', *Recueil des cours de l'Académie de droit international*, 1992.II (Vol. 233), pp. 65-69.

14 Verwilghen Report quoted above (fn. 6), p. 442.

15 *Cf.* in this connection G. Droz, 'Les réserves et les facultés dans les Conventions de La Haye de droit international privé', *Revue critique de droit international privé* 1969, p. 395 *et seq.*

of a divorce judgment rendered by default (sub-paragraph 3), Portugal not to apply it between persons related by affinity and also to judgments by default (sub-paragraphs 2 and 3) and Turkey not to apply the Convention between persons related collaterally and persons related by affinity (sub-paragraphs 1 and 2).

1 *The subsidiary connecting factors*

27 It is known that the two Hague Conventions on the applicable law did not designate the habitual residence of the maintenance creditor as the *exclusive* connecting factor. In order to favour the interests of the child to the greatest possible extent, the negotiators of the 1956 Convention made provision for a subsidiary rule, should the law declared applicable by the Convention refuse the creditors any right to maintenance: in such a case, Article 3 refers to the law designated by the national conflicts rules of the authority seized. This rule, which in actual fact is not very satisfactory from the point of view of the unification of law, was possible in the context of the 1956 Convention, since the latter is not universally applicable and the States Parties to it are obliged to maintain a system of national conflict rules to cover cases which do not fall within its scope.

28 Such a reference to the conflicts rules of the authority seized was no longer possible in the 1973 Convention, since the rules of the latter – owing to their universal character – specifically constitute the private international law of the authority seized; thus a reference similar to the one in the 1956 Convention would have constituted a vicious circle. Hence the negotiators of the 1973 Convention, in order to favour the maintenance creditor to the greatest possible extent – but there may be some doubt whether such a favour is genuinely justified, in view of the very wide circle of creditors covered by the scope of the Convention – made provision for a cascade of subsidiary connecting factors: if the creditor is unable to obtain maintenance by virtue of the law of his habitual residence, the court will first of all apply the law of the common nationality of the creditor and debtor (Article 5) and finally, if that in turn does not make any award or if there is no common nationality, he will have recourse to the *lex fori* (Article 6).

29 Lastly, let us point out two exceptional rules:

a one, which is in fact of secondary importance, is to be found in Article 7 of the 1973 Convention which makes provision, in the case of a maintenance obligation between persons related collaterally or by affinity, for the debtor to contest a request from the creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence. It should be pointed out that this Article 7 will never apply *ipso jure*: if the maintenance debtor does not avail himself of it, then it will not be for the authority hearing the application for maintenance to apply it *ex officio*.[16] Furthermore, the rule is sufficiently clear and the debtor has the right to contest the creditor's claim outside the context of any legal proceedings.

30 *b* Article 8 of the 1973 Convention lays down an *exceptional rule* which is in derogation of the provisions of Articles 4-6 and which exclusively concerns maintenance obligations between divorced spouses, those who are legally separated or whose marriage has been declared void or annulled. The uncertain nature of the maintenance allowance to a divorced spouse (which, according to the State, may have the character of maintenance or of an indemnity, or a mixed character) justified the Convention containing a special solution for problems which could not readily be assimilated to the other maintenance obligations covered by the Convention. Hence maintenance obligations between divorced spouses are governed, under the terms of Article 8, by the law applied to the divorce. This rule may naturally confirm the one provided for under Articles 4-6 of the Convention, either if the judge applied to the divorce the law of the spouses' common nationality, or if he applied the *lex fori*. But the special feature of the rule in Article 8, which departs from the general principle of the Convention, is that for the revision of maintenance decisions in case of divorce, this rule confirms the so-called '*perpetuatio juris*' solution: the law applied to the divorce will remain applicable to variation of such decisions.

16 In this connection, *cf.* Verwilghen Report quoted above (fn. 6), p. 447, paragraph 151.

31 It should not be concealed here that this Article 8 is undoubtedly the one in the 1973 Convention which is the source of the most sensitive problems. Firstly, maintenance allowances between spouses inevitably raise the preliminary question of the existence of the marriage or of its recognition, questions which we shall examine later on.[17] But the greatest difficulty of this article, the one which has provoked severe criticism in numerous writings, is precisely this *perpetuatio juris* solution provided in case of a revision of a maintenance decision in the event of divorce.

32 It should be recalled here that the solution decided on by the negotiators of the 1973 Convention to establish the principle of *perpetuatio juris* was adopted only after extremely lengthy discussion, in the course of which there was a genuine confrontation between delegates, and that the ultimately accepted solution never managed to quell the criticism of certain delegations. The Reporter of the Convention perfectly described the atmosphere in which the problem of the revision of maintenance allowances subsequent to divorce was tackled; he outlined the examples given, making it apparent how questionable, in certain cases, the ultimately adopted solution in fact was. Furthermore, it was only after having obtained the reservation in Article 14, sub-paragraph 3, that the delegations which were opposed to the *perpetuatio juris* solution finally accepted the compromise.[18]

33 There is no doubt that this sensitive question will be at the centre of the discussions of the Special Commission on the operation of the Conventions on maintenance obligations. It is even to be expected that certain States will consider the solution adopted in Article 8 so unsatisfactory that they propose a revision of the Convention. That would mean provoking an upheaval out of proportion to the reality of the problem: even if the solution adopted in Article 8 for the revision of maintenance allowances subsequent to divorce may in fact, in certain cases, be described as unsatisfactory, a solution might be found – either by means of a protocol or in the form of a recommendation – so as to eliminate the negative effects of this provision, without overturning the entire system of the Convention and subjecting it to a complete revision.

34 Finally, a remarkable innovation has to be pointed out which was introduced in the 1973 Convention by comparison with that of 1956. Article 9 in fact constitutes a uniform connecting factor rule, governing the right of a public body to obtain reimbursement of maintenance benefits provided by it for an indigent person. Under the terms of Article 9: ‘The right of a public body to obtain reimbursement of benefits provided for the maintenance creditor shall be governed by the law to which the body is subject’. In order to grasp the significance of this article, it is essential to read it with Article 10, sub-paragraph 3, which governs the *extent of the obligation of a maintenance debtor* and hence the extent of the reimbursements to which the public body may lay claim.

Under the terms of Article 1, paragraph 3, of the 1956 Convention, this right was governed by the law of the habitual residence of the child creditor. The new system adopted in the 1973 Convention may lead to some imbalance between the law governing the right to require reimbursement and the law governing the extent of the debtor's maintenance obligation. If the law applicable to the maintenance obligation under the Convention makes no provision for a claim in favour of the maintenance creditor *vis-à-vis* any other person, the public body is not entitled to lay claim to reimbursement of the benefits it has paid, even if the law applicable to it under Article 9 stipulates such a maintenance obligation.

2 *Case law*

36 As we mentioned earlier, the two Hague Conventions on the law applicable to maintenance obligations, despite the clarity of their rules, have given rise to a large number of court rulings, particularly in connection with the 1956 Convention. It would not be appropriate to examine these rulings in depth in the context of this Note; furthermore, extensive summaries of them are to be found in the publications of the Asser Institute on *Les nouvelles Conventions de La Haye, leur application par les juges nationaux*, which we referred to earlier on.[19] Moreover, a detailed examination of these rulings is particularly pointless in view of the fact that the vast majority of them merely confirm what

17 *Cf. infra*, paragraphs 45-52.

18 *Cf.* Verwilghen Report quoted above (fn. 6), paragraphs 152-165.

19 *Cf.* above, paragraph 23, footnote 10.

is fairly clearly stated in the text of the Conventions. The *raison d'être* of these confirmatory rulings arises out of the fact that the courts of first instance had often inadequately applied one of the two Conventions and that recourse to a court of appeal then merely confirmed the treaty texts and the justification of their rules as contained in the Explanatory Reports. Sometimes the courts of first instance had quite simply failed to apply the Conventions.

37 Hence we may simply confine ourselves – with the exception of two sensitive problems which we shall examine later on[20] – to citing just a few court rulings dealing with essential points. Thus in regard to the application of Article 8 of the 1973 Convention – namely the fact that the maintenance obligation between divorced or legally separated spouses is to be governed by the law applied to the divorce – the Civil Court of Luxembourg delivered a judgment which provides a good summary of the generally acknowledged court approach in regard to the distinction to be made between a maintenance allowance in favour of the spouse and an allowance in favour of the child.[21] In this case, a divorce was granted by application of Austrian law. The mother of the minor applied to the father of the latter before a Luxembourg court for a maintenance allowance on behalf of the child and a further one on her own behalf. All the parties had Austrian nationality and were domiciled in Luxembourg. In accordance with Article 4 of the 1973 Convention, the Court accordingly applied Luxembourg law to the maintenance proceedings introduced on behalf of the child; but it applied Austrian law, in accordance with Article 8 of the same Convention, to the maintenance application submitted by the mother on her own behalf.

38 With reference to the temporal application of Article 8 of the 1973 Convention, the Court of Bois-le-Duc found, in its judgment delivered on 23 July 1981, that this article was not applicable to obligations which are imposed on one of the parties in respect of the opposite party by a provisional decision adopted during the divorce proceedings; Article 8 concerns a divorce which has been granted, so that the conflict rule set forth in Article 8 is only valid for divorces which have been decreed.[22]

39 With regard to the determination of the habitual residence of a child, the *Bundesgerichtshof*, in a judgment of 5 February 1975, considered that a five-year-old child born out of wedlock, sent by his mother to a boarding school abroad, was resident with his mother, in this case in Germany.[23] The Court found that in order to establish a habitual residence, short-term residence or an excessively brief stay was not sufficient. Other links with the place of residence were required, in particular family or professional links, showing the centre of gravity of the person in question to be in that place. In this case, the mother had decided to send her child to boarding school as a temporary measure – in her view, this was an emergency solution as she had nowhere else to put him whilst she went to work. The mother's domicile had all the more to be regarded as the centre of gravity of the child's life, in view of the fact that he was only five years old and his mother was the only parent with whom he was able to spend his holidays.

40 However, the Court of Arnhem reached an entirely different conclusion in a judgment delivered on 13 December 1979. It decided that as the two minors whose right to maintenance was at issue went to school in the Netherlands, there were grounds for considering that their habitual residence under the terms of Article 1 of the 1956 Hague Convention was in fact in the Netherlands, despite the fact that for the past five years, *i.e.* since January 1974, the children had been living with their mother in the Federal Republic of Germany, a few kilometres from the Dutch border.[24] It does not seem that this ruling ought to meet with general approval.

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20 *Cf.* below, paragraphs 45-57.

21 Civil Court of Luxembourg, 20 February 1986, No 105/86, summarized in *Asser*, Vol. IV (fn. 10), p. 48.

22 *Hof Den Bosch* of 23 July 1981; *cf.* also *Nederlandse Jurisprudentie* 1982, p. 360.

23 *BGH* of 5 February 1975 - IV ZR 103/73; *cf. Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* 1975, No 83.

24 Court of the District of Arnhem of 13 December 1979, summarized in *Asser*, Vol. III (fn. 10), p. 33.

41 With reference to the capacity to introduce proceedings for maintenance, and particularly that of a public body, several German judgments were delivered on the question in relation to the 1956 Convention (it should be recalled that the 1973 Convention contains an express provision in this connection, *i.e.* Article 9). Hence a court in Koblenz declared that, under the terms of Article 1, paragraph 3, of the 1956 Convention, the *Kreisjugendamt* (youth authority) had standing to bring proceedings for a declaration of paternity as well as proceedings to obtain an allowance against a Turk domiciled in the Federal Republic of Germany, on behalf of a Turkish child born out of wedlock, domiciled in the aforesaid country.[25]

42 In another German judgment, a court carried out a lengthy examination of the scope of [26] It initially stated that there was still some doubt as to whether this article was applicable to the representation of a minor in court. The court found that the text of the provision was unclear: it could be interpreted as meaning that it exclusively governed the question as to who is entitled to introduce maintenance proceedings on his own behalf. But the court subsequently found that, in the light of the wording as well as the intention of Article 1, paragraph 3, the question of representation in court was also governed by that provision. The intention of the Convention was that, in regard to the right to maintenance, all children having their habitual residence in the same country should be treated equally, regardless of the State in which the application was made. In the event that a law other than that of his habitual residence were to be applied to the question of a child's legal representation, it would not be possible to reach uniform decisions in the Contracting States.

