OBLIGATIONS ALIMENTAIRES
MAINTENANCE OBLIGATIONS

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QUESTIONNAIRE RELATIF A LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES

établi par le Groupe de travail sur la loi applicable et le Bureau Permanent

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QUESTIONNAIRE RELATING TO THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

drawn up by the Working Group on applicable Law and the Permanent Bureau

Document préliminaire No 12 de Septembre 2004
à l'intention de la Commission spéciale
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Preliminary Document No 12 of September 2004
for the attention of the Special Commission
on the International Recovery of Child Support
and other Forms of Family Maintenance

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Introductory Remarks

At its June 2004 meeting, the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance decided that the Working Group on Applicable Law (hereinafter the "WGAL") should proceed with its work. That decision resulted from the discussion of the Special Commission based on Working Document No 13 entitled "Proposal by the Working Group on the Law Applicable to Maintenance Obligations" (hereinafter "Work. Doc. No 13"), a copy of which is appended.

As mentioned in Working Document No 13, the WGAL found that it would be very difficult to reach an agreement regarding a set of general rules on applicable law[1] that would be acceptable to a large number of States, and therefore could be included in the mandatory part of the future Convention. As alternatives, two other paths were contemplated: the first consists of including in the future instrument special rules dealing with specific problems caused by the absence of uniform rules on applicable law; the second consists of including in the instrument currently under discussion an optional section dealing with the issue of applicable law. This solution would allow a revision of certain disputed aspects of the *1973 Hague Convention on the Law Applicable to Maintenance Obligations* (hereinafter the "1973 Applicable Law Convention"), while providing other interested States with an option to join a system of uniform conflict rules.

The discussion at the Special Commission confirmed these considerations. It seems to show in particular that certain States Parties to the 1973 Applicable Law Convention are interested in a revision of that instrument, and that some States which to date have not ratified the 1973 Applicable Law Convention could be interested in optional regulation of the issues of applicable law as part of the new Convention.

In order to ascertain the possibility of finding a fairly speedy and simple agreement on the conflict rules to be included in an optional section, the WGAL and the Permanent Bureau have drawn up the following questionnaire. It is based on the "Sketch of Provisions on Applicable Law" developed by the WGAL during its meeting on 15 June, a copy of which is appended. The Questionnaire is sent to all Member States of the Hague Conference, to the States Parties to the New York Convention of 20 June 1956 on the Recovery of Maintenance Abroad, to all other States invited to the June 2004 Special Commission and to the relevant governmental and non-governmental organisations. It is also available from the Conference's website at the address <http://www.hcch.net>, under the heading "Work in progress". Other documents relating to the maintenance project are available from the same website.

The States and organisations to which the Questionnaire is forwarded are requested to forward their replies to the Permanent Bureau, if possible before **6 November 2004**.

[1] For the purpose of this Questionnaire the term "Law" means the law in force in the State, exclusive of rules of conflict of laws.

Questionnaire

1. Application of foreign law with respect to maintenance obligations

1) According to the private international law system of your country, can the establishment of a maintenance decision be based, in certain cases, on the application of foreign law? Please answer YES or NO.

2) If you answered NO to question 1, please specify whether, from your country's point of view, it could be contemplated that entitlement to maintenance and/or its amount might be governed, in certain cases, by the law of a foreign country. Please answer YES or NO.

If you answered NO to question 2), you are not required to answer the following questions.

3) If you answered YES to question 2), would your country be interested in the introduction of an optional section on applicable law within the framework of the new Convention?

2. Primary connecting factor

Pursuant to the 1973 Applicable Law Convention, maintenance obligations are governed in principle by the law of the country of the maintenance creditor's habitual residence (Art. 4). According to the WGAL's report (see Work. Doc. No 13, p. 5), that principle ought to be retained within the framework of the new Convention.

4) Do you support the plan for a rule in principle that "the internal law of the State of the habitual residence of the person whose needs are the subject of the claim ("the creditor") shall govern the maintenance obligations referred to in this Convention"?

5) If you answered NO to question 4), what in your view should be the primary connecting factor?

3. Subsidiary connecting factors

3.1 *In general*

6) If you answered YES to question 4), do you believe that the principle of connection with the location of the maintenance creditor's habitual residence ought to be supplemented by subsidiary connections? Please answer YES or NO.

3.2 *Common nationality of the parties*

Within the framework of the 1973 Applicable Law Convention, the connection with the location of the creditor's habitual residence is supplemented by a subsidiary connection with the law of the common nationality of the parties, which becomes applicable when the creditor is unable to obtain maintenance on the basis of the law of his or her habitual residence (Art. 5). Several arguments have been raised against the use of that connection in the area of maintenance: it may seem discriminatory in certain cases; it allegedly frequently leads to the application of foreign law; it could lead to the law of a State with

which there is no genuinely significant connection, in particular with respect to maintenance (see Work. Doc. No 13, p. 6).

7) In the light of these comments, do you agree that the subsidiary connection with the common nationality of the parties should be ruled out? Please answer YES or NO.

3.3 *Lex fori or law of the debtor's domicile*

In addition to the maintenance creditor's habitual residence, the maintenance obligation usually has a very significant connection with the State of the debtor's domicile or habitual residence. Moreover, the authorities of that State usually have jurisdiction on the basis of the principle *actor sequitur forum rei*.

