F. Conclusions

Closing a review of the impact of the Treaty of Amsterdam on private international law, a strong proponent of European integration in this field wrote in 2000:

> 'A great step forward—private international law recognised as Community task—has been achieved but at a high price on the technical level. Thus on balance it has been a mixed success. One hopes that the next Revision Conference will rectify this major mistake.'[97]

This wish[98] was only partially acted upon by the Lisbon Treaty. Once reformed, the Treaties will provide a slightly wider and more (but not entirely) clearly defined legal basis for Union action in the European internal sphere. However, while Article 293 has been deleted, the specific competence afforded to the Union to legislate in the field of conflict of laws will continue to coexist with provisions allowing it to enact sporadic private international law provisions in a way detrimental to the overall coherence and transparency of the field. More importantly, the elements of variable geometry which have been introduced by the Treaty of Amsterdam will remain, and continue, despite some changes, to raise many questions. Similarly, while the insertion in the reformed Treaties of provisions on categories and areas of competences will in some ways improves the legibility of the definition of external competences relevant to private international law, it will introduce new uncertainties. Technical perfection, it seems, will have to wait for yet another Revision Conference.

AUDE FIORINI*

II. THE NEW HAGUE MAINTENANCE CONVENTION

After four years of negotiations the Hague Convention of 5 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance and the Protocol on Applicable Law was adopted by the Hague Conference on Private International Law at its Twenty-First Session. The intention of the negotiators was to produce a convention designed to respond to the often modest needs of children and other dependents by providing international procedures which are simple, swift, cost-effective, accessible, fair, and build upon features of existing international instruments.

A. History and Background

The history of the Hague Conference with regard to maintenance goes back to the 1950s when the Eighth Session adopted two Conventions relating to maintenance. One dealt with the recognition and enforcement of decisions relating to maintenance obligations towards children while the other dealt with applicable law.[1] It was in the same

[97] U Drobnig, 'European Private International Law after the Treaty of Amsterdam—Perspectives for the next Decade', 11 The King's College Law Journal 2000, 201.

[98] Which had largely been left untouched by the Nice Treaty.

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[1] The Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations Towards Children and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.

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era that the United Nations drew up the New York Convention of 2 June 1956 on the Recovery Abroad of Maintenance.[2] This was a remarkable convention for its time, and it provided the only global framework for administrative cooperation in the international recovery of maintenance, for both children and other family dependents. Two decades later, the Hague Conventions on child support were revised and extended. Once again two Hague Conventions were adopted, each designed to replace one of the Conventions from the 1950s.[3]

Since 1992, encouraged by the United Nations, the Hague Conference has been monitoring the operation of the New York Convention together with that of the four Hague Conventions and convened Special Commission meetings for this purpose, involving all States Parties to the New York Convention, as well as Member States of the Hague Conference and States Parties to the Hague Conventions. The Special Commission was at first reluctant to consider further international instruments in an area in which so many instruments already existed. Despite this natural reluctance, the Special Commission eventually recommended a radical approach, namely that the Hague Conference should start work on a new worldwide instrument.[4] This gave rise to a new mandate: the preparation of a new comprehensive Convention on maintenance obligations, which would build on the best features of the existing Hague Conventions and include rules on judicial and administrative cooperation.[5]

The first round of negotiations took place in May 2003 and this was followed by further negotiations over the subsequent years which culminated in a three week Diplomatic Session in November 2007.[6] While initially the Convention was intended to cover all aspects found in the previous Conventions, it was found that it was not possible to reach a compromise between those States who were open to the application of a foreign law, and those States who preferred the application of the law of the forum. Due to this, the rules regarding applicable law are now to be found in an optional Protocol to the Convention.

B. The Convention

The Convention has nine chapters and 65 articles, as well as two annexes consisting of forms to be used by Central Authorities to assist in communication. Its objects are to

[2] 268 UNTS 3.

[3] The Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance (hereinafter the 1973 Hague (Enforcement) Convention) and the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (hereinafter the 1973 Hague (Applicable Law) Convention).