43 Lastly, let us quote an important German judgment concerning Article 6 of the 1973 Convention: the question was whether the right to an advance for the costs of the divorce proceedings was embodied in the concept of maintenance obligations.[27] In this case, the maintenance obligation was governed by Italian law, under which a spouse who is entitled to a contribution as a maintenance obligation is not automatically entitled to an advance to cover the costs of the proceedings as well. The court declared that Article 6 of the 1973 Convention did not apply in this case, as a prerequisite of its application was that the law designated by Articles 4 and 5 of the Convention did not recognize *any* right to maintenance whatsoever. But if this law, as in the case of Italian law, did in fact stipulate a maintenance obligation between separated spouses, it then established in particular whether, and *to what extent*, the creditor was able to claim maintenance. If, in the present case, Italian law was less generous than German law, the maintenance creditor had to be satisfied with the lower amount. Article 6 of the Convention did not constitute a provision declaring applicable the law most favourable to the maintenance creditor.

44 There remain now two problems to be examined, namely that of the *incidental question* and that of *party autonomy*, which might give rise to discussion in the Special Commission.

3 *The incidental question*

45 Of all the issues raised by the application of the two Hague Conventions on the applicable law, the so-called incidental question is the one which has been the cause of the greatest number of rulings and writings.[28] It would go beyond the scope of this Note to outline all the trends in legal writings to which this question has given rise and we refer on this point to the literature mentioned

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25 *Oberlandesgericht* Koblenz of 17 December 1974 - 6 W 553/74; *cf. Die deutsche Rechtsprechung* 1974, No 119.

26 *Kammergericht* of 4 December 1979, summarized *in extenso* in *Asser*, Vol. II (fn. 10), pp. 57-58.

27 *Kammergericht* of 23 July 1987; *cf.* in particular *IPRax* 1988, p. 234, with a note by Von Bar (pp. 220-222), who approved the decision.

28 *Cf. inter alia:* P. Lalive & A. Bucher, 'Sur la loi applicable à l'obligation alimentaire et à la «question préalable» de la filiation, selon la Convention de La Haye du 24 octobre 1956', *Annuaire suisse de droit international* 1977, p. 377 *et seq.*; Simon-Depitre, 'Les aliments en droit international privé', *Travaux du Comité français de d.i.p.* 1973-1975, pp. 30-70, in particular p. 55 *et seq.*; Von Overbeck, 'L'application par le juge interne des conventions de droit international privé', *Receuil des cours de l'Académie de droit international*, 1971.I (Vol. 132), pp. 62-68; K. Siehr 'Haager Unterhaltsstatutabkommen und gerichtliche Vaterschaftsfeststellung', *FamRZ* 18 (US71), p. 398 *et seq.*; Jean Déprez, article quoted above (fn. 11), pp. 391-396; P. Lagarde, 'Observations sur l'articulation des questions de statut personnel et des questions alimentaires dans l'application des conventions de droit international privé', *Mélanges A.E. von Overbeck*, Fribourg 1990, p. 511 *et seq.*

herein. But it is appropriate at this juncture briefly to recall the problem and to indicate the general tendency of court decisions.

46 At the time of the drafting of the 1956 Convention, and in view of the fact that there were major differences – both at the substantive law level and at that of the conflicts rules – between the various countries in regard to maintenance obligations, the negotiators of the Convention had wished to draw a basic distinction between the maintenance obligation itself, involving only a cash payment, and the family relationship out of which that obligation arose. The Conference, considering that the establishment of a family link was secondary when maintenance assistance was urgently required, raised the maintenance obligation to the status of an autonomous and distinct connecting factor.[29] However, it was not possible to grant maintenance benefits to a child without establishing a biological link with the maintenance debtor; hence the problem of the incidental question. Article 5, paragraph 2, of the 1956 Convention stipulates that the latter 'shall govern only conflicts of laws concerning maintenance obligations. Decisions rendered in application of this Convention shall be without prejudice to questions of affiliation or to family relationships between the claimant and the respondent'. Article 2, paragraph 2, of the 1973 Convention substantially incorporates the same rule, but in the latter Convention, this provision seems to contradict Article 1, which provides that the Convention shall apply in respect of a maintenance obligation specifically arising from a family relationship, parentage, marriage, etc. In a commentary on the 1973 Convention, Professor Batiffol points out the paradoxical nature of the two articles and questions how a man could be ordered by court to pay maintenance to his wife, whilst it simultaneously refused to take sides on the issue of whether or not she was in fact his wife.[30]

47 If it has to be acknowledged that, in order to entail a maintenance obligation, the establishment of a family link arises as an incidental question within the framework of the Hague Conventions, it is then necessary to ascertain which law will be applied to this incidental question. Neither the 1956 nor the 1973 Convention provides a direct reply to this question; but Article 1, paragraph 1, of the 1956 Convention answers it indirectly, since it stipulates: 'The law of the place of habitual residence of the child shall determine *whether*, to what extent, and *from whom* the child may claim maintenance'. This formulation led a broad majority of commentaries, and case law which can now be regarded as authoritative, to declare that the law applicable to the incidental question was the one governing the maintenance obligation.[31] However, this establishment of a family link between the maintenance creditor and debtor merely constituted a ground for granting maintenance and did not otherwise prejudge the questions of affiliation or the family relationships involving that creditor and that debtor. This result was clearly the intention of the negotiators of the 1956 Convention. It is regrettable that the 1973 Convention did not expressly state that the law applicable to a maintenance obligation had also to govern the incidental question, as the issue remains open and still gives rise to questions.[32]

48 The fact remains that the submission of the incidental question to the law governing a maintenance obligation is approved by the literature and by most of the case law of the States Parties to the Convention. Let us quote in this connection the decision of 6 October 1965 of the OGH in Austria, which dismissed any possibility of a connecting factor separate from the incidental question within the framework of the 1956 Convention, and acknowledged that a father should be ordered to pay maintenance on the basis of the law of the habitual residence of the child, even though proceedings for a declaration of paternity had been dismissed as no longer valid under Swiss law, the father's national law.[33] This decision is all the more important in that Austria no longer recognizes '*Zahlvaterschaft*' in municipal law.

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29 Von Overbeck, course quoted above (fn. 12), pp. 66-68.

30 H. Battifol, 'La douzième session de la Conférence de La Haye de droit international privé', *Revue critique de d.i.p.*, 1973, p. 266.

31 Verwilghen Report quoted above (fn. 6), pp. 435-437; Von Overbeck, course quoted above (fn. 12), pp. 66-67.

32 Von Overbeck, course quoted above (fn. 12), p. 67; Lalive & Bucher, article quoted above (fn. 27), p. 382 *et seq.*

33 *OGH* of 6 October 1965, *ZfRV* 1969, p. 299, with note by H. Hoyer; along the same lines, *Corte di Cassazione* (Italy) of 31 May 1969, *Riv. dir. int. priv. proc.* 1970, p. 110.

49 This principle is also followed in German case law which has, moreover, expanded the rules of the Convention: in Germany, the courts already made the question of descent (*i.e.* not only as a ground, but as a main issue) itself subject to German law, when that law applied to a maintenance obligation.[34]

50 But then a difficult question arises: what if the law applicable to a maintenance obligation stipulates, in order for maintenance to be granted, that a status decree has to be delivered, deciding on the family link? The problem cropped up in the Swiss Federal Court in a famous case, the *Peney* case.[35] A child residing in Germany brought proceedings in Switzerland against his alleged father. The *lex obligationis*, *i.e.* German law, requires a status decision recognizing the paternity of the maintenance debtor prior to granting maintenance. However, the Federal Court started from the premise that, as the Convention did not prejudge the parent-child relationship, it was implicit that such relationship might or ought to be determined *incidentally*. The consequence in fact seems to go beyond the strict framework of the conflict rule: it is binding, even if the 'conflicting' laws in a given situation – and in the present case, the German *lex obligationis* – do not recognize the possibility of a ruling on paternity being delivered in an incidental decision. Hence the Swiss Federal Court seems to acknowledge that the Convention establishes a *substantive* rule of private international law.[36] By this decision, the Court as it were replies to an incidental question to the incidental question, namely whether the Hague Convention offers a court the possibility, or even imposes the obligation, to decide solely incidentally on the parent-child relationship, when the *lex obligationis* stipulates that there has to be a status decree as a prerequisite for the maintenance proceedings to be successful.

51 This incidental question to the incidental question remains open, as the ruling in the *Peney* case seems to go beyond the treaty text. A discussion on this sensitive question during the Special Commission might be conducive to greater clarity on this point, paving the way to a uniform interpretation of Conventions on this issue.

52 With regard to the incidental question in case of divorce and the bringing into play of Article 8 of the 1973 Convention, the Reporter of this Convention effectively showed that when an application for maintenance is made after a divorce has been pronounced in another State, in order for the rule in Article 8 to come into play and for the law applicable to the divorce to govern the maintenance obligation, this divorce has to be recognized in the State of the forum. If, on the other hand, the divorce pronounced abroad does not satisfy, in a Contracting State in which the creditor hopes to start a maintenance action, the conditions which must be fulfilled before it can be recognized, Article 8 has to be interpreted to the effect that the law applicable to the maintenance obligations will be determined in accordance with Articles 4-6.[37] In actual fact, if the divorce cannot be recognized in the State seized of the application for maintenance, the spouses divorced abroad are considered in this State as remaining married to each other.

4 *Party autonomy*

53 It may seem strange to devote a passage in this Note to party autonomy in respect of maintenance obligations arising out of family law. In actual fact, neither the 1956 nor the 1973 Convention offers a maintenance creditor and debtor the possibility of choosing the law which is to be applied to the maintenance relationship. Furthermore, neither the *travaux préparatoires* in 1956 nor those in 1973 in particular ever envisaged such a possibility. During the *travaux préparatoires* for the 1973 Convention, a questionnaire was addressed to States, containing a list of the various applicable laws and asking States to choose which laws they considered ought to be applied to maintenance obligations; in this list, under sub-paragraph *j*, 'another law' was mentioned. Yet no State indicated under this letter that it might be possible to envisage offering the parties some choice in designating

34 Von Overbeck, course quoted above (fn. 12), p. 67; Lalive & Bucher, article quoted above (fn. 27), p. 384, and the case law digested in *Asser*, Vol. III (fn. 10), p. 36 *et seq.*

35 *ATF* 102 II, p. 128, of 4 May 1976, commented on at length by Lalive and Bucher, article quoted above (fn. 27).

36 Along these lines, see Lalive & Bucher, article quoted above (fn. 27), p. 382.

37 Verwilghen Report quoted above (fn. 6), paragraphs 159-161.

the law applicable to their maintenance obligations.[38] Finally, Professor Michel Verwilghen, in his very detailed Report, never once mentioned this possibility.

54 It is true that, at the time when those two Conventions were drafted, there was virtually no acknowledgement of party autonomy in the domain of family law, except to a limited extent in the law of succession to the estates of deceased persons, where certain States recognized the *professio juris*, offering the *de cujus* a limited choice in respect of the law applicable to his succession. Similarly, in the domain of matrimonial property, certain States allowed spouses to choose the law applicable to their property relations. But over and above those cases which were acknowledged on a limitative basis, party autonomy was not recognized in family law, either in literature or in the texts of laws. It must none the less be acknowledged that there has been a clear evolution in this domain and that party autonomy in family relationships is increasingly gaining ground. However, despite the developments in this direction in the law of succession and in that of matrimonial property, particularly in the recent Hague Conventions of 1978 and 1989, this movement does not appear to have reached the domain of maintenance obligations. In this connection, it is quite remarkable that in an extremely recent article on the evolution of party autonomy in private international law, Professor von Overbeck makes no mention of this autonomy in respect of maintenance obligations.[39]

55 And yet it would seem that the problem arises in a fairly acute manner, above all when maintenance questions are settled in agreements drawn up by a solicitor. It frequently happens that spouses, at the time of their divorce, decide to deal with the problem of maintenance obligations in favour of the children and of the mother in a settlement agreement. Those agreements are frequently governed by a law which does not correspond to the one recognized by the Hague Conventions and solicitors are reluctant to draw up such agreements, questioning whether the parties have the right to depart from the treaty obligations and to choose, in their settlement agreement, a law which would govern all the maintenance obligations arising out of their family relationships. It seems that the problem is posed less frequently for the courts seized of divorce proceedings, which quite readily agree to ratify such agreements, without going into the law applicable to the maintenance settlement.