The 1973 Applicable Law Convention does not provide for a connection with the law of the debtor's domicile or residence, but makes the *lex fori* applicable when the creditor is unable to obtain maintenance from the debtor on the basis of either the law of his or her habitual residence, or the law of common nationality (Art. 6). In practice, this subsidiary connection frequently leads to application of the law of the debtor's domicile or habitual residence.

For its part, the 1989 Inter-American Montevideo Convention on Support Obligations places greater emphasis on the law of the State of the debtor's domicile or habitual residence. That law is applicable instead of that of the creditor's domicile or habitual residence if, according to the authority seized of the application, it is more favorable to the creditor (Art. 6). This solution provides more protection for the creditor than that under the 1973 Applicable Law Convention, but it has the drawback of forcing the court to ascertain in every case the contents of two different laws and compare them, before making its determination.

In order to find a solution that would provide adequate protection of the creditor's interests without making the task of the competent authority too involved, the WGAL contemplated granting the maintenance creditor a right to request application of the law of the authority seized (at least if that law is also the law of the debtor's habitual residence). This solution is more favorable to the creditor than that under Article 6 of the 1973 Applicable Law Convention. At the same time, it also meets the interests of the authorities seized of the application as they may, at the creditor's request, apply the *lex fori*. As for the debtor, he or she could not object to that option, since it most commonly leads to the law applicable in his or her own State of residence.

8) In the light of these considerations, do you believe that a rule should be introduced into the new instrument whereby, as an exception to the primary connection with the creditor's habitual residence, the creditor may, in the maintenance application, designate the domestic law of the authority seized? Please answer YES or NO.

9) If you answered NO to question 8), do you believe that a subsidiary rule corresponding to Article 6 of the 1973 Applicable Law Convention, whereby the internal law of the authority seized becomes applicable if the creditor is unable to obtain maintenance by virtue of the principal law applicable, should be retained?

4. Special conflict rules

4.1 *Divorced spouses*

The 1973 Applicable Law Convention applies a specific rule to maintenance obligations between divorced spouses, which are governed, under Article 8, by the law governing the divorce. This solution applies not only when the maintenance application is determined in the course of the divorce proceedings (or at the time of divorce), but also in the case of any subsequent revision or amendment of decisions relating to maintenance obligations between divorced spouses, in particular in case of a claim supplementary to a divorce judgment delivered abroad. This special rule does have advantages (application of a single law to the divorce and the maintenance; observance of agreements made between the spouses at the time of divorce), but it also has several shortcomings (absence of protection for the maintenance creditor if the law of divorce is not favorable to him or her; absence of international standardisation owing to the absence of uniform conflict rules with respect to divorce; crystallisation of the applicable law despite changes in circumstances after the divorce; difficulty of detecting in the judgment the law by virtue of which the divorce was pronounced; see Work. Doc. No 13, pp. 7-8). For these reasons, several members of the WGAL have stated a preference for the elimination of this special connection.

10) In the light of these considerations, do you agree that maintenance obligations between divorced spouses should not be subject to a special rule, but be subject to the general connecting factors (law of the creditor's habitual residence, possibly subsidiary connections)? Please answer YES or NO.

11) If you answered NO to question 10), do you believe that a special rule ought to apply solely when the maintenance is determined directly in the divorce decision or even in the event of a subsequent determination or modification of maintenance between divorced spouses?

4.2 *Choice of law applicable to maintenance obligations between spouses*

Maintenance obligations between spouses are sometimes governed by agreements made between the parties concerned before or after marriage or at the time of divorce. In order to secure observance of these obligations, it might be interesting to allow the spouses an option to choose the law applicable to their agreement. The choice of applicable law could also assist in the application of a single law to all the property aspects of marriage (matrimonial property regime, upkeep of assets, etc.).

12) Do you support giving the spouses an option to choose the law applicable to the maintenance obligation? Please answer YES or NO.

13) If that choice of law were to be accepted, do you think that it should extend to maintenance claims for children? Please answer YES or NO.

14) If the choice of applicable law under question 12) were to be accepted, do you believe that it should be limited to certain options (*e.g.*, law applicable to matrimonial property regime, or *lex fori*), and if so, which?

4.3 *Persons related collaterally or by affinity*

Article 7 of the 1973 Applicable Law Convention currently contains a special rule relating to maintenance obligations between persons related collaterally or by affinity. That rule allows the debtor to object to a claim based on the generally-applicable rules relating to applicable law on the grounds that there is no maintenance obligation under the law of the common nationality of the debtor and creditor or, in the absence of common nationality, under the internal law of the debtor's habitual residence. The WGAL proposed retention of a special rule for maintenance obligations between persons related collaterally or by affinity, on the grounds that the principle of *favor creditoris* that inspired the general rules on applicable law cannot be extended directly to such specific cases. It nevertheless suggested certain amendments (restriction of the scope of the special rule to the situations where the creditor is an adult; possibly deletion of the reference to the law of common nationality; see Work. Doc. No 13, p. 9).

15) In the light of these considerations, do you support the retention of a special rule for maintenance obligations between persons related collaterally or by affinity? Please answer YES or NO.

16) If you answered YES to question 15), do you support the deletion of the reference to the law of the parties' common nationality? Please answer YES or NO.

17) If you answered YES to question 15), do you believe that the special rule should be restricted to the situations where the creditor is an adult? Please answer YES or NO.

4.4 *Public bodies*

No critical comment was made in relation to Article 9 of the 1973 Applicable Law Convention whereby "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."