[4] This decision was taken by the 1999 Special Commission meeting and was mainly in response to disappointment at the lack of progress made in improving the operation of the existing Conventions. See Report and Conclusions of the Special Commission on Maintenance Obligations of April 1999; A Borrás and J Degeling, 'Draft Explanatory Report on the Hague preliminary draft Convention on the international recovery of child support and other forms of family maintenance' Prel Doc No 32 of August 2007, 3–4.

[5] The mandate can be found in: Final Act of the Nineteenth Session, 2002, Proceedings of the Nineteenth Session, Tome I, Miscellaneous Matters. In addition, the mandate specified that there should be an attempt to increase the inclusiveness of the negotiations by ensuring participation of non-Member States of the Conference, in particular signatory States to the New York Convention, and by providing Spanish translation and interpretation where possible.

[6] It was attended by representatives from 41 States and nine organizations.

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ensure the effective international recovery of child support and other forms of family maintenance, and Article 1 sets out the means by which this will be achieved. Apart from applicable law, which is found in the Protocol, the other aspect of private international law which is absent from this list is the determination of jurisdiction. The Convention does not provide direct rules, but deals with jurisdiction indirectly within the bases for recognition and enforcement.[7] This stance is also found in the previous Hague Conventions but is a major difference from the scheme set up under the Brussels I Regulation.[8]

1. Scope

Article 2 allows a number of options for the scope of the Convention. It starts on a positive note by saying that it will apply to all maintenance obligations arising from a parent-child relationship towards a person under the age of 21. However, States can make a reservation to the effect that the application of the Convention will be limited to persons who are under the age of 18 rather than 21.

As for spousal support, the entire Convention will apply to the recognition and/or enforcement of a decision for spousal support when the application is made with a claim for parent-child maintenance.[9] For spousal support more generally, while the Convention will apply, the chapters on administrative cooperation and applications made through the Central Authorities will not.[10]

Another option is found in Article 2(3), which gives States the right to make a declaration that the application of the whole or any part of the Convention will be extended to any maintenance obligation arising from a family relationship, parentage, marriage, or affinity, including in particular obligations to vulnerable persons. Such a declaration would give rise to obligations between two Contracting States only to the extent that their declarations covered the same maintenance obligations and parts of the Convention.

These limitations and options for scope are not unusual among the previous Hague Conventions in the area. The Hague Conventions from the 1950s are limited to child support obligations, and the scope of the 1973 Hague Convention could be reduced from maintenance arising out of a family relationship by way of a system of reservations.[11] In contrast, in Europe, the Brussels I Regulation does not provide any limits to the nature of the maintenance obligation that will be covered and the Proposal for a Council Regulation on Maintenance Obligations[12] states that it will apply to

[7] The decision to exclude uniform direct rules of jurisdiction was based on the view that any practical benefits to be derived from uniform rules were far outweighed by the cost of embarking on a long, complex and possibly futile attempt to reach a consensus. See A Borrás and J Degeling, 'Draft Explanatory Report on the Hague preliminary draft Convention on the international recovery of child support and other forms of family maintenance' Prel Doc No 32 of August 2007, 10–12.

[8] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2002] OJ L 12, 1–23 (hereinafter the Brussels I Regulation).

[9] Art 2(1)(b).

[10] Art 2(1)(c).

[11] Art 26.

[12] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649, Brussels 15 Dec 2005 (hereinafter the proposed Maintenance Regulation).

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maintenance obligations arising from family relationships or relationships deemed by the law applicable to such relationships as having comparable effects.

