

CHAPTER TWO

THE HAGUE APPLICABLE LAW CONVENTION

Introduction. In common law countries, a court asked to make a maintenance order, including an order for maintenance made in or in consequence of divorce or similar proceedings, will always apply its own law. It is immaterial that the parties are domiciled or resident abroad or are foreign nationals; provided the court has jurisdiction it will apply the lex fori.

Not only is this the present practice, there is also no evidence of any serious dissatisfaction with it. Given that most maintenance applications are dealt with in subordinate courts, there are strong arguments of convenience for excluding reference to foreign legal principles. Some would argue further that the elements of discretion which may be involved make the correct application of foreign principles in this area peculiarly difficult.

That being so, it might be expected that there would be little interest among common law countries in a Convention which would require the abandonment of present practice and the application in some cases of a foreign law. The preparation of the Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations was followed by the holding of meetings of a Special Commission in 1973, and this Commission prepared a parallel Convention on the Law Applicable to Maintenance Obligations. This Convention entered into force in 1977, but only three States (France, Portugal and Switzerland) are parties to it. Five other States, Belgium, Italy, Luxembourg, the Netherlands and Turkey are signatories but have yet to ratify.

In these circumstances, it has been decided to include in the present paper the text and a short commentary upon the Convention, but not to prepare draft legislation or associated documentation.

Scope: maintenance obligations. The scope of the Convention is similar to that of the Enforcement Convention; it applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including obligations in respect of illegitimate children (art. 1). Special provisions apply to the right of public bodies to claim reimbursement of benefits provided (art. 9; see below).

Scope: limits of applicability. Unlike the Enforcement Convention, this Convention does not rest upon reciprocity. The law identified as applicable is to be applied whether or not it is the law of a Contracting State (art. 3). In fact, this Convention is in effect a Model Law, its preamble speaking of a desire to establish "common provisions". It is intended to deal with cases which are international in nature; article 17 makes it clear that it need not be adopted in respect of conflicts arising between two or more territorial units within a single sovereign State.

Article 2 provides that the Convention governs "only conflicts of laws in respect of maintenance obligations", and that decisions rendered in application of the Convention are without prejudice to

the existence of any of the relationships referred to in article 1 (e.g. marriage or paternity) on which the obligation may be founded. The effect appears to be that a decision in State A that F is bound to maintain C because the applicable law would so hold in view of its recognition of F's paternity does not render the paternity issue res judicata in State A. A considerable body of case-law has gathered around a similar question arising under the earlier Hague Convention on the same topic (but limited to children), and the point bristles with technical difficulties.

The applicable law. In summary, a court in a Contracting State would apply

- (i) the internal law of the habitual residence of the maintenance creditor;
- (ii) if under the above law, the creditor was unable to obtain maintenance from the debtor, the law of the common nationality of the maintenance creditor and the maintenance debtor; and
- (iii) if the parties had no common nationality, or the creditor would not be able to obtain maintenance from the debtor under the law of their common nationality, the lex fori (i.e. the law of the country in which the court was sitting). (Articles 4-6.)

The applicable law would govern inter alia whether, to what extent and from whom the creditor might claim maintenance; who was entitled to bring proceedings and the time limits for their institution; and, in the case of a claim for reimbursement by a public body, the extent of the debtor's obligation to pay (article 10).

Special cases: divorce, separation and nullity of marriage. In practice many decisions as to maintenance arise in the context of divorce, legal separation or (less frequently) nullity of marriage. In this important group of cases, special provisions apply. By article 8, notwithstanding the general rules summarised above, "the law applied to a divorce" will (both in the Contracting State granting the divorce and in a Contracting State recognising the decree) govern the maintenance obligations between the divorced spouses, including future variations. The same rule applies, mutatis mutandis to legal separation and nullity cases.

It is important to note that this special rule applies only in respect of maintenance obligations between the spouses. Obligations towards the children of the marriage do not fall within article 8, so that the general rules apply. This was a matter of controversy at the time of the preparation of the Convention; the division of an ex-spouse's obligations in this way can, in some cases, be extremely unrealistic.

Where article 8 does apply, it is necessary to identify the law applied to the divorce. In common law jurisdictions, this will almost always be the lex fori, so that if State A recognises a divorce granted in State B, it will assume that the courts of State B applied the law of that State. But this is not necessarily the case in civil law countries (some of which may apply the law of the nationality even if that is not the law of the forum); nor to nullity cases even in common law jurisdictions, e.g. if a marriage is declared void because the ceremony did not comply with the law of the place of celebration.