18) Do you support the retention of this rule in the new instrument? Please answer YES or NO.

5. Scope of the applicable law

The scope of the applicable law is governed by Article 10 of the 1973 Applicable Law Convention. In the opinion of the WGAL this provision ought to be retained without major changes. The only change contemplated relates to the issue of determining "who is entitled to institute maintenance proceedings". Under Article 10(2), that issue is governed by the law applicable to the maintenance obligation. The wording of this rule could lead to uncertainty.

19) Do you support retention of a rule corresponding to Article 10(2) of the 1973 Applicable Law Convention? Please answer YES or NO.

20) Do you have suggestions for amendment of this rule?

6. Substantive rules

Under Article 11(2) of the 1973 Applicable Law Convention, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise. Doubts have been raised in the WGAL regarding the scope and practical usefulness of this rule (see Work. Doc. No 13, p. 10).

21) Do you believe that this rule should be deleted? Please answer YES or NO.

According to a suggestion made at the WGAL, another substantive rule should be included in a revised text, providing that the economic settlements between spouses should be taken into account in determining the amount of maintenance between them, even if the applicable law provides otherwise (see Work. Doc. No 13, p. 10).

22) Do you support the introduction of such a rule? Please answer YES or NO. If so, do you have views whether such rule should be extended to other parties, and if so, which?

Note: the parties questioned are also invited to forward their comments on any other issue that they consider to be relevant to the applicable law in the context of the international recovery of child support and other forms of family maintenance, and in particular in relation to the appended Sketch.

ANNEX

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No 13 E

Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (7-18 June 2004)

Distribution: 10 June 2004

Proposal by the Working Group on the Law Applicable to Maintenance Obligations

Report presented to the Special Commission

Introduction

The Working Group on the Law Applicable to Maintenance Obligations (hereafter "the WG") was established by the Hague Conference on Private International Law, Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance of May 2003, with the task of analyzing the possibility of introducing rules on applicable law in the envisaged instrument on maintenance obligations, and of formulating recommendations on this issue to the Special Commission in June 2004.

The WG is composed of the following members: Sheila Bird (Australia), Michèle Dubrocard France), Raquel Correia (Portugal), Ase Kristensen (Norway), Tracy Morrow (Canada), Shinichiro Hayakawa (Japan), David MacClean (Commonwealth Secretariat), Robert Spector (United States of America), Rolf Wagner (Germany), Andrea Bonomi (Switzerland, Chair).

The members of the WG would like to express their thanks to the Hague Conference on Private International Law and to the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, for the opportunity they were given to analyze and debate the important issues relating to the law applicable to maintenance obligations and to present this report. They would also like to thank the Permanent Bureau for the support provided during all their activities to date.

The WG met twice. The first meeting took place in The Hague on 15 May 2003, during the Special Commission of May 2003, the second one in The Hague on 27 and 28 May 2004. For the rest the discussion took place by way of an electronic Listserv.

I. Possibility of including a set of rules on applicable law in the obligatory part of the convention

A. General rules on the law applicable on maintenance obligations

In accordance with its mandate, the WG first explored the possibility of elaborating a set of general rules on the law applicable to maintenance obligations which could be acceptable for a large number of States, and could thus be included in the obligatory part of the envisaged convention. From the very beginning of the discussion, this task proved to be a difficult one, because of the radical opposition of two substantially different national approaches:

- A first group of countries (in particular the States which are parties to the 1973 Hague Convention as well as other civil law jurisdictions) adopt choice-of-law solutions which aim to protect the interests of the maintenance creditor, and which are based on the application of the law of the State of the creditor's habitual residence. Other connecting factors (such as the common nationality of the parties and the *lex fori*) are

either

subsidiary, or apply only to particular situations (*e.g.* to maintenance obligations between divorced or separated spouses). The application of the law of the creditor's habitual residence has various advantages. Its main *raisons d'être* are 1) the fact that it better reflects the interest of the creditor, and 2) that it often leads to the application of the law of the authority seized with a maintenance application: as a matter of fact, the majority of the States concerned by this rule give jurisdiction to the court at the creditor's place of residence. If however the application is filed in a different country (in particular in the State of the debtor's residence), the connecting factor of the creditor's residence obliges the court to apply a foreign law. In the countries that follow this approach, the difficulties connected with ascertaining and applying foreign law are not perceived as a major problem.

♦ In another group of countries (in particular the majority of common law jurisdictions, but also Norway and other Scandinavian States) maintenance obligations are governed in principle by the *lex fori*. Some common law jurisdictions (such as Canada) are prepared to apply foreign law, but only to issues relating to entitlement, and not to the amount of maintenance. For most of these countries the application of foreign law is principally excluded. There are many different reasons for this rather strict attitude. The most important is that in many of these countries maintenance applications are dealt with by means of a rapid and efficient administrative procedure, and that the authorities in charge of such procedure are not qualified to apply a law different from that of the forum. Even when the issue is taken to court (which can happen, in certain countries, only as the result of an appeal, or because of a choice of the creditor), the application of foreign law is rejected because of the time and the costs which are usually linked with the ascertaining of the content and the application of that law. This negative approach is also influenced by the traditional reluctance of common law jurisdiction to apply foreign law in family law proceedings.

Both systems have their pros and cons, and both seem to work well in practice. In particular, both aim to protect the interests of the maintenance creditor, although they realize this objective in different ways: while the first approach is more concerned with the quest for justice in the individual case, the second favors the achievement of an easy and rapid decision.