56 There is virtually no ruling condemning a choice of the applicable law by a maintenance creditor and debtor; nor, moreover, with a few exceptions, is there any case law expressly acknowledging such a practice. To the best of our knowledge, only one judgment, delivered by the Cantonal Court of Zurich on 15 April 1975 in the *WP.P v. W.* case,[40] expressly recognizes that the parties have such a choice. In this case, a minor born out of wedlock was represented by the Austrian youth authority, which instituted proceedings on behalf of the child against a father presumed to be domiciled in Switzerland. A compromise was reached in a document called an *'Abfindungsvertrag'*, in which the defendant acknowledged that he was the father of the child and agreed to make a lump sum payment to this child, as well as to cover the costs of the mother's confinement. This agreement was expressly subject to Swiss law, whereas the child was at the time domiciled in Austria: the court declared that the choice of Swiss law by the parties was admissible.

57 This obvious discrepancy between practice on the one hand and the texts of laws and literature on the other might constitute a topic for consideration by the forthcoming Special Commission on the operation of the Conventions on maintenance obligations. Maybe this Special Commission might acknowledge that, within certain limitations (but what should those limitations be and in what framework should the latter be spelled out?) the two Hague Conventions on the law applicable to maintenance obligations do not stand in the way of the creditor and debtor submitting their mutual maintenance obligations to a law which they themselves have chosen.

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38 See *Actes et documents de la Douzième session*, Vol. IV, *Obligations alimentaires*, pp. 9-11 and 54-84.

39 A.E. von Overbeck, 'L'irrésistible extension de l'autonomie en droit international privé', *Mélanges François Rigaux*, Brussels 1993, pp. 619-636.

40 *Obergericht* of the Canton of Zurich of 15 April 1975, *BlZR* 75 (1976), No 13, p. 23, partially reproduced in *Annuaire suisse de droit international*, 1977, pp. 326-333.

B *The Conventions on the recognition and enforcement of decisions*

58 Nineteen States are at present Parties to the 1958 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children, namely: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Liechtenstein, Norway, Netherlands, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Suriname and Turkey; furthermore, Greece and Luxembourg have signed the Convention, but without ratifying it.

59 On the other hand, only sixteen States are Parties to the new Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, namely: Czech Republic, Denmark, Finland, France, Germany, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Slovak Republic, Sweden, Switzerland, Turkey and the United Kingdom; Belgium is the only State to have signed the Convention, but without ratifying it. Lastly, the Republic of Poland deposited its instrument of accession with the Ministry of Foreign Affairs of the Netherlands on 14 February 1995. In accordance with Article 31, paragraph 3, of the Convention, such accession shall have effect only as regards the relations between the acceding State and the other States Parties which have not raised an objection to its accession in the twelve months after the receipt of the notification referred to in sub-paragraph 3 of Article 37. For practical reasons, this twelve-month period started on 15 April 1995 and runs to *15 April 1996.*

60 Since the aim of the Convention was to unify certain rules of conflicts of authorities and jurisdictions – the favoured territory of *reciprocity* – neither of the two is universal in character and each of them applies solely in reciprocal relations between Contracting States, and in such relations only. But beware: this reciprocity only applies where the country from which the decision emanates is a Contracting State, the nationality of the parties or the place of their habitual residence being of no importance for the application of the Convention (Article 2, paragraph 3, of the 1973 Convention).[41]

61 Furthermore, Article 29 of the 1973 Convention declares that this latter shall replace, as regards the States who are Parties to it, the 1958 Convention applicable to children. But this article does not have the effect of abolishing the application of the 1958 Convention between the States which are Parties to it, contrary to what certain maintenance debtors believed they were able to argue. In actual fact, with regard to payments which had fallen due before the entry into force of this Convention between two States, the 1973 Convention does not rule out the application of the 1958 Convention. When a court has to decide on an application for maintenance, dealing both with payments which had fallen due before the entry into force of the 1973 Convention and for maintenance obligations after this entry into force, it will have to declare the decision enforceable in regard to the payments which had fallen due on the basis of the 1958 Convention and, for the rest, on that of the 1973 Convention.[42]

62 But a distinct difference of opinion is to be found in the court rulings of the States Parties to the 1958 Convention as regards the problem of the temporal application of that Convention. There is, in fact, a well-established precedent in Germany and in the Netherlands, by which, through the interplay of Article 12, which provides that 'the present Convention shall not apply to decisions delivered before its entry into force' and Article 16, which fixes the entry into force of the Convention for each State having ratified the latter, it has to be considered that the 1958 Convention enters into force, within the meaning of those articles, at the time when it is in force both in the State where enforcement is sought and in the State where the decision has been made. Hence by a judgment of 20 May 1977, the *Landgericht* of Essen, finding that the 1958 Convention had entered into force in Sweden on 1 March 1966, refused to apply the Convention to a Swedish decision relating to

41 Verwilghen Report quoted above (fn. 6), p. 389, paragraph 12.

42 See *Gerechtshof* of The Hague, judgment of 12 September 1986, in *Nederlandse Jurisprudentie*, 1987, p. 856.

maintenance obligations of 8 May 1963, even though this Convention had been in force in Germany since 1 January 1962.[43]

63 Along the same lines, the District Court of Arnhem, in a judgment of 19 May 1979, refused to enforce a maintenance order against a father in accordance with a Norwegian decision of 8 May 1964. The Court declared *ex officio* that, on the basis of Article 12 of the 1958 Convention, the latter was not applicable to the judgment predating the entry into force of the Convention. Now it found that this Convention had been concluded on a basis of reciprocity and that consequently it had to be acknowledged that it was only applicable after the date of its entry into force, both in the Netherlands and in Norway. As the Convention did not enter into force in the latter country until 1 November 1965, under the terms of this Convention, the Norwegian decision could be neither recognized nor enforced in the Netherlands.[44]

64 Austria applies the same precedent with regard to States which were not represented at the Eighth Session of the Conference and have consequently to accede to the 1958 Convention: by the interplay of Articles 12 and 17, the *Oberlandesgericht* of Vienna declared that a Hungarian decision made before the publication by Austria of its declaration of acceptance of Hungary's accession could not be enforced in Austria, under the terms of Article 12 of the Convention.[45]

65 Italian courts, for their part, adopt a different attitude, namely that Article 12 of the 1958 Convention refers not to the entry into force of the Convention in the State in which the decision was rendered, but solely to the point at which the Convention entered into force for the State in which application was made for recognition of the decision. This precedent is clearly apparent in a judgment of the Court of Cassation of 4 April 1977, concerning an application for enforcement in respect of a Swedish judgment of 5 October 1965, ordering a natural father domiciled in Italy to pay a maintenance allowance. The Court of Appeal of Venice had declared the application admissible and considered the Hague Convention of 1958 to be applicable, although Sweden had only ratified the latter on 31 December 1965, *i.e.* after the date of the judgment. The Court of Cassation dismissed the appeal lodged against this decision, on the following grounds: the time of entry into force of the Convention, within the meaning of Article 12, is exclusively determined in a general sense by the provision of Article 16, paragraph 1, and it cannot be deduced from the second paragraph of this article that the Convention is not applicable to a decision rendered in Sweden prior to ratification by that State. In order for the Convention to be applicable in this case, it is sufficient to ascertain that at the time when the Swedish decision was rendered, Italy had already ratified the Convention.[46]

66 In actual fact, from a mere reading of the 1958 Convention, the reasoning of the *Corte di Cassazione* would appear to be correct and it is not entirely clear on what grounds the German, Dutch or Austrian courts rely in requiring the test of twofold ratification, when refusing the enforcement of a judgment on the basis of Article 12. The question has not yet arisen in connection with the application of the 1973 Convention. It is true that this Convention provides a different solution to this problem of temporal application. In fact, unlike Article 12 of the 1958 Convention, Article 24 of the 1973 Convention provides that the latter shall apply irrespective of the date on which a decision was rendered, but: 'Where a decision has been rendered prior to the entry into force of the Convention between the State of origin and the State addressed, it shall be enforced in the latter State only for payments falling due after such entry into force'. For payments which have already fallen due, the recognition and enforcement will be governed by the private international law of the State addressed, which might refer back to the 1958 Convention, if the latter were applicable in relations between the two States. Article 24 of the new Convention thus solves this problem of temporal applicability in a way which avoids the difficulties of the 1958 Convention; this undoubtedly explains the absence of case law on that point in regard to this Convention.

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43 See *Die deutsche Rechtsprechung* 1977, No 88; along the same lines, *OLG* Schleswig of 14 May 1974, *ibid.*, No 140*a*.

44 *Cf. Asser*, Vol. II (fn. 10), pp. 76-77.

45 *OLG* Vienna, of 9 October 1973, *ZfRV* 1974, p. 143, note by H. Hoyer.

46 *Riv. dir. int. priv. proc.* 1978, p. 565; along the same lines, *Corte di Cassazione*, 12 April 1979, *Riv. dir. int. priv. proc.* 1980, p. 412.

67 As in the case of the two Conventions on the applicable law, the two Hague Conventions on the recognition and enforcement of decisions relating to maintenance obligations have given rise to abundant case law, without any major difficulties or fundamental differences between the rulings of the States Parties having thereby become apparent. The large number of decisions is essentially due to the remarkable obstinacy continually demonstrated by maintenance debtors in evading their obligations. Any reason is good enough to contest a decision or appeal against an order for enforcement; advantage is taken of the slightest possibility for ambiguous interpretation of a judgment or of a treaty text: fraud in the proceedings, public policy, etc.! But fortunately the courts seized did not allow themselves to be exploited and, in the vast majority of cases, they made rulings which merely confirmed the treaty text. It is not possible in the context of this Note to give a detailed account of this abundant case law. Furthermore, that would be pointless insofar as, yet again, the latter simply confirms the treaty text or consolidates an already well-established precedent. We shall confine ourselves to outlining certain essential points in these rulings, sometimes noting certain divergencies. In conclusion, we shall deal with the only genuine problem raised by the application of the 1973 Convention, a problem which has not been the subject of case law, but which exists as a result of the national legislation of a State Party to this Convention and which concerns a review of the substance of a decision.[47]

68 But before examining these rulings, it should be recalled here that – unlike the two Conventions on the applicable law, which, as we have seen, were fairly similar in spirit, if not in letter (apart from the problem of the law applicable to maintenance subsequent to a divorce) – the two Conventions on recognition and enforcement differ from one another to a considerable extent. The negotiators of the 1973 Convention took account of the case law relating to the 1958 Convention and the criticisms which had been levelled against it in legal writings by adopting a more detailed new convention. Hence the 1973 Convention applies not only to *decisions* rendered by an authority in the State of origin, but also to *settlements* between maintenance creditors and debtors, which had not been the case in the 1958 Convention and had given rise to major problems. Under the terms of Article 21, those settlements are to be declared enforceable *subject to the same conditions as a decision*, insofar as they are enforceable in the State of origin.

69 Furthermore, the new Convention of 1973 contains an extremely useful Chapter IV, which moreover provoked lively discussion within the Conference, and which deals with the additional provisions relating to public bodies. This chapter covers two hypotheses which are extremely important in practice: on the one hand, the recognition of decisions rendered against a maintenance debtor on the application of a public body (Article 18), and on the other, applications for recognition and enforcement of a decision rendered between a maintenance creditor and a maintenance debtor, where, under the law to which the public body is subject, the latter is entitled *ipso jure* to seek such recognition in place of the creditor. There is definitely a lacuna in the 1958 Convention in this connection and the new chapter of the 1973 Convention is in line with what was adopted in the new Convention on the applicable law under Article 9.[48] It has to be realized that this Chapter IV of the 1973 Convention solely applies to *public bodies*, and not to just any third party intervening in the maintenance relationship between the creditor and the debtor. Although the Convention does not define what is meant by *public bodies*, it is apparent from the discussions and the Report on the Convention that this term includes individuals and legal entities acting, within the framework of a maintenance relationship between the creditor and the debtor, by virtue of the *imperium* with which they are endowed in this respect under the law of the State in which they intervene.[49]

70 Finally, the 1973 Convention breaks new ground even in regard to the heads of indirect jurisdiction adopted, since it adds an additional one by comparison with the 1958 Convention. In actual fact, the new Convention repeats the classic bases of jurisdiction adopted in 1958, namely the habitual residence of the maintenance debtor, the habitual residence of the maintenance creditor or the submission of the *defendant* (there is an improvement on this point by comparison with the 1958 Convention, which only referred to the submission of the *maintenance debtor*) to the jurisdiction of

47 See *infra*, paragraphs 92-96.

48 *Cf.* above, paragraphs 34 and 35.