The application of the various instruments is also affected by the new Convention. It is intended to replace both of the previous Hague Maintenance (Enforcement) Conventions[13] and also the New York Convention, but the latter only to the extent to which their scope coincides.[14] The effect of Article 51, which specifically makes reference to Regional Economic Integration Organisations, allows the maintenance provisions of the Brussels I Regulation to continue to operate as between Member States of the European Union. The new Convention will also not affect the application of future instruments concluded by such an organisation, such as the proposed Maintenance Regulation, provided that such instruments do not affect the application of the provisions of the Convention in the relationship of Member States of the Regional Economic Integration Organisation with other Contracting States. This will allow the proposed Maintenance Regulation to take precedence over the Convention in relations between Member States.[15]

B. Administrative Cooperation

The new Convention differentiates itself from the 1973 Hague (Enforcement) Convention[16] by providing for Central Authorities to play an important role. In this way it incorporates the ideas behind the New York Convention, while trying to ensure that the result would be more effective cooperation in practice.[17] The general functions of the Central Authorities comprise cooperating with each other and promoting cooperation among the competent authorities in order to achieve the purposes of the Convention, as well as seeking possible solutions to difficulties which arise in the application of the Convention.[18] More specifically, the Central Authorities will be responsible for transmitting and receiving applications and initiating or facilitating the institution of proceedings in respect of such applications. They are also required to take all appropriate measures to provide or facilitate the provision of legal assistance, help locate the debtor or the creditor, encourage amicable solutions and the voluntary

[13] Art 48.

[14] Art 49.

[15] As stated in Art 49 of the proposed Maintenance Regulation itself.

[16] Where there was no mention of Central Authorities. There are also no Central Authorities provided for under the Brussels I Regulation system.

[17] In particular, the work of the Administrative Cooperation Working Group concentrated on this aspect. See 'Report of the Administrative Cooperation Working Group' Prel Doc No 34 of October 2007. Among the areas receiving attention was the question of translations, and how the need for them could be avoided, Art 25(3)(b) envisages a form for abstracts of decisions that can be easily understandable in all languages. See also 'Report of the Forms Working Group' Prel Doc No 31 of July 2007.

[18] Art 5. These are the same general functions as found in other Hague Conventions such as the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1889 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. Similar Central Authority roles can also be seen in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (the new Brussels II Regulation).

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payment of maintenance, facilitate the ongoing enforcement of maintenance, the collection and transfer of maintenance payments and the obtaining of documentary or other evidence, provide assistance in establishing parentage, and facilitate service of documents.[19]

Each Central Authority is to bear its own costs in applying the Convention and may not impose any charge on applicants, with the exception of exceptional costs arising from a request for the Central Authority to take certain measures to assist a potential applicant who has not yet made an application under the Convention.[20]

C. An Application under the Convention

There are two ways in which a maintenance application can be made to a foreign authority: the general method of a direct application by the applicant to the competent authority or through a Central Authority under the system set up specifically by this Convention.[21] The drafters realised that the majority of applicants would often be families with limited resources and seeking relatively low amounts.[22] As a method of achieving low cost access to foreign legal systems, there is a chapter of the Convention devoted to the process for Central Authority applications.[23]

This chapter provides that applications for establishment, for modification and for recognition and enforcement can be made through the Central Authority[24] and provides all the rules for the transmission, receipt and processing of these applications.[25] In addition, the chapter also houses the rules regarding legal assistance and free legal aid. These issues were the subject of intense debate during the negotiations, and the resulting compromise is stated over four articles.

Article 14 sets out the basic obligation to provide effective access to procedures, including free legal assistance in accordance with this set of articles, unless the procedures of the requested State enable the applicant to make the case without the need for such assistance and the Central Authority provides such services as are necessary free of charge. Under Article 15, the requested State is obliged to provide free legal assistance for the creditor in child support cases, unless it considers that the application or any appeal is manifestly unfounded on the merits. However, Article 16 provides this obligation can be limited through a declaration by the State to cases where the recognition or enforcement of an existing decision is being sought and that a child-centred means test will apply in all other cases.[26] Article 17 then allows a State to make the

[19] Art 6.

[20] Art 8.

[21] Art 37 provides that nothing in the Convention prevents the making of a direct application and also lists the articles that will apply to such an application.

[22] See A Borrás and J Degeling, 'Draft Explanatory Report on the Hague preliminary draft Convention on the international recovery of child support and other forms of family maintenance' Prel Doc No 32 of August 2007, 64.

[23] Chapter III.

[24] Art 10.