Although no country is prepared to abandon its own system, various solutions were proposed in the WG in order to bridge the gap between the "creditor's residence" and the "*lex fori* approach". In particular, several options were suggested and discussed in order to extend the cases in which the forum law is applied in civil law jurisdictions, and in particular:

- Application of the law of the forum State when the debtor has his habitual residence in that State, and both parties have the nationality of that State: this solution corresponds to the reservation which is presently provided for by Article 15 of the 1973 Convention;
- Application of the law of the forum State when the debtor has his habitual residence in that State, and the parties had their last common habitual residence in that State;
- Application of the law of the creditor's habitual residence, with the possibility for the creditor to opt for the application of the law of the forum when it coincides with the habitual residence of the debtor;
- Application of the law of the forum when it coincides with the habitual residence of the debtor, with the possibility for the creditor to opt for the application of the law of the State of his habitual residence.

All these suggestions have in common that they reduce the role of the law of the creditor's habitual residence and increase that of the law of the forum. From the point of view of the State parties to the 1973 Hague Convention, most of them represent a step back from the present situation, and could thus be acceptable only in the perspective of a compromise with the States which follow the "*lex fori* approach". Unfortunately, the discussion of these proposals revealed that a compromise cannot be easily achieved: as a matter of fact, no one of the mentioned compromise proposals seems to be acceptable to the common law States, for the simple reason that (at least some of them) completely reject the application of foreign law in maintenance cases for the reasons set out above.

B. Special rules designed for particular problems

Because of the difficulty of reaching a compromise on general conflict-of-laws solutions, the WG explored the possibility of adopting special rules dealing with particular problems which arise from the absence of uniform rules on the applicable law. In this perspective, a pragmatic approach was taken in order to identify the concrete situations in which the opposition between "creditor's residence" and "*lex fori* approach" leads to particularly disturbing results. This discussion focused particularly on maintenance applications which are not included in status proceedings.

- It was first noted that in many important cases the two approaches lead in practice to similar results. This is obviously the case when the creditor files an application in the State of his habitual residence: since in such cases the law of the creditor's habitual residence coincides with the *lex fori*, both approaches lead practically to the application of the same law. The divergence becomes concrete only when the action is brought in a country other than that of the creditor's residence (*e.g.* in the country of the debtor's habitual residence or in a country where neither of the parties is resident), but even these situations do not always raise real practical problems.
- If an action is brought in a country where neither the creditor nor the debtor have their habitual residence, the application of the law of the forum is not an appropriate solution. However, this situation will only arise in rather rare situations, since the authorities of such countries will generally lack jurisdiction. If they are competent (on the basis of a jurisdictional ground which could be regarded as rather exorbitant), they will be able in many common law countries to decline jurisdiction by applying the doctrine of *forum non conveniens*. Even if they accept to exercise jurisdiction, their decision will often not be able to be recognized and enforced in the State of the debtor because of the lack of indirect jurisdiction (this would notably be the case under Article 27 of the Working Draft prepared by the Drafting Committee on 12-16 January 2004), so that the creditor is well advised not to file an application in that State. In conclusion, these situations are not very significant from a practical point of view.
- More important are the cases in which the creditor files an application in the State of the debtor's residence. If however this is the result of *his own choice* (*e.g.* if the creditor believes that an application in that country is more advantageous for him, because the procedure is quicker or cheaper, or because the law applicable in that country is more favorable to him), the application of the law of the forum does not raise any substantial objection, because it normally corresponds to the will and the interests of the creditor.
- The situation is different if the creditor for some reason is *forced* to file in the State of the debtor. This can first happen when the authorities of the creditor's State *do not have jurisdiction* under their own rules. In this situation (which is not very common in practice, because of the wide acceptance of a jurisdiction based on the creditor's residence), although the application of the law of the creditor's habitual residence can be desirable in the interest of the creditor, one has to recognize that the application of the law of the forum is not really shocking, even for countries which follow the "creditor's residence approach". It is thus not clear why the authorities of the debtor's State should apply the law of the creditor's State when the latter does not even claim jurisdiction in the particular case. Traditional private international arguments based on the quest for uniformity are not applicable to this case, since only the authorities of the debtor's State have jurisdiction. Even if we take an approach based on interest analysis, the fact that the State of the creditor does not have jurisdiction reveals that this State is not interested in the application of its own law. In such situations, it seems that the application of the law of the forum could perhaps be generally accepted.
- The really hard cases (one could say the "true conflicts") arise when the creditor is forced to file in the debtor's country because *the decision* which has been (or could be) rendered in his State of residence, *cannot be recognized and enforced* in the debtor's country, in particular because of the lack of indirect jurisdiction (typical situation: a creditor resident in a European country is forced to file in the US jurisdiction where the debtor is resident, because the decision of his State of residence cannot be recognized in the US). Even in such situations no real problems arise if the law of the forum (*i.e.* of the residence of the debtor) grants to the creditor a level of protection which is

equivalent to (or higher than) that which he would be entitled to under the law of his own residence. On the other hand, the application of the *lex fori* is not entirely acceptable if it is less favorable to the creditor. In such case, the creditor is not only obliged to initiate proceedings in a foreign country, but furthermore he will obtain a smaller amount of support than he could obtain in his own country, or no support at all.