49 Verwilghen Report quoted above (fn. 6), p. 422, paragraph 90; A. von Overbeck, 'Les nouvelles Conventions de La Haye sur les obligations alimentaires', *ASDI*, 1973, pp. 157-159.

the authority seized. In addition to those three heads of indirect jurisdiction, the 1973 Convention introduces that of the common nationality of the maintenance debtor and creditor when it is that of the State of origin of the decision at the time when the proceedings were instituted. This new basis of jurisdiction, adopted at the request of countries whose rules of jurisdiction contain an exceptional head of jurisdiction based on the nationality of the parties, if this coincides with that of the forum,[50] strangely had not been adopted by the negotiators of the 1958 Convention, even though it was equally justified if not more so, in view of the fact that it involves an under age child *vis-à-vis* its maintenance debtor parent.

71 Let us finally point out that, like the 1973 Convention on the applicable law, the 1973 Treaty on recognition and enforcement applies to decisions rendered in respect of any creditor whose maintenance claim arises out of a family relationship; but the scope of that Convention – as with the Convention on the applicable law – may be restricted *ratione personae* by States by dint of a system of reservations. Whereas in respect of the 1973 Convention on the applicable law, virtually no State Party made any reservation,[51] which is justifiable in view of the fact that it is a convention determining the applicable law, in connection with the 1973 Convention on recognition, practically all the States Parties made some reservation or another, and sometimes several of them. Hence it can be maintained that in practice, the new 1973 Convention on the recognition and enforcement of decisions is restricted in scope *ratione personae* to under age children and to maintenance allowances subsequent to divorce or legal separation.

72 To come to the case law under the two Conventions on recognition and enforcement, we have said that it is nowadays well established and does not give rise to any major difficulties. The two most important questions to which the application of the two Conventions give rise are directly dependent on Article 1 of the 1958 Convention, as well as Articles 1 and 3 of the 1973 Convention, namely on the one hand, the concept of a 'decision' and on the other, the independent nature of the decision on the maintenance obligations *vis-à-vis* the determination on which this obligation is based, as to the relationship between the maintenance creditor and debtor.

1 *The concept of* decision

73 It is well known that neither the 1958 nor the 1973 Convention define what is meant by a maintenance 'decision'; in actual fact, on this point the negotiators of the two Conventions intended the scope of the latter to cover the widest possible range of judgments or decisions, regardless of whether those were rendered by a judicial or an administrative authority. As for settlements, they cover any instruments concluded between the parties before an authority having jurisdiction – generally, a court – in order to put an end to litigation.[52]

74 A large number of maintenance debtors contested decisions made by administrative authorities in the Nordic countries, primarily in Norway and Denmark. In those countries, there is a separation between the pronouncement on the relationship on which the maintenance obligation is based – this pronouncement being made by a civil court – and the decision on the amount of the maintenance, which is made by an administrative authority, frequently without the debtor being heard. It was contended that this latter type of decision did not fall within the scope of the Conventions.

75 Those objections were unanimously swept aside by the courts of the Contracting States. A judgment of the Hagen *Amtsgericht*, of 7 March 1977, is particularly interesting on this point, as the maintenance debtor contested not only that the Danish pronouncement by which he was obliged to pay maintenance in favour of a minor was a 'decision' within the meaning of the 1958 Convention, but he also argued that it was contrary to public policy. In this case, the court granted the enforcement of a Danish 'bidragsresolution', rendered on 26 August 1975 in favour of minors dependent on their legitimate father, although on 17 March 1969, within the framework of the parents' divorce, the latter had reached an agreement concerning the children's maintenance. The court declared that this

50 Verwilghen Report quoted above (fn. 6), p. 406, paragraph 51.

51 See above, paragraphs 25 and 26.

52 Verwilghen Report quoted above (fn. 6), p. 395, paragraphs 26-29.

'bidragsresolution', although delivered by an administrative authority, constituted a decision rendered in respect of maintenance within the meaning of Article 2 of the Convention. In proceedings culminating in the 'bidragsresolution', the father had not been heard. That was not contrary to Article 2, paragraph 2, of the Convention ('the defendant party was regularly cited or represented in accordance with the law of the State of the authority which made the decision'), in view of the fact that Danish law did not require the maintenance debtor to be heard during proceedings relating to the fixing of the amount. Furthermore, in Danish law, the decision was enforceable without an enforcement order being required (Article 2, paragraph 3, of the Convention. On the other hand, neither did this 'bidragsresolution' infringe Article 2, paragraph 4, of the Convention in regard to the agreement reached by the parents, since the minors were not parties to that agreement and consequently they had no rights or obligations under that agreement. Lastly, the Danish decision also did not manifestly infringe public policy: in Danish law, if one of the parents failed to fulfil his maintenance obligations, an administrative authority fixed a maintenance allowance representing the amount which was considered the minimum in the place where the child was resident, even if the debtor was unable to pay this amount in view of his financial situation. The fact that the defendant was not heard during the proceedings did not have any harmful effect on him.[53]

76 These rulings, in particular the one relating to Article 2, paragraphs 2-4, of the 1958 Convention, were practically unanimously followed in the other States Parties to the Convention. More particularly, with regard to the regular summons of the defendant to appear before the authority deciding on the amount of the maintenance allowance (Article 2, paragraph 2), it was clearly established that it is the procedure in the State *of origin* of the decision which governs all questions concerning the summons to appear, time limits and representation before the authority, and that this procedure in the State of origin, which allegedly did not fulfil the conditions of the procedure in the State in which the application for enforcement was made,[54] was not contrary to Article 2, paragraph 2, nor above all contrary to the public policy of the State in which the debtor was resident.

77 Still in connection with the concept of a 'decision' within the meaning of the 1958 Convention, it was also acknowledged that a settlement agreement reached between the parents on the occasion of a divorce and dealing *inter alia* with the maintenance which the debtor has to pay to his children constitutes a 'decision' within the meaning of the 1958 Convention. In this connection, the *Oberster Gerichtshof* of Austria, in a judgment delivered on 19 March 1986, clearly outlined the problem, stating that whereas it was correct that the 1958 Convention settled only the recognition and enforcement of judicial *decisions*, and not settlements, it none the less considered that a Czech settlement – made in the course of a divorce – did in fact constitute a decision within the meaning of Article 1 of the Convention. In accordance with Czech family law, the divorce judge spelt out in the same judgment the parents' rights and obligations subsequent to divorce with regard to the custody and maintenance of their children. The law made provision for the judicial decision to be replaced by an agreement, which was valid provided that it was approved by the judge. Consequently the nature of the parents' agreement, subsequent to approval by the judge in the divorce judgment, was not purely contractual and had to be treated as a judicial decision concerning the parents' rights and obligations. Moreover, the High Court of Austria referred in its reasoning to Article 158, paragraph 5, of the Swiss Civil Code, which contains a similar provision.[55]

2 *Autonomous character of the maintenance obligation*

78 The autonomy of a maintenance obligation *vis-à-vis* the family relationships on which it is based – an essential factor, as we have seen, in the Conventions on the applicable law[56] – is also clearly affirmed in the Conventions on recognition and enforcement, in that of 1958 in Article 1,

53 *AG* Hagen of 7 March 1977, *Die deutsche Rechtsprechung* 1977, No 142; along the same lines, *LG* Hamburg of 16 August 1974, *ibid.* 1974, No 178; *AG* Recklinghausen of 3 December 1975, *ibid.* 1975, No 172.

54 *Corte di Cassazione* of Italy of 17 March 1976, *Riv. dir. int. priv. proc.* 1977, p. 914; Court of Appeal of Lyon of 29 May 1973, *Dalloz* 1974, I, 665; Court of Louvain of 16 June 1975, *Asser*, Vol. II (fn. 10), p. 85.

55 *OGH* of Vienna of 19 March 1986, *ZfRV* 1986, p. 233; along the same lines, *OLG* Nurnberg of 4 July 1984, *Asser*, Vol. II (fn. 10), p. 23.

56 See above, paragraph 46.

paragraph 2, and in that of 1973, in Article 3. This autonomy is also clearly affirmed in consistent court rulings in the States Parties to the Conventions.

79 A recent judgment delivered on 12 July 1994 by the French Court of Cassation is extremely clear on this point, stating that the enforcement of the decisions made in respect of an application for maintenance does not require prior enforcement procedure with regard to the judgment declaring paternity on which it is based. Naturally, in this case, the maintenance debtor relied on the *Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* which, in the countries in which it is in force, can be applied to the enforcement of maintenance obligations, if the litigants so choose.[57] But as the commentator on this judgment, Mr Bertrand Ancel, rightly pointed out, the declaration of the Court of Cassation was merely a response to an argument which unhesitatingly ran directly counter to court rulings which nowadays appear to be well established, both in regard to the Hague Conventions and to the Brussels Convention. This case concerned recognition of a decision made by the *Landgericht* of Langenfeld, in Germany, a country in which an order to pay maintenance always depends upon the prior determination of the paternity of the debtor. Despite this requirement of substantive law of the court in the State of origin, it is possible for this order to pay maintenance to be directly and distinctly subjected to the enforcement procedure, without the status decision itself having already been verified and accepted in France. As the commentator of the judgment entertainingly ascertains, 'what has been united by German law may be separated by the French judge, by taking a decision on the other side of the border'.[58]

80 These consistent rulings failed to discourage the persistency with which maintenance debtors have attempted to evade their obligations. They acted at two levels, on the one hand pleading an infringement of the rights of the defendant (Article 2, paragraphs 2-4, of the 1958 Convention, Article 5, paragraphs 2-4, of the 1973 Convention, as we have seen above),[59] and on the other, claiming an infringement of public policy in the State where enforcement was sought.

3 *Public policy*

81 It is in the domain of public policy that the imagination of maintenance debtors ran riot, attempting to rely on the most tenuous arguments in order to maintain that the public policy of the forum of the enforcement had been infringed by a decision rendered abroad.[60] Hence it is not surprising that these rulings on public policy are the most numerous in all the States Parties to the Conventions of 1958 and 1973 and it is quite impossible to review those rulings here. Fortunately, in most countries, the arguments claiming an infringement of public policy in a foreign decision were swept aside by the courts, and the enforcement of such decisions was granted. We shall merely give a few examples here, just so as to demonstrate that on this point, the precedents are well established.

82 Two characteristics of German law on maintenance obligations have prompted maintenance debtors residing in France to raise an objection on the ground of public policy: this involves, on the one hand, the retroactive effect of the order to pay maintenance, dating from the birth of the child and, on the other, the fixing of this allowance by reference to a legal scale.

83 As regards retroactivity, the argument of the objectors is as follows: since the decision on maintenance is recognized in France as being separate from the link of paternity, it is not possible to

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57 See *infra*, paragraph 126.