[25] Arts 11–12. It is worth noting here that as part of the approach of ensuring that the Convention would accommodate the use of information technology solutions, the system put in place ensures as a first step the swift transmission of applications and accompanying documents, by whatever medium available, between Central Authorities. However, the possibility of a requirement for the transfer of complete certified copies is also recognised and can be carried out at a later stage if necessary.

[26] However, under Art 16(4) if the most favourable legal assistance provided for by the law of the requested State in respect of applications concerning maintenance obligations arising from a

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provision of free legal assistance subject to a means test for all other applicants. This is subject to the condition that an applicant who benefits from free legal assistance in his or her State of origin is entitled, in proceedings for recognition and enforcement, to benefit to at least the same extent from the free legal assistance provided in the requested State.[27] These provisions are significant as the level of free legal assistance that States must provide is probably the most generous found in private international law and international legal cooperation.

D. Restrictions on Bringing Proceedings

Article 18 provides that proceedings cannot be brought in another State to modify a decision made in the State of the habitual residence of the creditor as long as the creditor remains habitually resident in that State.[28] The aim is to prevent the generation of multiple decisions, a problem which the inability to agree on direct rules on jurisdiction left open. No similar provision was found in the earlier conventions but it was felt that this article was necessary for the protection of the creditor and to prevent the denial of justice.[29] This article, combined with the absence of an indirect jurisdictional ground based on the habitual residence of the debtor, as opposed to the respondent, are clearly aimed at preventing the practices that developed, particularly in the United Kingdom, under the 1973 Hague (Enforcement) Convention of allowing the modification of a decision at the time of its recognition and enforcement.[30]

E. Recognition and Enforcement

These rules are found in Chapters V and VI. Article 20 sets out the jurisdictional requirements for recognition and enforcement. There are six listed:

- the respondent was habitually resident in the State of origin at the time proceedings were instituted;
- the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

parent-child relationship towards a child is more favourable than that provided for following the declaration, the most favourable legal assistance shall be provided.

[27] It must be noted that these provisions apply only to applications that are made through the Central Authority system; for direct applications only the rules that no bond is required (Art 14(5)) and that the applicant is entitled to benefit from legal assistance in the foreign State to the same extent as he or she has benefited from in his or her State of origin (Art 17(b)). The reason for this reflects the variety of methods that may be used to ensure effective access to procedures, such as setting up the system in such a way that simplified procedures not requiring legal aid apply to Central Authority applications.

[28] Although some exceptions apply.

[29] See A Borrás and J Degeling, 'Draft Explanatory Report on the Hague preliminary draft Convention on the international recovery of child support and other forms of family maintenance' Prel Doc No 32 of August 2007, 76.

[30] Permanent Bureau, 'Note on the Operation of Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance' Prel Doc 1 of 1995, 23–25.

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- the creditor was habitually resident in the State of origin at the time proceedings were instituted;
- the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;
- except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or
- the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

Jurisdiction exercised by an authority in a State where both parties were nationals will no longer be sufficient to warrant recognition and enforcement, as was the case under the 1973 Hague (Enforcement) Convention. Aside from that, the provisions largely reflect acceptable jurisdictional grounds found in other instruments, including the proposed Maintenance Regulation.[31] However, unlike in other instruments, reservations can be made for three of these grounds.[32] The effect of such reservations has been limited. First, a State is required to recognise the decision if its law would in similar factual circumstances confer jurisdiction on its own authorities to make such a decision[33] and, second, if a refusal to recognise is as a result of a reservation, a State is required to ensure that all appropriate measures are taken to establish a decision for the benefit of the creditor.[34]

Article 22 lists the grounds on which recognition may be refused. These include the usual grounds of public policy, fraud, incompatible decisions, and protection for debtors who had not appeared or were not represented at the proceedings. Recognition can also be refused if the decision was made in violation of the restrictions placed on bringing proceedings found in Article 18. The provisions that recognition may be refused on the grounds of an incompatible decision made or recognisable in the requested State reflect those in the 1973 Hague (Enforcement) Convention,[35] but differ from the Brussels I Regulation[36] by not specifying that if the incompatible decision is from a third State it must have been rendered earlier.