In conclusion: a practical problem concretely arises when a) the creditor is obliged to file in the debtor's country because the decision he could obtain in his own State of residence cannot be recognized, and b) the level of protection he is entitled to in the debtor's country is lower than that provided by the law of his own habitual residence.

With these situations in view, the WG has tried to elaborate some concrete solutions.

1) With regard to the issue of entitlement to maintenance, important differences exist with regard to the age up to which a child has the right to be supported by his parents (*e.g.* in some systems until majority, in others until the normal end of studies). With respect to this issue, consideration of the law of the creditor's habitual residence does not raise the complicated problems that are connected with the application of a foreign law to the amount of maintenance. It seems therefore that a specific rule concerning this aspect could be acceptable even to some common law jurisdictions, in particular if its effectiveness could be increased by some mechanism facilitating proof of foreign law. To this effect, it has been suggested that the authorities of the creditor's State of residence could issue a certificate stating the content of their own law, or – more concretely – make a finding that that the requesting creditor is entitled to maintenance until a certain age. Two models could be considered for such a certificate:

- According to Article 15 of the *1980 Hague Convention on the Civil Aspects of International Child Abduction* "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."
- According to Article 35 of the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, «"The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision."

The authority in the debtor's country would then be obliged to "admit and consider" this certificate or finding made by the authorities in the creditor's State before deciding on the entitlement of the creditor. The exact features of this mechanism, as well as the possibility to extend its application to issues other than the creditor's age, need further discussion in the Special Commission and the WG.

2) With respect to the amount of maintenance, the consideration of foreign rules is much more problematic, because of the practical difficulties connected with the use of foreign formulas. A solution which has been discussed in the WG is to renounce classical choice-of-rule rules and substitute for them a substantive clause, requiring the authority seized with an application to take into account the needs of the creditor in his own environment. Such solution, inspired by Article 11(2) of the 1973 Convention would imply however a modification of the substantive law rules of certain jurisdictions, and thus raise in certain States serious constitutional problems. Furthermore, such a rule would not always be compatible with the interest of the creditor, since consideration of the needs of the creditor would often lead to a

lower amount of maintenance (in particular, of the creditor's State of residence has a lower standard of living than that of the debtor).

C. The law applicable on the statute of limitations in the framework of the enforcement of a foreign decision

An issue which should be dealt with in the framework of the envisaged convention is that of the law applicable to the limitation period in the framework of the enforcement of a foreign decision. This question is different from those discussed under A and B, and presently governed by the 1973 Convention, because it does not arise in the framework of proceedings initiated to obtain or modify a decision on maintenance, but at the stage of enforcement of an existing foreign decision, in particular when the authorities of the State addressed have to establish if such enforcement should be permitted for the collection of arrears, and if so, for which period.

Traditionally the question depends on the characterization of the issue as one of procedure or of substance. In the first case, the alternative is between the application of the limitation period of the State of origin of the decision, or of that of the State addressed. In the framework of a substantive characterization, the possible options are the application of the law which has been applied to the merits of the decision to be enforced, or the law which would be applicable to the maintenance obligation according to the law of the forum.

An express rule included in the US *Uniform Interstate Family Support Act 1992* (§ 604) provides that the enforcing tribunal shall apply either the statute of limitation of the forum or that of the issuing State, whichever is longer. Since this practical solution has the advantage of reflecting the principle of *favor creditoris*, several members the WG felt that it could be a good model for a rule to be included in the envisaged convention. This rule should be included in the section relating to recognition and enforcement of foreign decisions (present Chapter IV of the Working Draft prepared by the Drafting Committee on 12-16 January 2004).

II. Revision of the 1973 Hague Convention on the Law Applicable to Maintenance Obligations, or introduction of an optional set of conflict rules in the new instrument

A. The possibility and the modality of a revision of the 1973 Convention

Because of the difficulties in reaching a compromise acceptable to all States, the WG focused on the possibility of revising the *1973 Hague Convention on the Law Applicable to Maintenance Obligations*. Although the State parties to this Convention are rather satisfied with its application, many members of the WG stressed that there is a need for improvement of certain solutions provided in that instrument (in particular, the provisions of Articles 5 and 8).

This revision could be the object of an *ad hoc* negotiation between the State parties, but it could also be realized in the framework of the current project of a comprehensive convention on maintenance obligations. In particular, the WG considered the opportunity to include in the instrument presently discussed an optional section dealing with the applicable law issue. This section would not be obligatory for all States ratifying the Convention, but could be the object of an option (opt-in or opt-out). The advantages of this solution would be the following:

- The States which are not interested in the application of foreign law in the field of maintenance, nor in a revision of the 1973 Convention, would not be obliged to adhere to the section on applicable law. At the same time, the existence of this section would not prevent them from ratifying the obligatory sections of the convention relating to administrative cooperation and to the recognition and enforcement of foreign decisions;
- The States which are parties to the 1973 Hague Convention and who are interested in a revision of that instrument, would have the possibility of immediately improving the existing instrument, without having to await an *ad hoc* negotiation on that issue;
- Those States which are not parties to the 1973 Convention, but are interested in the introduction of a certain uniformity in the field of applicable law, could also be interested in this solution.

With a view to this possibility, the WG discussed possible modifications to be included in a

revised version of the 1973 Convention.

B. General rules

The 1973 Convention is based on a "cascade" of three different connecting factors: the habitual residence of the maintenance creditor (Article 4), the common nationality of the parties (Article 5) and the *lex fori* (Article 6). The applicability of the subsidiary factors is triggered by the impossibility of the creditor obtaining maintenance under the law designated by the previous rules.