58 Court of Cassation of 12 July 1994, *Rev. crit.* 1995, p. 71, note by B. Ancel, pp. 73-79. Along the same lines, *OLG* of Cologne, of 10 April 1979, *Die deutsche Rechtsprechung* 1979, No 197, in which it is clearly stated that the enforcement of a decision relating to maintenance made in a divorce judgment does not depend upon recognition of the divorce judgment. See also P. Lagarde, article quoted above (fn. 27), p. 523 *et seq.*

59 See above, paragraphs 75 and 76.

60 See D. Martiny, 'Maintenance Obligations in the Conflict of Laws', *Recueil des cours de l'Académie*, 1994.III (Vol. 247), pp. 258 *et seq.*

treat the order to pay an allowance as being an effect of such paternity; on the contrary, it has to be acknowledged that a German judgment, requiring recognition in France by virtue of the Hague Conventions, no longer constitutes more than an order to pay an allowance once all family ties have been set aside. French courts have consistently ruled that a decision granting an allowance, unlike a judgment deciding on a parent-child relationship, is constitutive and not declaratory, so that a defendant cannot be obliged to pay sums claimed for a period prior to the date of the writ. But the French Court of Cassation countered this argument on the ground that 'the maintenance was granted as a consequence of a legally established paternity; hence the effects of the latter date back to the birth of the child'.[61]

84 This decision in fact sanctions a duality of a maintenance decision which is both separate from and dependent on family relationships. Yet, the basis of the decision by the Court of Cassation is not without its dangers, as it might induce the judge responsible for the French enforcement to treat the German judgment as a status determination and hence to claim an infringement of public policy in view of the principles governing the law of establishment of paternity in France. Consequently a more recent judgment rejects this approach, relying solely on the principles governing the granting of maintenance and sanctioning a kind of maintenance public policy, by declaring that 'as the effects of the judicial determination of paternity date back to the birth of the child, the Court of Appeal rightly declared that the decision made in accordance with the applicable German law was not manifestly incompatible with French public policy, in particular with regard to the methods for fixing the allowance and the time limits'. This means, as the commentator of this decision realized, that the assumption of responsibility by treaty law (in this case, the 1973 Convention), is accomplished at the expense of the German judgment being treated as an order to pay an allowance, whereby this entirely functional reduction does not modify the content of this judgment as it arises out of the application of German law.[62]

85 Neither did the French Court of Cassation regard recourse to a legal scale in order to fix the amount of a maintenance allowance as being manifestly incompatible with French public policy. It is true that in France, this type of calculation is theoretically prohibited. But the court did not consequently consider that a scale would be shocking: in order to counteract the German orders following this system, it is not sufficient to denounce the method: it must at the very least be established that the application of a legal scale changes the nature of the allowance by manifestly diverting it from the purposes which, according to the *lex fori*, it is legitimate to attribute to the children's claim to maintenance.[63]

86 In a judgment of 9 August 1995, the *Hoge Raad* of the Netherlands dismissed the appeal of a maintenance debtor who had contested on grounds of public policy a Swedish decision ordering him to pay a maintenance allowance to his child born out of wedlock, on the pretext that his financial means were in no way sufficient to enable him to carry out that decision. The *Hoge Raad* considered that the Court of Utrecht had been right in clearly establishing the following principle: to decide that the recognition and enforcement of a decision is manifestly contrary to Dutch public policy on the sole ground that, at the time of the enforcement, the financial means of the maintenance debtor did not enable him to fully honour his obligation, is not compatible with the purpose of the 1973 Hague Convention, nor with Articles 12 and 5 of that Convention. The explanatory memorandum stresses an interesting point which we shall consider later on,[64] namely that it is not possible to evade the rule forbidding a review of the merits provided for under Article 12 by having recourse to the roundabout means of compliance with public policy. To offer the judge who has to grant the enforcement a possibility of verifying, within the framework of Article 5, whether the debtor's financial means enable him to carry out the decision (which he is not allowed to do within the context of an application for enforcement, constitutes a major impediment to implementation of the goal of the Convention and in effect renders meaningless the rule forbidding a 'review of the merits'.[65]

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61 See judgment quoted (fn. 57) with a note by B. Ancel.

62 Court of Cassation of 18 October 1994, *Rev. crit.*, 1995, pp. 72-73, note by B. Ancel, pp. 77-78.

63 *Ibid.*, pp. 78-79.

64 See *infra*, paragraphs 90 *et seq.*

65 *HR* 9 August 1985, *Nederlandse Jurisprudentie* 1985, p. 818, summarized in *Asser*, Vol. IV (fn. 10), p. 58.

87 A large number of decisions concern public policy invoked against maintenance allowances which have to be paid to a child born out of wedlock and are founded on the existence of intimate relations between the defendant and the mother, established solely on the basis of a statement by the latter. In this connection, an important judgment of the Court of Cassation of 25 January 1977 sanctions a well-established trend in French case law. The judgment first of all ascertains that in the light of Article 2, paragraph 5, of the Hague Convention of 1958, the French concept of international public policy cannot impede the enforcement, unless the foreign decision is 'manifestly incompatible' with this concept; it subsequently asserts that this is not the case, as the mother's statements are corroborated by other factors, *the evidential force of which is sovereignly appraised by the foreign judge.* In this case, the Court of Appeal had found that, in the light of the German decision, not only was there no indication that the mother had lied under oath, but also the defendant, who had raised an objection on the grounds of *plurium concubentium*, had failed to provide any evidence of the 'plurality of lovers'; nor had he invoked any other ground in support of his non-paternity.[66] In another judgment of the French Court of Cassation delivered on 7 March 1978, it is equally clearly established that the French concept of international public policy does not stand in the way of the enforcement of a foreign judgment, which based the order to pay maintenance on the existence of sexual relations between the defendant and the mother of the child, established on the basis of a statement by the latter, provided that such a statement is corroborated by other factors, the evidential force of which is sovereignly appraised by the foreign judge.[67]

88 A decision of the Italian Court of Cassation goes even further: in fact, the Court of Appeal of Brescia had refused to enforce a German judgment, on the grounds that the ascertainment of paternity under German law had been based exclusively on evidence taken from a statement by the child's official guardian, in the absence of any objective evidence. The Italian Court of Cassation set aside this decision, drawing a distinction between recognition of the part of the judgment dealing solely with maintenance, which had to be distinguished from the decision concerning the relationships under family law. With regard more specifically to the possibility of a partial recognition of the foreign judgment – the maintenance obligations alone – it considered that in the case of such a partial recognition, the verification of its compatibility with Italian public policy had to be confined to the operative clause and ought not to include the merits and evidence, in accordance with Italian private international law.[68]

89 A decision of the Belgian Court of Cassation of 25 October 1979 reaches the same conclusion: the defendant maintained that the judgment ordering him to pay a maintenance allowance was based solely on a statement made under oath by the mother of the child and that that was contrary to Article 340 of the Belgian Civil Code, a provision of public policy. The Belgian Court of Cassation considered that Article 340 of the Civil Code was a provision of *internal* public policy and would only be contrary to international public policy in the event that by this limitation, the legislator had intended to establish a fundamental principle of the political, economic and moral system in Belgium. However, the provision of Article 340 did not constitute such a limitation; the public policy referred to in Article 2, paragraph 5, of the 1958 Convention was not the internal public policy of the State in which the enforcement was applied for, but the international public policy of that State.[69]

It remains for us to examine the only serious problem raised by the application of the 1973 Convention, which concerns the forbidding of a review of the merits.

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66 Court of Cassation, of 25 January 1977, *Rev. crit.* 1978, p. 352, note by Simon-Depitre and Jacques Foyer.

67 See *Clunet* 1979, p. 614, note by Jacques Foyer.

68 *Corte di Cassazione*, of 16 December 1976, *Riv. dir. int. priv. proc.* 1978, p. 110.

69 *Cf. Asser*, Vol. II (fn. 10), p. 91. Along the same lines, Civil Court of Brussels, of 18 November 1981, *Asser*, Vol. III, p. 60.

4 *Review of the merits*

90 Article 12 of the 1973 Convention provides: 'There shall be no review by the authority of the State addressed of the merits of a decision, unless this Convention otherwise provides'; a provision which is similar in substance, but drafted in different terms, is contained in Article 5 of the 1958 Convention. The rule forbidding a review of the merits of a maintenance decision has been dealt with in several decisions, mostly in an indirect way, in the context of applications to set aside decisions on the ground that they were incompatible with public policy. Most of the time, the court rulings merely found that the review was not permitted under the Hague Conventions and that as such reviews usually concerned family relationships justifying a maintenance allowance, failure to review the grounds on which the maintenance decision was based did not constitute an infringement of public policy.

91 However, an important judgment of the District Court of Arnhem of 15 March 1984 raises a problem, the full significance of which will become apparent when we come to examine the practice which has evolved in the United Kingdom in connection with the 1973 Convention. The facts of the case are as follows: after a divorce pronounced in the Netherlands, the Court of The Hague on 26 July 1979 had ordered the husband to pay a maintenance allowance to his children, who were living with their mother in Germany. *Three years later*, subsequent to an application by the mother of the children, the father was again ordered in Germany to pay a maintenance allowance to his children, the new decision being presented as a modification of the Dutch judgment. The mother applied for the enforcement of this German decision. The Court of Arnhem found that under Article 2, paragraph 4, of the 1958 Hague Convention, the application for recognition and enforcement of the decision could be dismissed, if the latter were contrary to a decision made on the same subject and between the same parties in the State in which it was invoked. Thus the question was whether the decision of the Court of The Hague, modified by the German Court, was still valid. It should be pointed out that the German Court had regarded the recognition of the 1979 decision of the Court of The Hague as a condition enabling that decision to be modified; that court subsequently considered that it had jurisdiction, on the basis of its own private international law, to modify the decision of the Court of The Hague. The Court of Arnhem found that the maintenance decision of the Court of The Hague had in fact to be recognized in Germany (Article 3, paragraph 3, of the Hague Convention). Under those circumstances and by virtue of Article 2 of the Convention, the German Court ought to have abstained from reviewing the merits of the Hague decision, which it explicitly recognized. By modifying the decision of the Court of The Hague, the German Court had infringed that obligation. The Court of Arnhem then concluded that the modification by the German Court of the 1979 decision of the Court of The Hague was unacceptable on the basis of Article 2, paragraph 4, of the 1958 Convention. In its reasoning, the Court pointed out – and this point is extremely important – that Dutch law indeed recognized a possibility of modifying a maintenance allowance, but that under the Dutch Code of Civil Procedure, that power was reserved for the judge who had made the decision to modify.[70]

70 *Rb.* Arnhem, of 15 March 1984, *Nederlandse Jurisprudentie* 1985, p. 205; contra: Court of Appeal of Svea (Sweden), which thought (in our opinion, correctly) that revision in Germany of a maintenance decision handed down in Sweden several years before, which revision was ordered because of a change of circumstances, should not be considered as being 'a decision rendered on the same matter ...' and thus should be enforced in Sweden (in *Nytt Juridiskt Arkiv*, 1992, p. 592).

92 This problem relating to a review of the amount of a maintenance allowance at the time when a decision is enforced evolved in an unexpected and acute manner as a result of legislation in the on on the recognition and enforcement of maintenance decisions in the United Kingdom, it is stipulated that in order for any decision on maintenance rendered in a State Party to the Convention to be enforceable in the United Kingdom, it has to be registered with the court within whose jurisdiction the maintenance debtor is domiciled. This registration of the decision *automatically entails*, by virtue of the law of introduction, the possibility for this court to modify the allowance at the request of either the maintenance creditor or the maintenance debtor.[71] And it is a fact that, in practice, most of the decisions made in the States Parties to the 1973 Convention are automatically modified when they are recognized and enforced in the United Kingdom.

93 This British practice derived from the law introducing the 1973 Convention into the United Kingdom has provoked so much criticism, particularly on the part of the Nordic States, that the Lord Chancellor's Department applied to the Permanent Bureau of the Conference to inquire whether it considered that this practice was at variance with the 1973 Convention. The Permanent Bureau replied to the Lord Chancellor's Department in the following terms, it being understood that this interpretation commits the Bureau alone:

94 First of all, speaking in general terms, it is true that the practice followed in the United Kingdom is at variance with the rule forbidding a review of the merits of a maintenance decision, as stipulated in Article 12 of the 1973 Convention. In actual fact, the problem of reviewing a maintenance allowance, the recognition of which is provided for under Article 2, paragraph 2, of the Convention, is a question of *jurisdiction* and it seems necessary to argue initially on the basis of the Brussels-Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Conventions which determine direct jurisdiction, particularly in regard to maintenance obligations. Now those Brussels-Lugano Conventions offer the maintenance *creditor* a choice when he wishes to apply to a court to obtain a maintenance decision: the creditor can either apply to the court of the domicile or habitual residence of the maintenance debtor (Article 2 of the Convention, the classical rule of *actor sequitur forum rei*), or he can apply to the court of the State where he himself is domiciled or habitually resident (Article 5, paragraph 2, of the Brussels-Lugano Convention). On the other hand, the maintenance *debtor* has no choice: if he wishes to institute proceedings to obtain a review of a maintenance decision, under the terms of the Brussels-Lugano Conventions, he is only able to seize the court of the maintenance creditor, the defendant in the proceedings (Article 2 of the Convention). He cannot take advantage of the forum provided for under Article 5, paragraph 2, as he is not the maintenance *creditor*.

95 If this reasoning is now transferred to the system of the 1973 Hague Convention, it has first of all to be noted that the latter makes no provision for any indirect jurisdiction in regard to the procedures for reviewing a maintenance allowance. That seems to be an omission on the part of the negotiators of the 1973 Convention, who did not even repeat Article 8 of the 1958 Convention, providing for the recognition of decisions modifying the order relating to a maintenance obligation made by a court which had rendered the initial decision. Article 7 of the 1973 Convention, which stipulates the four forms of indirect jurisdiction provided for in the Convention, namely the forum of the maintenance debtor or creditor, that of their shared nationality or the one to which the defendant had submitted, solely determines the fora of the initial maintenance decision; in other words, by referring in Article 7 to the forum of the maintenance debtor, the negotiators of this Convention had intended to stipulate the forum of the defendant in the original decision. It had never been the intention of the delegations which drafted the Convention that Article 7 should also cover decisions modifying a maintenance allowance. In actual fact, the wording of Article 7, paragraph 1, of the 1973 Convention ought to have been: 'if either the maintenance *defendant* or the maintenance creditor had his habitual residence ...'. If one reads the Report of the Convention or the *procès-verbaux* of the

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71 Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993, of 5 April 1993, *Schedule 3*, Article 9(1):

'Subject to the provisions of this section –

(a) the registering court shall have the like power, on application made by the payer or payee under a registered order, to vary the order as if it had been made by this registering court and as if that court had had jurisdiction to make it;'.