The procedure to be followed in an application for recognition and enforcement is set out in Article 23, with an alternative procedure provided for in Article 24. This was another set of articles requiring intense discussion in order to achieve the current consensus. The original procedure was that found in Article 23 alone,[37] and this envisages a two-step process whereby a decision would be declared enforceable or registered for enforcement without delay, the only ground on which the relevant authority could refuse was that of public policy. The parties would not be entitled to make any representations at this point, but rather could challenge or appeal this

[31] Although the reference to parental responsibility is more specific in the proposed Maintenance Regulation, with Art 3(c) referring to a State which has jurisdiction to entertain proceedings concerning parental responsibility under the Brussels II Regulation.
[32] Art 20(2), reservations can be made for the third, fifth and sixth of these grounds.
[33] Art 20(3).
[34] Art 20(4).
[35] Art 5(4).
[36] Art 34(4).
[37] See Art 20 'Revised Preliminary Draft Convention on the International Recovery of Child Support and other forms of Family Maintenance', Prel Doc 29 of June 2007, 16.

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decision.[38] Such a challenge can only be based on the grounds set out in Article 22, the bases for recognition or enforcement set out in Article 20 or the authenticity or integrity of one of the documents transmitted. The aim behind this article, reducing the procedural aspects of recognition, can also be seen in developments at the European level, where the discussion on the proposed Maintenance Regulation are working towards the automatic recognition of maintenance orders made in other Member States and allowing a challenge only at the enforcement stage.[39]

The alternative[40] is a one-step procedure of which the respondent is duly notified and where both parties are given adequate opportunity to be heard. The competent authority is allowed, of its own motion, to refuse recognition and enforcement on the grounds of public policy and the existence of incompatible decisions, and the rest of the grounds may be reviewed if raised by the respondent or if concerns arise from the face of the documents submitted.

For both of these procedures, a refusal may also be founded on the fulfilment of the debt to the extent that the application relates to payments that fell due in the past.[41] In addition, if there is a further appeal allowed for under the domestic law of the State addressed, this is governed by that domestic law, although such an appeal will not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.[42] As under the previous Hague Maintenance Conventions and the Brussels I Regulation, the decision cannot be reviewed on the merits.[43] There is also an additional new rule that the physical presence of the child or the applicant is not to be required at any proceedings in the requested State.[44]

There was great concern during the negotiations to ensure that the enforcement provisions would be effective and prompt.[45] While, as in the 1973 Hague (Enforcement) Convention, enforcement is to take place in accordance with the law of the State addressed, this Convention takes a step further into influencing internal laws on the enforcement of foreign decisions. If a decision has been declared enforceable, or registered for enforcement, following an application made through a Central Authority, enforcement must proceed without the need for further action from the applicant.[46]

States have to provide the same range of enforcement measures for foreign orders as for domestic ones,[47] and must make available in internal law effective measures to enforce decisions under this Convention.[48] Article 34(2) goes on to list a number of measures that may be used to effectively enforce maintenance decisions. It is clear that this paragraph does not impose an obligation on any State to introduce each of the measures listed, but it is also clear that the first paragraph contains a mandatory clause for all States that foreign maintenance decisions must be enforced effectively, and that

[38] Although the challenge had to be lodged within 30 days of the notification of the decision to declare or register, or 60 days if the contesting party is not resident in the State.

[39] This proposal is currently found in Art 25 of the proposed Maintenance Regulation and was agreed on by the Justice and Home Affairs Council at the meeting of 5–6 June 2008.

[40] Found in Art 24, this applies in a State if it makes a declaration to that effect.

[41] Art 23(8) and Art 24(5).

[42] Art 23(10) Art 24(6).

[43] Art 28.

[44] Art 29.

[45] Reflected in Art 32(2).

[46] In addition, the law of the State of origin of the decision controls the duration of the maintenance obligation (Art 32(4)) and the limitation period for which arrears may be enforced are to be determined by whichever of the two States provides for a longer period (Art 32(5)).