It goes without saying that the law of the creditor's habitual residence should continue to be the main connecting factor in the future instrument. With respect to it, it has been suggested that it should be indicated that, in the case of an application filed for the support of a child, the habitual residence is that of the child, and not that of the person representing him. This corresponds to the present solution, but an express indication would be useful to avoid any misunderstanding.

With respect to the subsidiary connecting factors, some possible modifications have been suggested and discussed:

1) The first modification that could be envisaged is the elimination of the subsidiary connecting factor based on the common nationality of the creditor and the debtor. Several arguments have been raised against the use of this connection in the field of maintenance:

- This solution is discriminatory in character as it favors without justification creditors having the same nationality as the debtor: indeed, only these creditors are able to rely on alternative application of three different laws, while others must be content with application of the law of their residence or the *lex fori*. This unequal treatment manifests itself notably with regard to maintenance obligations towards children born out of wedlock, of which a significant number do not have the same nationality as their father.
- If the State of the common nationality is the same as that of the habitual residence of the maintenance creditor or debtor, this connecting factor has a certain amount of effectiveness. However, if it is not the same State, the connecting factor leads to the application of a law with which there is normally no really significant connection.
- While the link to the creditor's residence very often leads to the application of the law of the judge seized (indeed, the majority of the Contracting States to the 1973 Convention provide for a forum in the State of the creditor's residence), this is not true for the common nationality. This often results therefore in a dissociation between *forum* and *ius*, between jurisdiction and applicable law, thus obliging the authority seized to apply a foreign law. Under these circumstances, this connecting factor – which is designed to benefit the creditor – actually causes unnecessary complications: the court seized, after having noted that maintenance is not due in accordance with the law of the creditor's habitual residence, will have to verify the content of another foreign law (that of the common nationality) while, in many cases, maintenance is due anyway in accordance with the law of the forum.
- Finally, from a more general point of view, the significance attributed to nationality, justifiable in 1973 at a time when this criterion still played a central role in the private international law of a large number of European States, would appear nowadays to be out of date. Today, the role of nationality has diminished in many national systems. As regards international conventions, this change is reflected for instance by the developments which took place in the field of child protection between the 1961 and the 1996 Hague Conventions on the protection of children. Abandonment of the notion of nationality is even more justifiable in the field of maintenance, given the patrimonial element of the allowances themselves.

Although the abandonment of the common nationality could raise some problems in some State parties, the majority of the members of the WG agrees that this rule could be abolished.

The law of the common nationality could be replaced by other subsidiary connecting factors (the law at the debtor's residence, the law of the nationality of one of the parties, etc.), or not be replaced at all. In the light of the considerations mentioned above, the latter solution could not be regarded as a step back from the present level of creditor's protection.

2) A second possible amendment to the general rules of the 1973 Convention has been discussed in the WG. It would consist in granting the maintenance creditor a right to opt in favor of the *lex fori*, in those cases where the action is brought in the State of residence of the debtor. In other words, the application of the *lex fori* would not (only) depend on the impossibility of obtaining maintenance under the law designated by the principal connecting factor(s), as presently provided in Article 6 of the Convention, but (also) on a choice of the creditor.

The rationale of this suggestion is based on the following considerations. When a maintenance application is filed in the State of the debtor's residence, the connecting factor of the creditor's habitual residence loses a part of its merits. In such situations, it does not lead to the application of the lex fori, so that the authority seized will have to ascertain the content of a foreign law, an operation which can be quite expensive and time consuming. Moreover, this foreign law will have to be applied even if it is *less favorable* to the creditor than the *lex fori* (the only exception provided in the Convention being when the creditor is not entitled at all to maintenance under the law of its habitual residence). In such situations, the application of the law of the creditor's residence runs counter to its own rationale. From the point of view of the *favor creditoris*, it is thus better to give the creditor the right to opt for the *lex fori*. This solution not only takes into account the interests of the creditor, but also corresponds to that of the forum State, whose authorities will be able to apply their domestic law. As to the debtor, he could not object to this right of option, because it would lead to the application of the law which is applicable in his own State of residence. Last but not least, this solution would extend the cases where the maintenance obligation is governed by *lex fori*, and could therefore be attractive for those common law jurisdictions who do not absolutely reject the adoption of bilateral choice of law in this field (*e.g.* Canada).

This solution is tempting, but it also raises some additional questions which need an in-depth discussion:

- Until when can the option be declared?
- Who would be entitled to exercise this right of option? The questions arises in particular when the application is not filed directly by the maintenance creditor, but by a public body seeking reimbursement of the benefits paid to the creditor.
- The most serious question arises with respect to a debtor's request to vary of the original order: if the creditor has requested and obtained an order in the country of the debtor on the basis of the *lex fori*, what would happen if the debtor files an application for variation of that order in the country of residence of the creditor? According to the general rules, the law of creditor's residence would apply, without a possibility of choice, with the consequences that the order might be varied because of the different applicable law, rather than any substantial change in the circumstances. Although this situation can already arise under the 1973 Convention in those cases when the *lex fori* is applicable on a subsidiary basis, the introduction of an option risks making it more frequent and problematic.