Diplomatic Conference, it is quite clear that during the drafting of the Convention, the intention had always been to recognize either the classical forum of the defendant or the original, new – and moreover, for certain persons unacceptable – forum of the applicant in the proceedings, namely the maintenance *creditor*. There had never been any intention – *and it would never have been accepted* – in the event of a review of a maintenance allowance, to offer the maintenance debtor a possibility to seize the court of his own habitual residence. The United Kingdom legislation which offers a maintenance debtor such a possibility creates – within the framework of a convention dealing only with *indirect* jurisdiction – a *direct* jurisdiction for the maintenance debtor which not only has never been envisaged and is entirely contrary to the spirit of the Convention, but which also runs counter to the system for direct jurisdiction laid down in the Brussels-Lugano Conventions.

96 There is no doubt that this sensitive problem will have to be discussed at the Special Commission in November 1995, as the practice followed in the United Kingdom is generally regarded as unsatisfactory; it is contrary to the spirit of the 1973 Convention, without it being possible to maintain that it is contrary to the letter of that Convention, since on this point the drafting of Article 7 seems to be defective.

CHAPTER II – THE NEW YORK CONVENTION

97 The *Convention on the Recovery Abroad of Maintenance*, which was drafted by the United Nations Economic and Social Council, was signed in New York on 20 June 1956.[72] This was in fact the first multilateral treaty on maintenance obligations. Prior to the Second World War, in 1929, on the initiative of the League of Nations, Unidroit had undertaken work on this subject, which was interrupted by the war and resumed thereafter; but ultimately the project of a convention on the recognition of maintenance obligations failed, primarily owing to the United States' opposition to recognition of the competence of the authorities of the applicant's habitual residence to deliver judgments concerning maintenance obligations.[73] At the present time (as at 19 May 1995), 52 States are Parties to the New York Convention, namely: Algeria, Argentina, Australia, Austria, Barbados, Belgium, Bosnia & Herzegovina, Brazil, Burkina Faso, Cape Verde, Central African Republic, Chile, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, The former Yugoslav Republic of Macedonia, France, Germany, Greece, Guatemala, Haiti, Holy See, Hungary, Israel, Italy, Luxembourg, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Tunisia, Turkey, United Kingdom and Yugoslavia;[74] of these 52 States Parties, 19 are not Members of the Conference, but have been invited to participate in the work of the Special Commission. Furthermore, Bolivia, Cambodia, Colombia, Cuba, Dominican Republic and El Salvador have signed the Convention, but without ratifying it. These States, none of which is a Member of the Hague Conference, have also been invited to take part in the work of the Special Commission.

98 As we have already mentioned elsewhere,[75] the New York Convention does not contain any provision relating to the substance of the claims in the domain of maintenance law brought against a foreigner, or procedure which should be followed. Its purpose is solely to regulate the *administrative* problems created by international maintenance obligations. 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 pretrial 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

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72 The English and French texts of this Convention are appended as an annex.

73 *Cf.* D. Martiny, course quoted above (fn. 59), p. 161.

74 We quote this list as communicated to us by the Treaty Section of the United Nations Office in New York.

75 M. Pelichet, 'Report on Maintenance Obligations in Respect of Adults in the Field of Private International Law', *Actes et documents de la Douzième session*, Vol. IV, *Obligations alimentaires*, pp. 49-50; similarly, D. Martiny, course quoted above (fn. 59), pp. 279-281; G. Droz, 'Regards sur le droit international privé comparé', *Recueil des cours*, 1991.IV (Vol. 229), pp. 197-198.

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 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).

100 Provided that it operates satisfactorily, this Convention is very useful in that it provides effective assistance for the maintenance creditor. This system will often suffice, as the debtor will be intimidated when confronted with this administrative agency and will not dare to avoid his obligations. But this Convention does not provide any definite solution on the legal and judicial level, as the receiving agency, if the settlement fails, will have to enforce the decision obtained abroad by the legal means provided for in the State of the residence of the debtor, either by a petition for enforcement or by means of a new lawsuit. In actual fact, the New York Convention combines harmoniously with the Hague Conventions on the applicable law or on the recognition and enforcement of decisions in the States Parties to those Conventions. Even if the creditor is free to bring proceedings himself for enforcement before the court of the debtor or to institute proceedings before this court in order to obtain a decision, he can use the mechanism of the New York Convention, requesting that the receiving agency provided for by the latter should undertake either to institute proceedings before the court of the debtor, or to obtain an enforcement order based on the Hague Conventions on the recognition and enforcement of decisions.[76] Hence this point is important: the New York Convention of 1956 does not constitute an alternative to the Hague Conventions on the recognition and enforcement of decisions, as has too frequently been maintained; on the contrary, the Conventions are complementary.[77]

101 The mechanism for co-operation between administrative or judicial authorities introduced by the New York Convention implies that the latter should be based on *reciprocity*: the Convention only comes into play in relations between States Parties to that Convention. However, and contrary to the other Conventions based on reciprocity, particularly those of The Hague, the New York Convention does not contain any provision enabling a State Party to refuse to be bound to a new State acceding to the Convention. In other words, although based on reciprocity, the New York Convention is an *open* type of convention. On the other hand, Article 17 provides that if a State submits a reservation to any of the articles of this Convention (and the possibilities for making reservations are not limited by the Convention) any Contracting State which objects to the reservation may, within a period of 90 days from the date of the communication made by the Secretary General of the United Nations, notify the depositary of the Convention that it will not accept the reservation, and the Convention shall not then enter into force as between the objecting State and the State making the reservation. It is legitimate to question whether the drafting of this Article 17 does not go beyond the intentions of the negotiators of the Convention, as ultimately the system culminates in the following situation: if a new State acceding to the Convention does not make any reservation, all the other States Parties are bound to this State by the Convention; but if the acceding State makes the slightest reservation, any State Party can then

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76 G. Droz, course quoted above (fn. 74), p. 198.

77 H. Klinkhardt, 'Einige Erfahrungen mit der Geltendmachung der Unterhaltsansprüche nichtehelicher Kinder im Ausland', *Zentralblatt für Jugendrecht*, 1984, p. 165.

object to it and the Convention will not enter into force between the objecting State and the new acceding State. Yet there is no apparent reason why a State should be allowed to reject the mechanism of the New York Convention *vis-à-vis* another State having made a reservation, for example, against Article 16, enabling it to refuse to recognize the jurisdiction of the International Court of Justice to settle a dispute concerning the interpretation or application of the Convention – a reservation which was made by a large number of States Parties (although in fact the other States did not object).

102 Finally, a few words should be said about Article 20 of the New York Convention, which may acquire some importance in connection with the discussions of the Special Commission in November 1995. This article concerns the *revision* of the Convention and enables any Contracting State to request revision of the Treaty at any time by a notification addressed to the Secretary General of the United Nations. The procedure of Article 20 then requires the Secretary General to transmit this request to each of the Contracting Parties, inviting such Contracting Party to reply within four months whether it desires the convening of a conference to consider the proposed revision. If a majority of the Contracting Parties favours the convening of a conference, it shall be convened by the Secretary General. This means that should the need for a revision of the New York Convention of 1956 arise in the course of the discussions of the Special Commission in November, the procedure laid down in Article 20 would in any event have to be followed; consequently it would not be up to the Special Commission either to take a decision in favour of such a revision, or to recommend to the Eighteenth Session of the Hague Conference that such a revision should be undertaken. The procedure of Article 20 of the New York Convention has to be respected; an application would have to be addressed to the Secretary General of the United Nations by one of the States Parties to this Convention and a conference on revision would have to be convened by him, should the need arise. However, Article 20 of the New York Convention does not seem to rule out the possibility that, once the procedure under this article had been exhausted, a conference on revision would be held under the auspices of an organization other than the United Nations, if the States Parties to the New York Convention agreed with that proposal.

The operation of the New York Convention

1 *Operation in general*

103 The New York Convention of 1956 has practically not given rise to any significant case law, that is to say rulings relating to misapplication or malfunction of the Convention. Not that the Convention is never quoted in judgments delivered by the various Contracting States, but each time this occurs, it is generally only to point out that such and such a Youth Authority or Ministry of Justice, or even Guardianship Authority, is intervening in proceedings – usually a petition for enforcement – as a receiving agency within the meaning of Article 2, paragraph 2, of the Convention. Sometimes, a judgment merely points out that the New York Convention does not contain any provision on the recognition and enforcement of decisions and that this procedure is consequently governed by the law of the State in which application is made for enforcement,[78] or that the foreign claimant shall be accorded the same exemptions in the payment of costs and charges as are given to a maintenance creditor resident in the State where the proceedings are pending,[79] in accordance with Article 9 of the Convention.

104 It is the Dutch court rulings which most frequently quote the New York Convention of 1956, if truth be told for a reason that seems to be characteristic of civil procedure in the Netherlands, which provides that a party cannot appear before a court without being assisted by an adviser, attorney or '*procureur*'. However, several Dutch judgments specify that the 'Council for the Protection of Children' (*Raad voor de Kinderbescherming*) is entitled to intervene *directly* in proceedings concerning maintenance obligations, by application of the New York Convention of 1956 and on the authority of the receiving agency, without being represented by an attorney or '*procureur*'.[80]

78 *OLG* Schleswig of 14 May 1975, *Die deutsche Rechtsprechung* 1977, No 140.

79 *OLG* Braunschweig of 2 February 1984, *Die deutsche Rechtsprechung* 1984, No 47.

80 Court of Arnhem, of 5 February 1991, *NIPR* 1991, No 70, pp. 91-92; Court of Amsterdam, of 1 July 1991, *NIPR*, 1991, No 311, p. 411; Court of Amsterdam, of 18 March 1993, *NIPR*, 1993, No 233, p. 395.

105 This absence of case law on objections to the substance of the Convention is easily explicable: as the purpose of the Treaty was simply to create an administrative mechanism for the collection of maintenance, the Convention is not directly addressed to the courts, but is geared to co-operation between the administrative authorities. In the event that a difficulty should arise in its application, either owing to a failing on the part of the authorities instituted by the Treaty, or for any other reason unrelated to the very basis of the maintenance obligation, the dispute will as far as possible be settled by consultations between the administrative authorities. Disputes on the application of the Convention and its malfunction do not fall within the jurisdiction of the civil courts. Furthermore, Article 16 of the New York Convention provides that any dispute relating to the interpretation or application of the Convention falls within the jurisdiction of the International Court of Justice. But bringing suit in the International Court of Justice is much too cumbersome a procedure in respect of disputes the nature and origin of which are frequently of lesser importance, and, for the time being, the court has never been seized, even in cases in which application of the New York Convention is totally ineffective.[81]

106 Hence the few pieces of information which we shall provide on the operation of the New York Convention have been obtained through direct consultation with certain receiving agencies, which were good enough to grant us an interview or transmitted valuable information to us. Thus we were able to hold talks with receiving institutions in Austria and Switzerland, we have received documents and information from the receiving agency in Germany, but above all from the *Deutsches Institut für Vormundschaftswesen* in Heidelberg, one of the main tasks of which is the recovery abroad of maintenance allowances due to children born out of wedlock and lastly, certain Nordic States provided us with a written account of some of their experiences.[82]

107 Naturally, we are aware that the information we have gathered is very fragmentary, compared with the number of States Parties to the New York Convention. But it will be readily comprehensible that the Permanent Bureau was unable to contact a large number of authorities provided for in the Treaty. On the other hand, the pieces of information we have obtained, either directly from the receiving agencies consulted, or from the literature communicated to us, are entirely consistent and mutually confirmatory, thereby enabling us to draw certain general conclusions as to the application of the Convention. But it is clear that the Permanent Bureau has high expectations of the experience to be communicated by the experts during the Special Commission in November 1995; that is one of the specific uses of this Special Commission, which has to enable the experts responsible for the New York Convention in their countries to come and share their difficulties in applying this Treaty. Should it also prove possible to find certain solutions so as to remedy a certain number of malfunctions of the Convention, then the goal of the Special Commission will have been attained.