[47] Art 33.

[48] Art 34.

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these examples indicate what will generally be considered the most suitable methods to achieve this.[49]

F. Maintenance Agreements

Article 30 provides for the recognition of maintenance agreements. As with 'settlements' under the 1973 Hague (Enforcement) Convention and 'authentic instruments' and 'court settlements' under the Brussels I Regulation,[50] some formal official recognition of the parties' agreement by a competent authority is mandatory.[51] In addition to the requirements that it must be an agreement in writing[52] and relate to the payment of maintenance, it also has to have been either formally drawn up or registered as an authentic instrument by a competent authority, or authenticated by, or concluded, registered or filed with a competent authority. In either case it should also be possible for a competent authority to review and modify the agreement.

Once a maintenance agreement fills these requirements and is enforceable as a decision in the State of origin, it will be entitled to be recognised and enforced in all other Contracting States. Most of the provisions in the Convention relating to recognition and enforcement apply to maintenance decisions, although some distinctions are made. There are no jurisdictional requirements for recognition. There is also a separate set of circumstances in which a maintenance agreement will be refused recognition and enforcement, the first being the making of a reservation by a State to the effect that they will not recognize and enforce a maintenance agreement. A competent authority may also refuse to recognize or enforce a decision based on its manifest incompatibility with public policy, because it was obtained by fraud or falsification or because it is incompatible with a decision, which is entitled to recognition or enforcement, rendered between the same parties and having the same purpose, either in the State addressed or in another State.[53] In addition, States may make a declaration that applications for the recognition and enforcement of maintenance agreements shall only be made through Central Authorities.[54]

G. Public Authorities

One reason why establishing an international framework for the recovery of maintenance was a high priority for States is the impact that it can have on the national treasury. Because of this, it is important to allow for situations where public authorities act in place of the maintenance creditor, usually in situations where the public

[49] Representatives of some States expressed concern during the negotiations that some of these methods conflicted with their constitutional provisions and questioned the necessity of including such a non-mandatory list.

[50] Art 57.

[51] See the definition of maintenance arrangements found in Art 3(e).

[52] The desire to ensure that the Convention as a whole was technologically medium neutral is reflected in the definition of 'agreement in writing' found in Article 3(d) which states that it means an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference.

[53] There are also different requirements as to what should accompany the application for recognition and enforcement of a maintenance agreement (Art 30(3)). In addition, States may make a declaration that applications for the recognition and enforcement of maintenance agreements shall only be made through Central Authorities.

[54] Art 30(7).

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authority has already made payments to the maintenance creditor. This had been incorporated into the provisions of the 1973 Hague (Enforcement) Convention and has also been recognised by the European Court of Justice in its interpretation of the Brussels I Regulation.[55] Article 36 largely replicates the rules in the earlier convention[56] and allows public authorities to fall under the definition of a creditor within the terms of the Convention for the purposes of seeking recognition and enforcement of a maintenance decision.

There are limitations: the public body can only seek payment to the extent of the benefits that it has already provided,[57] and there is no provision for a public body to make an application for the establishment of a decision through a Central Authority unless its application for recognition or enforcement was refused due to a reservation made by the requested State. This seems in line with the approach of the European Court of Justice that while the legal rules should seek, as far as possible, to assist individual maintenance creditors in applications for establishment, public bodies are not at the same level of disadvantage.[58] The law to which the public body is subject governs the question of whether it is entitled to act in place of a person to whom maintenance is owed or to seek reimbursements of benefits provided to the debtor.[59] The public body may be required to furnish documentation demonstrating that it is so entitled and that the relevant payments have been made.[60]

H. The Protocol

The mandate was to conclude one comprehensive Convention that covered all aspects found in previous instruments. Although many of those involved in the negotiation of the new instrument considered that it represented a unique opportunity to review, revise, and modernise the 1973 Hague (Applicable Law) Convention, insufficient compromise could be found between approaches towards applicable law questions to include applicable law rules as a mandatory part of the Convention.[61] The decision was made in May 2007 to put the rules relating to applicable law in a protocol, formally separate from the Convention.