Despite these difficulties, the introduction of a creditor's right of option should be seriously considered in those cases when the application is brought in the debtor's State of residence. On the other hand, the WG agrees that this solution should be rejected when the application is filed in the creditor's State of residence, because it creates unnecessary difficulties by imposing the application of a foreign law. *A fortiori* the option should be excluded when neither the creditor nor the debtor are habitually resident in the forum State, because in this case the situation is not sufficiently connected with the *lex fori*, and because the application of this law could encourage an unacceptable forum shopping by the creditor.

B. Special rules on applicable law

After the general rules, the 1973 Hague Convention contains a certain number of special rules governing particular situations, like maintenance obligations between collaterals or based on affinity (Art. 7) and between divorced or separated spouses (Art. 8), as well as the law

applicable to public bodies seeking reimbursement of benefits paid in favor of the maintenance creditor (Art. 9). The WG has discussed whether these rules should be maintained in the framework of a revised text.

1) Maintenance between divorced or separated spouses

By virtue of Article 8 of the 1973 Convention, maintenance obligations between divorced spouses are exclusively governed by the law applied to the divorce. The same rule applies *mutatis mutandis* in the case of a legal separation, and in the case of a marriage which has been declared void or annulled. This solution applies not only when the application for maintenance is decided in the framework of the divorce proceedings (or at the time of divorce), but also in the case of any subsequent revision or modification of decisions concerning maintenance obligations between divorced spouses, in particular in the event of an action complementary to a divorce judgment rendered abroad.

This special rule certainly has some advantages:

- When the maintenance obligation between spouses is to be settled within the framework of divorce proceedings, Article 8 leads to the application of a single law to divorce and to maintenance. If the issue of divorce is governed by the domestic law of the forum, the application for maintenance is also decided on the basis of *lex fori*. Of course, this does not apply with respect to maintenance obligations towards the children of the couple, so that in such cases the application of a single law is not achieved.
- When the maintenance obligation between divorced spouses is to be settled after the divorce, within the framework of a complementary action or by modification of the divorce decision, the advantage of Article 8 is that it prevents any factual change of the circumstances which may occur after divorce (in particular, a change in the creditor's residence) giving rise to a modification of the applicable law. This is important when the spouses have agreed to the amount of maintenance, as this agreement should not be put into question simply by a change in the creditor's residence.

Nevertheless, Article 8 also presents various shortcomings:

- As the alternative connecting factors of Articles 4 to 6 are set aside, the interests of the creditor are not fully protected. In particular, if the law of the divorce does not provide for maintenance, there is no possibility of discounting it in favour of another law, except by way of the public policy clause. In addition, the factual and juridical conditions of the social environment in which there is a real need for maintenance are not taken into account, which is in contradiction to the general spirit of the Convention.
- As the conflict rules with regard to divorce are not standardized at the international level, the effect of Article 8 is to compromise any unification with regard to the law applicable to maintenance obligations. This latter law must depend on the private international law of the State of the divorce proceedings, and this solution inevitably favors forum shopping.
- The choice of a connecting factor does not vary with time can lead, when the maintenance obligation between divorced spouses is to be settled after the divorce, to application of a law which has lost all relevance with regard to the situation of the ex-spouses and their respective interests. The judge will not be able to take into account either the law of the current residence of the creditor or that of the debtor.
- It is possible that the divorce judgment contains no decision as regards maintenance. In this case, the concern for continuity on which Article 8 is based would appear to be unfounded. This is particularly true if the spouses have divorced in a country which does not provide for maintenance of a divorced spouse (for example, Islamic States); here, application of the law of the divorce leads to refusal of any maintenance, except if its application is discounted by public policy.
- Finally, there may be practical difficulties in that sometimes it is difficult to detect in the judgment the law by virtue of which the divorce was pronounced.

For these reasons, a revision of the present solution is desirable. Various options have been discussed in the WG, in particular:

- Limit the additional connecting factor to maintenance decisions taken within the framework of divorce proceedings;
- Allow for the additional connecting factor in the event of a subsequent application, but on condition that the divorce judgment has ruled on the maintenance (*i.e.*, in the event of revision and not in the event of a new application);
- Only allow for the additional connecting factor if the spouses indeed wish it (*i.e.* based on a choice of law made available to them in this particular instance);
- Simply eliminate the additional connecting factor.

In the WG the opinion seems to prevail that Article 8 should be simply deleted, with the consequence that obligations between divorced and separated spouses would be governed by the general rules.

With respect to maintenance obligations between spouses, the WG also discussed the possibility of introducing a right to choose the applicable law. Party autonomy would be particularly useful when the spouses have concluded an agreement relating to maintenance obligations and/or to matrimonial property. This question needs however a more detailed analysis. In any case, if the admission of the parties' choice is envisaged, it seems that it should be subject to certain restrictions as to the law that could be designated by the parties (*e.g.* the *lex fori*, the law of the debtor's residence, the law applicable to the matrimonial property) and to compliance with internationally mandatory rules (*lois de police*, overriding statutes).

2) Maintenance obligations between persons related collaterally or by affinity

A special rule is presently included in Article 7 of the 1973 Convention on maintenance obligations between persons related collaterally or by affinity. This rule enables the debtor to oppose an application based on the general rules on applicable law on the ground that no maintenance obligation exists under the law of the common nationality of debtor and creditor or, in the absence of common nationality, under the internal law of the debtor's habitual residence. If the debtor makes use of this right, the rule leads to the cumulative application of the law governing maintenance according to the general rules of Articles 4 to 6 and of either the law of common nationality or the law of the debtor's residence.