108 In the light of the information we have managed to obtain, it is possible to pinpoint three groups of States which are quite readily distinguishable from one another as regards their conception of co-operation between the authorities laid down in the Treaty and their awareness of its operation. It is also necessary to distinguish between groups A and C on the one hand – where significant changes in the respective situations of those two groups are unlikely in the future, with the exception of some improvements in group C – and group B on the other, comprising certain States in which the situation is continuously evolving and for which the Special Commission will undoubtedly be most useful.

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81 See *infra*, paragraphs 109-113.

82 Apart from the article by H. Klinkhardt quoted above (fn. 76), *cf.* 'Alimenteninkasso im Ausland', published by the *Conférence nationale suisse de l'action sociale* (Lako), Zurich 1987; M. Zingaro, 'Die Arbeit mit dem New Yorker-Uebereinkommen vom 20. Juni 1956', in Hangarter-Volken, *Alimenteninkasso im Ausland*, Saint-Gall 1984, pp. 31-52; A. Marx, 'Wege zur Realisierung von Kindesunterhalt in Europa', *Nachrichtendienst des Deutschen Vereins für öffentliche und private Fürsorge*, 1993, pp. 374-377; 'Erfahrungsbericht 1993 des Bundesverwaltungsamts vom 20.6.1956 über die Geltendmachung von Unterhaltsansprüchen im Ausland', *Aussenstelle Bad-Homburg.*

Group A

109 This group comprises the countries of Africa, South America and Asia and has to be qualified as negative: in these States, either the New York Convention does not operate at all, or it operates unilaterally. This means that if applications for maintenance from those countries on behalf of creditors residing in them are in fact followed up in European countries, the opposite situation never obtains, *i.e.* where a maintenance creditor residing in Europe asserts a claim for maintenance against a debtor residing in one of the countries of group A.[83] It should be stressed from the outset that this non-operation of the New York Convention does not in any way derive from the text of the Convention itself, but is dependent on other factors inherent in the situation in those countries – such as the maintenance debtors' financial situation or the general mentality – which nothing seems likely to change. It is significant in this connection that in the light of all the opinions we have heard, there would be no point in modifying the New York Convention: a revision of the latter would not in any way increase the likelihood of its operating satisfactorily.

110 One of the major difficulties is due to the huge economic discrepancy between the European countries and those in group A. This means that in most cases, a maintenance allowance fixed for example in Germany or Switzerland for the child of a maintenance debtor residing, for example, in Africa, frequently represents half, if not the whole, of this debtor's monthly salary; consequently the receiving agency of the State addressed – if any – does not take any steps to follow up the application, knowing that that would be pointless.[84] Furthermore, the organization of the authorities designated in the Convention is generally inadequate in those States: generally one single person is designated, who is in fact unable to fulfil the obligations imposed upon him by the Convention.

111 Finally and above all, in certain countries, it is the very concept of a maintenance obligation which constitutes the main ground for the malfunction of the New York Convention. For example, it is considered contrary to public policy in certain countries to oblige a father to pay a maintenance allowance for a child born out of wedlock; this infringement of public policy is not necessarily raised before a court, but already at the level of the operation of the New York Convention, that is to say by the receiving agency. That is not what was stipulated in the Convention and seems entirely contrary to its spirit. Furthermore, in those countries, it is standard practice for a maintenance debtor to use every possible means, both material and legal, to avoid his obligations, so that the receiving agency, if it had the slightest inclination to intervene, would be immediately discouraged.

Group B

112 This group comprises the European States around the Mediterranean Basin – a distinction has to be made in this connection between Southern and Northern Italy – and the States of Eastern Europe. In those States, the New York Convention can be described as operational, but it operates unsatisfactorily or with considerable difficulty. As with the countries in group A, the main reason for this lies in the great differences in economic development between those countries and those of Northern Europe.

113 But the malfunction in those States is also due to unsatisfactory organization on the part of the authorities instituted under Article 2 of the New York Convention: inadequate funds, absence of delegation to other organizations capable of extracting maintenance allowances from the debtors concerned, lack of financial means to accomplish the goals pursued by the Convention. For in order for the New York Convention to operate satisfactorily, some determination is required on the part of the transmitting or receiving agencies in pursuing maintenance debtors. It is not just a question of instituting proceedings against the debtor or applying for the enforcement of a decision: one has to attempt to persuade the debtor, to harry him, or even to intimidate him, and once a decision has been obtained from a court, it is essential to follow it up, check that the maintenance allowance is paid every month, etc. – all activities which presuppose a highly structured organization within the

83 M. Zingaro, article quoted above (fn. 81), pp. 48-49.

84 *Ibid.*, pp. 48-49; see also 'Alimenteninkasso im Ausland' (Lako) quoted above (fn. 81), p. 11.

agencies in the debtor's country of residence and a power to delegate to organizations capable of such interventions. However, such determination in follow-up, such doggedness in recovering maintenance is usually lacking in the countries in this group B to such an extent that in certain Eastern European countries, it is virtually impossible to make the debtor fulfil his maintenance obligations. Yet the situation is evolving and in certain Eastern European countries, in particular in the Czech Republic and in Romania, the New York Convention is operating more and more satisfactorily.[85]

Group C

114 This group comprises the States of Northern and Central Europe: despite certain minor problems which we shall examine below, practice has shown that the New York Convention of 1956 operates well in those countries; it facilitates the recovery of maintenance allowances and fully justifies the drafting of this Convention.[86]

115 The high and relatively similar standard of living in those countries goes a long way towards explaining the success of the Convention: the transmitting or receiving agencies have sufficient means at their disposal to enable a smooth functioning structure to be established in those countries and delegations of competence, in particular to youth or guardianship authorities, increase the effectiveness of the system of the Convention. Furthermore, certain treaty obligations requiring expenditure on the part of the authorities, for example legal assistance, translation costs, etc. do not give rise to any serious problems, and that is conducive to effective operation.

116 In addition to this, practically all the States in this group are Parties to one or other of the Hague Conventions which, with one exception which we shall examine later on,[87] greatly facilitates the recovery of maintenance allowances. On this point, satisfactory co-ordination in the application of those various Conventions is also necessary, which is unfortunately not always the case and will require examination during the Special Commission in November 1995. It is in fact apparent that in certain States, the transmitting and receiving agencies are relatively unaware of the existence of the Hague Conventions despite the fact that their States are Parties to them; this seems to be due to a lack of internal co-ordination between the various services. In several States, the transmitting or receiving agency is dependent on a ministry which is not identical with the one dealing with the Hague Conventions, and sometimes those in positions of responsibility within those agencies, out of ignorance, fail to use the channels provided by the Hague Conventions on the recognition and enforcement of decisions to obtain the payment of maintenance. That is a regrettable practical aspect which the Special Commission in November will be in a position to analyze and to remedy.

117 Before examining a few special cases which give rise to problems in the countries of group C, and although this falls outside the framework of the Special Commission in November, we should like to stress here – because it has been pointed out to us insistently from all sides – the important and preponderant role played by the International Social Service (ISS) in the collection of maintenance abroad.[88] Not only is this Organization – with its central Secretariat in Geneva and a network of national branches in more than one hundred countries – the only one providing for the collection of maintenance in States which are not Parties to the New York Convention, but it is also the Organization which obtains the best results in the States Parties to the New York Convention, but falling under groups A and B examined above. By tracking down maintenance debtors, which often proves an extremely difficult task, by establishing direct contacts with the debtors and by managing to reach agreements with the latter, the ISS achieves results which frequently cannot be obtained by recourse to the New York Convention.

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85 M. Zingaro, article quoted above (fn. 81), *passim*; A. Marx, article quoted above (fn. 81), p. 377.

86 M. Zingaro, article quoted above (fn. 81), p. 48 *et seq.*; M. Sumampouw, article quoted above (fn. 3), p. 334.

87 See *infra*, paragraph 122.

88 'Alimenteninkasso im Ausland' (Lako) quoted above (fn. 81), pp. 14-16; A. Marx, article quoted above (fn. 81), p. 376.

2 *A few special cases*

118 *a* One of the difficulties which has arisen in the application of the New York Convention has to do with the scope *ratione personae* arising out of Article 1. On the basis of this article, which provides that 'The purpose of this Convention is to facilitate the recovery of maintenance to which a *person*, hereinafter referred to as claimant, ...', certain States, and more particularly Germany and Austria, have concluded – by dint of a literal interpretation – that only the maintenance creditor *himself* is entitled to benefit from the Convention, but not legal entities (youth authorities, guardianships, etc.). This interpretation is borne out by the first preambular paragraph, which mentions 'the urgency of solving the humanitarian problem resulting from the situation of persons in need dependent for their maintenance on persons abroad', from which it can readily be concluded that legal entities are not faced with humanitarian problems and that the treaty mechanism was not set up for them. This restrictive interpretation of the scope of the Convention creates problems for States in which a public body, often the State itself, advances allowances to a maintenance creditor and then automatically finds itself legally subrogated to the rights of the claimant in taking action against the maintenance debtor. Those public bodies then find that in the debtor's country of residence they are refused the benefit of the New York Convention for the recovery of the allowances advanced to the maintenance creditor.[89]

119 This difficulty will have to be discussed at the Special Commission in November and a more flexible interpretation of the scope of the Convention will have to be found. If this proves impossible, there remains the solution of a power of attorney: in almost all countries, public bodies are able to obtain full powers from the maintenance creditor and take action against the debtor on the basis of those full powers, that is to say not as a body *subrogated* to the rights of the claimant, but as a body *representing* the claimant. Such recourse to a power of attorney is already largely followed in practice.

120 *b* The scope *ratione loci* can also give rise to problems: under the terms of Article 1, paragraph 1, the application of the Convention does not depend on either the nationality or the habitual residence of the parties, but simply on the fact that the claimant 'is in the territory of one of the Contracting Parties' and that the debtor 'is subject to the jurisdiction of another Contracting Party'. Most States tend to adopt, as connecting factor for the implementation of the Convention, the habitual residence of the parties alone. However, the wording of Article 1 leaves room for the adoption of other connecting factors, as is clearly shown by a Swiss example: a debtor of Austrian nationality was resident in Austria, near the Swiss border; he exercised his profession in Switzerland. He failed to provide for the maintenance of an Austrian child of his born out of wedlock and likewise domiciled in Austria. The applications for maintenance submitted to the court of the child's habitual residence, *i.e.* Austria, were ineffective. The question then arose whether it was possible to obtain an attachment of salary from the debtor's Swiss employer, on the basis of the New York Convention. The reply was positive, owing to the fact that Article 271, paragraph 4, of the Swiss Law on Collection of Debts and Bankruptcy [*Loi suisse sur la poursuite pour dettes et la faillite*] entitles a creditor of a debt which has fallen due to confiscate property in Switzerland, when the debtor does not live in Switzerland.[90] This literal consequence of Article 1, paragraph 1, of the New York Convention does not seem to be accepted in all States.

121 *c* One important problem, of a purely material nature, arises in all countries and goes so far as to call in question the application of the Treaty: that of the translation of the documents constituting the file which the transmitting agency has to send to the receiving agency. If one follows the procedure laid down in the New York Convention, all the documents have to be translated (only the Netherlands does not have this requirement), which can be extremely expensive.[91] Now, under the

89 'Alimenteninkasso im Ausland' (Lako) quoted above (fn. 81), pp. 12-13; M. Zingaro, article quoted above (fn. 81), pp. 36-37; M. Sumampouw, article quoted above (fn. 3), p. 332.

90 M. Zingaro, article quoted above (fn. 81), pp. 38-39.

91 A. Marx, article quoted above (fn. 81), p. 375; H. Klinkhardt, article quoted above (fn. 76), p. 165.

terms of Article 9, those translation costs have to be borne by the transmitting agencies of the claimant's country of residence. The question arises as to what exactly has to be translated: for example, in the case of a divorce judgment which also comprises a specification concerning the maintenance obligations of the defendant, is it necessary to translate the whole divorce judgment, or is it sufficient to translate just the operative clause dealing with the maintenance obligation? It seems that certain judges want complete translations and this also appears to be the requirement of Article 17 of the 1973 Hague Convention on the recognition and enforcement of decisions, which provides that a party seeking recognition or applying for enforcement of a decision has to furnish 'a complete and true copy of the decision' and, further on, 'a translation, certified as true of the ... documents' mentioned in that article. The Special Commission of November 1995 might well discuss this problem, as a requirement to furnish a complete translation of the documents seems to go well beyond what is necessary: a limitation of the translation to essentials would facilitate the smooth operation of the New York Convention.