The Protocol is a much shorter document, containing 30 articles in total, including the final clauses. The scope is different from that of the Convention, narrower in that it applies solely to questions of applicable law, but broader in that it applies to all

[55] Case C-271/00 *Gemeente Steenbergen v Baten* [2002] ECR I-10489 and Case C-433/01 *Freistaat Bayern v Blijdenstein* [2004] ECR I-981 both recognised that when a public authority action for recovery was similar to a private action in subrogation it would be covered by the scope of the Brussels I Regulation. However, the former case emphasised that the Regulation does not apply if no action would have been permissible if the individual creditor had been the applicant.

[56] Although the new Convention is more precise and restrictive providing that only benefits paid in place of maintenance may be sought, rather than simply benefits paid to a maintenance creditor as in Art 18 of the 1973 Hague (Enforcement) Convention.

[57] Art 36(3), the public body can rely on a decision rendered against the creditor on the application of either the public body itself claiming payments of benefits provided in place of maintenance, or a creditor to whom the public body has provided benefits.

[58] Case C-433/01 *Freistaat Bayern v Blijdenstein* [2004] ECR I-981 which held that public bodies could not take advantage of the more favourable jurisdictional rules provided for maintenance creditors.

[59] Art 36(2).

[60] Art 36(4).

[61] Bonomi, Preliminary Draft Protocol on the law applicable to maintenance obligations—Explanatory Report, Prel Doc No 32 of August 2007, 4–5.

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maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents. The Protocol has universal application, applying even if the applicable law is that of a non-Contracting State.[62]

The general rule found in the Protocol is also that found in the both the 1973 Hague (Applicable Law) Convention and the proposed Maintenance Regulation and states that maintenance obligations will be governed by the law of the creditor's State of habitual residence.[63]

Also like the other instruments, the Protocol provides special rules for a number of different circumstances, although the circumstances involved and the rules applied differ. The first set of rules applies to maintenance obligations for parents towards their children, persons towards other persons under the age of 21 who are not their children or their spouses or ex-spouses, and children towards their parents.[64] If one of these categories of maintenance creditors applies to a court in the jurisdiction of the habitual residence of the debtor, then the laws of the forum apply.

The rest of this set of special rules seeks to ensure that such maintenance creditors will be entitled to obtain maintenance. They provide that if under the law of the State of the habitual residence of the creditor he or she is not entitled to obtain maintenance, then the law of the forum may be relied upon. The converse is true if a court in the State of the debtor's habitual residence was seised by the creditor, then if the law of the forum does not lead to any entitlement, the law of the creditor's State of habitual residence may be relied upon. If the creditor is not entitled under either of these laws, then the law of the State of the common nationality of the parties, if there is one, may be relied upon.[65] Under the 1973 Hague (Applicable Law) Convention,[66] any creditor within the scope of the Convention, apart from ex-spouses in certain instances,[67] could rely on the law of the State of their common nationality first, and then the internal law of the authority seised, to obtain maintenance obligations if this was not possible under the general rule. Special rules found in the proposed Maintenance Regulation[68] also apply to all maintenance obligations without limitation and the Commission proposal provides for an ultimate option of the application of the law of the State of a close connection rather than just common nationality.[69]

The second set of special rules applies to spouses and ex-spouses.[70] The much criticised rule in the 1973 Hague (Applicable Law) Convention, that in a Contracting State where the parties were divorced the law applied to the divorce would also govern the maintenance obligations between the divorced spouses,[71] has been replaced with the position that the general rule shall not apply if one of the parties objects and the law

[62] Art 2. In addition, renvoi is excluded by Art 12.

[63] Art 3.

[64] Art 4.

[65] Art 9 provides that a State which has the concept of 'domicile' as a connecting factor in family matters may inform the Permanent Bureau of the Hague Conference on Private International Law that, for the purpose of cases which come before its authorities in these instances, the word 'nationality' is replaced by 'domicile' as defined in that State.