In the opinion of the WG special rules for maintenance obligations between persons related collaterally or by affinity should be maintained, at least when the creditor is an adult. As a matter of fact, the principle of *favor creditoris* which inspires the general rules on applicable law cannot be directly transposed to such particular situations. The rule of Article 7 could however be amended in some respects:

- First, it has been suggested that the scope of the special rule should be limited to the situations where the creditor is an adult. The need for a restrictive rule is much less evident when the maintenance of a child is at stake: in this situation, the principle of *favor creditoris* should apply, with the consequence that an application made by (or on behalf of) a child should be governed by the general rules of the future instrument, even if it concerns persons related collaterally or by affinity.
- *Another modification could concern the connecting factors used by Article 7 for determining the law on which the debtor's defense can be based. In this respect, some members of the WG are in favor of suppressing the reference to the law of the common nationality, in order to establish uniformity with the general rules (assuming the elimination of present Art. 5). According to other members, however, the "negative" role of the common nationality in the framework of Article 7 is different and more justified than the "positive" role which this connecting factor now plays in Article 5. According to this view, the existence of a maintenance obligation between collaterals or based on affinity is not justified when such obligation does not exist under the law of the common nationality of the parties. This question needs further reflection.*
- *However, the reference to the law of the common nationality is maintained, it is not clear why the possibility of invoking the law of debtor's residence should be open* only *when the parties do not have a common nationality, as provided by the present text. The rule could thus be amended by simply stating that the debtor can*

contest the application by relying, either on the law of the common nationality or on the law of his habitual residence.

3) Public bodies

Finally, in the opinion of the WG, the special rule of Article 9 on the law applicable to public bodies should be maintained in the future instrument. According to this rule, the right of a public body to obtain reimbursement of benefits for the maintenance creditor is governed by the law to which the body is subject. It is not excluded that a more general agreement could be found on this rule, so that it could even be included in the obligatory section of the future convention.

It should be noted that the applicable law rules just mentioned concern the situation where a public body files an original application for reimbursement. However, they should not apply when the public body is seeking recognition and enforcement of a decision already rendered on that issue. During the discussion it was thus suggested that present Article 39 of the Working Draft prepared by the Drafting Committee on 12-16 January 2004 (which is based on Art. 18 of the *Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*) should be amended, in the part where it enables the authority of the State addressed to newly verify the law that was applied in the foreign decision ("A decision rendered against a debtor on the application of a public body ... shall be recognised and enforced in accordance with this Convention *if reimbursement can be obtained by the public body under the law to which it is subject"*). Such "double check" not only raises some practical difficulties when the foreign decision does not indicate on which law it is based, but is also in contradiction with the general rules included in the Working Draft on the recognition of foreign decisions (Art. 26-31), which do not provide for a verification of the law applied by the authority of the State of origin.

C. Scope of the applicable law

The scope of the applicable law is regulated in Article 10 of the 1973 Convention. In the opinion of the WG, this provision should be maintained without major changes. In particular, a large majority of the members found that *dépeçage* should be avoided, and that the same law should be applicable to the eligibility and to the amount of maintenance.

The only modification which was envisaged concerns the issue of determining "who is entitled to institute maintenance proceedings". According to Article 10(2), this question is governed by the law applicable to the maintenance obligation. The formulation of this rule gives rise to a certain amount of uncertainty. In the opinion of the WG, various different issues should be distinguished:

- Who is the creditor, *i.e.* who is entitled to maintenance? This is certainly a matter to be governed by the law applicable to the maintenance obligation, as provided by Article 10(2) of the 1973 Convention;
- If the creditor is a child, who is representing him? It seems that this issue is outside the scope of the law applicable to maintenance and should not be dealt with in the envisaged convention; it depends on parental responsibility in respect of the child which is to be determined by other, autonomous conflict rules (the 1961 or the 1996 Hague Convention on the protection of children contain such rules for the States which are parties to these instruments);
- Who has *locus standi* in the procedure? This seems to be an issue to be determined according to the law of the authority seized;
- Who is entitled to enforce a right of the creditor on his account? This problem particularly arises with public bodies who seek reimbursement of the benefits paid to the creditor, and is dealt with under Articles 9 and 10(3) of the 1973 Convention.

Because of the risk of confusion among these (and possibly other) issues, the wording of Article 10(2) should perhaps be amended, but the WG could not yet agree on a clear-cut formulation.

D. Substantive rules

According to Article 11(2) of the 1973 Convention, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise.

The question of whether to maintain such a substantive rule was discussed in the WG. In this respect, it should be observed, on the one hand, that the meaning of the rule is not very clear: is it to be regarded as a device for discounting the applicable foreign law when it does not provide for the consideration of the needs of the creditor and the resources of the debtor, or does it come into play also when the maintenance obligation is governed by the domestic law of the forum (*e.g.* when the application is filed at the creditor's habitual residence)? At the same time, doubts were raised on the practical utility of the provision.

According to one view, another substantive rule should be included in a revised text, providing that the economic settlements between the parties should be taken into account in determining the amount of maintenance between adults, even if the applicable law provides otherwise. This suggestion is inspired by a resolution of the Institute of International Law (Session of Helsinki, 1985), which recommends taking into consideration the patrimonial settlements actually effected by the spouses at the time of dissolution of marriage.

Since the pros and cons of such substantive rules are not yet completely clear, the issue will need further reflection.

The Hague, June 2004