122 *d* A difficulty in the application of the New York Convention occurs in the United Kingdom, arising out of the fact that in this country, application of the Hague Conventions and of the New York Convention is not regarded as cumulative, but alternative.[92] Furthermore, this alternative is not automatic, but has to be pointed out by the maintenance creditor or by the transmitting agency which dealt with his file. This means that if the maintenance creditor is the beneficiary of a judgment delivered against the debtor in the claimant's country of residence, *i.e.* where an enforcement decision can be obtained on the basis of the 1973 Hague Convention, the claimant's file transmitted to the receiving agency in the United Kingdom has to expressly mention the recourse to the Hague Convention. If no mention is made of the 1973 Hague Convention, the New York Convention of 1956 alone will be invoked in instituting new proceedings in the United Kingdom against the debtor, without relying on the decision obtained in the country of the claimant. Furthermore, all the transmitting or receiving agencies we have consulted complain about the automatic revision of judgments which takes place in the United Kingdom and which we examined earlier.[93] It would be useful for the Special Commission in November 1995 to examine those two difficulties peculiar to the United Kingdom.

123 To sum up, while reaffirming that the New York Convention operates satisfactorily between the States in group C, the few special cases we have just examined might usefully be the subject of discussions during the Special Commission in November 1995 and give rise to clarifications, or even, on certain points, to recommendations.

CHAPTER III – THE OTHER CONVENTIONS

124 We have seen, in the introduction, that in addition to the four Hague Conventions and the New York Convention of 1956, there are three other Conventions which deal partially or entirely with maintenance obligations.[94] Although the Special Commission of November 1995 is not called upon to examine the operation of those Conventions, it seems useful, for purely informatory purposes, to say a few brief words about the latter. We shall begin with the only one of the three which is in force.

A *The European Convention on the recognition and enforcement of judgments*

125 The *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, concluded on 27 September 1968, as well as the parallel Convention of Lugano

92 'Alimenteninkasso im Ausland'(Lako) quoted above (fn. 81), p. 12.

93 See *supra*, paragraphs 92-96.

94 See *supra*, paragraphs 5-10.

drafted in 1988, both include maintenance obligations within their scope. The advantage of those Conventions over the Hague regime is twofold: on the one hand, the Brussels-Lugano Conventions confer direct jurisdiction, and we saw earlier on that in addition to the general jurisdiction of the domicile of the maintenance debtor, the defendant in the proceedings (Article 2), the Conventions also confer jurisdiction on the courts of the place where the maintenance creditor is domiciled (Article 5, paragraph 2).[95] Moreover, the Brussels-Lugano Conventions ought to take precedence over the Hague regime owing to the simplicity and swiftness of the enforcement procedure (Article 34).[96]

126 The possible conflict between the two treaty regimes is envisaged in the Conventions themselves, without it really being resolved. In fact, the Hague Conventions state that they are willing to give way to any other instrument which might be invoked for the purposes of obtaining recognition and enforcement (Article 23 of the 1973 Convention, Article 11 of the 1958 Convention), whereas the Brussels-Lugano Conventions make provision for substituting for its own conditions those of any convention relating to a particular matter and to which the State of origin and the State addressed are Parties (Article 57). In the face of this mutual cross-reference, it is ultimately up to the parties to choose between enforcement in accordance with the Hague Convention and enforcement by virtue of the Brussels-Lugano Conventions.[97] As a general rule, it will be the maintenance creditor who will make this choice at the time of instituting proceedings for enforcement; but we have seen above that it is possible for the debtor to invoke the Brussels-Lugano Convention in order to object to an enforcement on the basis of Article 27, paragraph 4.[98]

127 Owing to the simplicity and swiftness of the enforcement procedure introduced by the Brussels-Lugano Conventions, in Europe the latter tend to replace the Hague Conventions in the recovery of maintenance. However, Article 27, paragraph 4, under the terms of which a judgment will not be recognized if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons in a way that conflicts with the rule of the private international law of the State in which the recognition is sought, gives rise to a problem which is encountered more and more frequently in practice: when the application for enforcement concerns a decision relating to maintenance due to a child born out of wedlock, there may be an advantage in giving preference to the Hague regime over the Brussels-Lugano Conventions. The latter in fact enable the debtor to object to the application for enforcement on the basis of Article 27, paragraph 4, and difficulties have already arisen on this point in France in connection with German judgments.[99]

128 Furthermore, in a judgment of 7 March 1980, a court in Palermo refused to enforce a German decision on the basis of Article 27, paragraph 4, of the Brussels Convention, the maintenance creditor having chosen to apply for the enforcement of his judgment on the basis of that Convention. Subsequent to this refusal to enforce, the claimant introduced proceedings before the same court on the basis of the Hague Convention and obtained an enforcement decision.[100] This example symptomatically demonstrates that the Hague Conventions on the recognition and enforcement of decisions are more favourable than the Brussels-Lugano Conventions where the maintenance relates to children born out of wedlock.

B *The Inter-American Convention on Support Obligations*

129 The *Inter-American Convention on Support Obligations*, which was drafted under the auspices of the *Organization of American States* (OAS), was concluded in Montevideo on 15 July 1989. This Convention has so far only been ratified by Mexico, on 10 May 1994, but it has been

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95 See *supra*, paragraph 94.

96 G. Droz, course quoted above (fn. 74), No 199, fn. 276.

97 Court of Cassation, of 16 June 1993, in *Rev. crit.* 1995, with note by B. Ancel, pp. 75-76; *OLG* Cologne, of 29 February 1980, *Die deutsche Rechtsprechung* 1980, paragraph 164.

98 See *supra*, paragraph 79.

99 *Cf.* on this point H. Klinkhardt, article quoted above (fn. 76), p. 164; A. Marx, article quoted above (fn. 81), pp. 376-377.

100 The judgment is quoted by H. Klinkhardt, article quoted above (fn. 76), p. 210.

signed by eleven other States, namely: Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay and Venezuela. Hence the Convention is not yet in force.

130 The scope of the Inter-American Convention is both wider and more restricted than that of the Hague Conventions:

a the scope is wider insofar as the Inter-American Convention covers, on the one hand, the determination of the applicable law and on the other, the direct jurisdiction of the courts, as well as lastly, the recognition and enforcement of judgments, thereby combining the regime of the four Hague Conventions, plus that of the Brussels-Lugano Convention;

b the scope is more restricted, insofar as Article 1 provides that the Convention only covers support obligations towards children or those between spouses on grounds of marriage or subsequent to divorce. However, Article 3 enables a State, at the time of signature or ratification of the Convention, to declare that the latter shall apply to other support obligations based on family law or other legal relationships, in accordance with a degree of relationship which it will be up to the State to specify.

131 In regard to determination of the applicable law, the Inter-American Convention states, in Article 6, that support obligations will be governed by the law of the domicile or of the habitual residence of the support creditor, or by the law of the State of the domicile or habitual residence of the support debtor, it being up to the authority seized to apply the one of those two laws which is most favourable to the claimant.

132 With regard to direct jurisdiction specified in the Inter-American Convention, Article 8 lays down that the following judicial or administrative authorities shall have jurisdiction, according to the claimant's preference:

a those of the State of the domicile or of the habitual residence of the support claimant;
b those of the State of the domicile or of the habitual residence of the support debtor; or
c those of the State with which the support debtor has personal links, such as property or income.

Furthermore, recognition is bestowed upon the jurisdiction of the court before which the defendant voluntarily appears.

133 It is apparent that this Inter-American Montevideo Convention is more complete than those which we have so far examined and it above all offers more flexible solutions, enabling the courts, both in determining the applicable law and in assessing direct competence, to adapt to each individual case.

C *The Rome Convention of 6 November 1990*

134 Some thirty years after the adoption of the New York Convention of 1956, the Member States of the European Economic Community decided that this Convention, ratified by all the Member States of the Community with the exception of Ireland, was inadequate. A working party had reached the conclusion that a maintenance creditor domiciled in a State of the European Union always encountered enormous difficulties in obtaining payment of a maintenance allowance from a debtor domiciled in another Member State of the Union.[101] The conclusion of this working party was that a new convention ought to be drafted, which would facilitate the recovery of maintenance allowances within the European Union and would, as it were, be related to the Brussels Convention of 1968. The conclusions of this working party led to the adoption of the *Convention Between the Member States of*

101 M. Sumampouw, article quoted above (fn. 3), p. 321; D. Martiny, course quoted above (fn. 59), pp. 281-282.

the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments, concluded in Rome on 6 November 1990.

135 The *raison d'être* and scope of this new Convention are essentially the same as those of the New York Convention of 1956, although the scope is more restricted, since the Rome Convention only applies to maintenance *judgments* which fall within the scope of the Brussels Convention (Article 1). But the mechanism adopted by the Common Market Convention closely follows the system of the New York Convention, instituting Central Authorities which have to co-operate with one another so as to facilitate the recovery of maintenance obligations (Articles 2 and 3). The only improvement incorporated in this Convention by comparison with the New York Convention of 1956 is in the scope *ratione personae*: Article 1, paragraph 5, provides: 'Any body which, under the law of a Contracting State, is entitled to exercise the rights of redress of the creditor or to represent him shall benefit from the provisions of this Convention'. This, as we have seen, is not the case in the New York Convention of 1956.[102]

136 The usefulness of this Rome Convention of 1990 is not self-evident, in view of the fact that all the States of the European Union, with the exception of Ireland, are Parties to the New York Convention of 1956. Instead of drafting a new convention, the Member States of the European Union would perhaps have performed a more useful task by attempting to persuade Ireland to accede to the New York Convention! But, more seriously, there is no guarantee of the simplification promised by this new Treaty, as the somewhat careless drafting of the Convention gives rise to a large number of questions as to how the latter is to operate and its relation with the other Conventions.[103] So far, no Member State of the European Union has ratified the Convention and its future is somewhat bleak.[104]

CONCLUSION

137 The purpose of the present Note was to prepare for the discussions which will take place during the Special Commission in November 1995. It has attempted to show that, despite several serious problems which will need to be examined in November, the four Hague Conventions operate to the satisfaction of the litigants and make a major contribution towards solving the thorny and often tragic problems to which maintenance obligations under family law give rise. In respect of the Hague Conventions, the term 'operation' is moreover inadequate, in view of the nature of those Treaties.

138 As for the New York Convention of 1956, we have seen that its operation varies considerably according to the States in which it is applied, but that the malfunction, or even the non-application of this Treaty is not due to its nature or its text, but to circumstances peculiar to the States in which this Convention fails to operate.

139 Subsequent to the examination of those Conventions and in view of the discussions which are to take place in November 1995, it is appropriate at this point to outline an agenda of the work of the Special Commission, it being understood that this agenda will have to be refined and spelt out in detail at the beginning of the meeting by the Chairman and the Bureau of the Commission:

The discussions might begin with a general round-table discussion, during which the experts would be able to describe their experience with the various Conventions. Perhaps it might be appropriate to subdivide this round-table in the light of the nature of the Conventions to be examined, *i.e.* to begin with the two Hague Conventions on the applicable law, followed by an examination of the two Hague

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102 See *supra*, paragraphs 118 and 119.

103 D. Martiny, article quoted above (fn. 59), p. 282.

104 M. Sumampouw, article quoted above (fn. 3), pp. 334-336.

Conventions on the recognition and enforcement of decisions, concluding with a general survey of the New York Convention of 1956 – although such a division does not genuinely reflect actual practice, since the recovery of maintenance often presupposes simultaneous recourse to all the Conventions.

Subsequently, the following specific points ought in particular to be examined:

a party autonomy in the choice of the applicable law (paragraphs 53-57 of the present Note);
b Article 8 of the 1973 Convention: the question of *perpetuatio juris* (paragraphs 30-33);
c the incidental question (paragraphs 45-55);
d the problem of a review of the merits and the practice followed in the United Kingdom (paragraphs 92-96 and 122);
e scope *ratione personae* of the New York Convention of 1956 (paragraphs 118 and 119);
f costs of translation and free legal assistance (paragraph 121);
g co-ordination between the application of the Hague Conventions and the New York Convention of 1956 (paragraph 116).

The Permanent Bureau expresses its appreciation in advance to any State which might indicate to it other problems requiring special attention at the meeting in November 1995.