[66] Art 5 and 6.

[67] Art 8.

[68] Art 13.

[69] Although the European Parliament adopted a legislative resolution on 13 Dec 2007 which recommends a different approach (T6-0620/2007), found at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0620.

[70] Art 5.

[71] Art 8. This also applies to legal separations and marriages that were annulled.

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of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State applies.

In all remaining types of maintenance, a special rule on defence[72] specifies that the debtor may contest a claim from the creditor on the ground that there is no such obligation under both the law of the State of the habitual residence of the debtor, and the law of the State of the common nationality of the parties,[73] if there is one. This rule is taken from the 1973 Hague (Applicable Law) Convention.[74]

Parties are allowed to designate the applicable law for either a particular proceeding[75] or for the maintenance obligation generally.[76] These are new provisions as there are no rules on party agreement on applicable law in either of the previous Hague Maintenance Conventions on applicable law. Only if both parties are adults of full capacity can they make an agreement designating the law applicable to the maintenance obligation generally, and they are limited to choosing one of four laws with which they have some connection.[77] This designation will not, however, apply to the question of whether the creditor may renounce his or her right to maintenance, which will be governed by the law of the State of the habitual residence of the creditor at the time of the designation. The designation will not apply at all if, unless the parties were fully informed and aware of the consequences of their designation, the law would lead to manifestly unfair or unreasonable consequences for any of the parties.

Like the 1973 Hague (Applicable Law) Convention,[78] the applicable law is responsible for determining questions of whether, to what extent and from whom the creditor can claim maintenance, who is entitled to institute maintenance proceedings,[79] prescription or limitation periods, and the extent of the obligation of the debtor when a public body seeks reimbursement of benefits provided for a creditor in place of maintenance.[80] In addition, like the proposed Maintenance Regulation,[81] the Protocol also specifies that the applicable law will determine the extent to which the creditor can claim retroactive maintenance, and the basis for calculation of the amount of maintenance and indexation.

The applicable law cannot override a mandatory rule found in Article 14 of the Protocol that the needs of the creditor and the resources of the debtor, as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance.[82]

[72] Art 6.

[73] Once again States can, under Art 9, indicate that this will be used to refer to common domicile in cases before competent authorities in their States.

[74] Art 7.

[75] Art 7. In this case they can only choose the law of the forum.

[76] Art 8. In both cases, the agreement must be signed by both parties and be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference.

[77] Art 8(1): the law of the State of which either party is a national at the time of the designation, the law of the State in which either party is habitually resident at the time of the designation, the law designated by the parties as applicable, or the law in fact applied, to their property regime, or the law designated by the parties, or the law in fact applied, to their divorce or legal separation.

[78] Art 10.

[79] Except for issues relating to procedural capacity and representation in the proceedings.

[80] Art 11.

[81] Art 17.

[82] This rule was taken from Art 11 of the 1973 Hague (Applicable Law) Convention and can also be found in Art 17 of the proposed Maintenance Regulation.

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In addition, the application of the law determined by the Protocol can be refused to the extent that it is contrary to the public policy of the forum.[83]

The Protocol has also been made less complex than the new Convention by the absence of an ability to modify its application by way of reservation or declaration.[84] This is also a change from the 1973 Hague (Applicable Law) Convention and indicates both the general acceptance of the rules contained in the Protocol and recognition of its optional nature.

I. Conclusion

The success of the Hague Conference in producing a comprehensive and inclusive instrument is somewhat reflected in its complexity. While this is unlikely to diminish its potential for wide ratification,[85] it will require the investment of considerable resources to successfully implement, not least in training officials and lawyers in Contracting States. However, once the system is fully functional it should result in much simplified procedures for the maintenance applicants, the end users of the Convention.

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[83] Art 13.
[84] Apart from in relation to its application to territorial units within a State or as regards Regional Economic Integration organisations.
[85] The clear engagement with and dedication to the negotiation process on the part of many States would indicate that there will at least be serious consideration of its ratification. It may be noted that the United States of America signed the Convention on the date it was concluded.

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