By article 14(3) a Contracting State may reserve the right not to apply the Convention in respect of divorces, separations and annulments granted by default in a State in which the respondent did not have his habitual residence. This reservation was introduced at the request of some common law delegations, and would clearly be desirable from the common law point of view; otherwise, it would become far too easy for maintenance obligations to be evaded by a spouse who was able to obtain a divorce in some inappropriate jurisdiction. (Presumably, however, article 8 would not apply if the divorce, etc., was not itself entitled to recognition in the requested State.) The effect of a reservation under article 14 is stated to be the exclusion of the operation of the Convention; the intention was, it seems, to exclude article 8, leaving the general rules in articles 4 to 6 to stand.

Special cases: persons related collaterally or by affinity. By article 7, it is a defence which may be invoked by a defendant in a claim for maintenance brought on the ground of a relationship which is collateral or by affinity that there is no such obligation under

- (i) if the parties have a common nationality, the law of that nationality; and
- (ii) in other cases, the internal law of the defendant's habitual residence.

This area, too, may be the subject of a reservation. By article 14(1)(2) a Contracting State may exclude such claims from the operative scope of the Convention, a provision paralleling one in the Enforcement Convention.

Special cases: public bodies. The question whether a public body is entitled to claim reimbursement of benefits provided for a maintenance creditor is governed by the law to which the public body is subject (article 9).

Changes in connecting factors. One of the more difficult problems in private international law arises when use is made of factors such as domicile or residence, which factors are liable to change. In respect of the basic rule adopted in the present Convention, the applicability of the habitual residence of the maintenance creditor, provision is made to deal with this eventuality. The internal law of any new habitual residence applies as from the moment the change occurs (article 4, second paragraph).

"Domestic" cases. By way of concession, the authors of the Convention were prepared to exclude the operation of the Convention's rules in certain cases where, despite the presence of a relevant foreign element the links with the forum State were so strong that that State would wish to apply its own law. Suppose that H and W are nationals of State A; H is habitually resident there, but W is habitually resident in State B. Under the basic rules of the Convention, the courts of State A would have to apply, to any claim brought in those courts by W against H, the internal law of State B, the law of the habitual residence of the maintenance creditor. By article 15, a Contracting State may make a reservation to the effect

that it will apply its own internal law if the creditor and debtor are both nationals of that State and if the debtor has his habitual residence there - as in the example given, in respect of State A.

Qualifications on the applicability of the designated law. Article 11 provides that a Contracting State may refuse to apply the law designated as applicable by the Convention if - and only if - it is manifestly incompatible with its public policy (ordre public). A more important provision in the same article declares that in all Contracting States, even if the applicable law should provide otherwise, the court or other authority determining the amount of maintenance shall take into account the needs of the creditor and the resources of the debtor.

Time-factors. It is immaterial when the maintenance obligation first arose. But the Convention does not apply in any Contracting State to maintenance claimed in respect of a period prior to the Convention's entry into force in that State (article 12). It would of course be open to any country to apply the rules contained in the Convention retrospectively, but it would not be obliged to do so by virtue of accession.

Federal States. A reference to "the law of" federal or composite States, as being the law of the common nationality, for example, is unhelpful when there are divergent legal rules. Article 16 deals with this problem: the applicable law is identified by reference to the rules laid down for this purpose by the State in question, or if there are no such rules, by deciding which is the law with which the persons concerned are most closely connected.

Miscellaneous provisions. Further provisions as to the relationship of this Convention and earlier instruments, or with other existing or future international instruments, and as to accession, denunciation, etc. are contained in articles 18 et seq. In most cases, the provisions are closely modelled upon the corresponding articles of the Enforcement Convention and are not further elaborated here.

APPENDIX: TEXT OF THE CONVENTION ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, 1973.

The States signatory to this Convention,
Desiring to establish common provisions concerning the law applicable to maintenance obligations in respect of adults,
Desiring to coordinate these provisions and those of the Convention of the 24th of October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children,
Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions:

CHAPTER I — SCOPE OF CONVENTION

Article 1

This Convention shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate.

Article 2

This Convention shall govern only conflicts of laws in respect of maintenance obligations.

Decisions rendered in application of this Convention shall be without prejudice to the existence of any of the relationships referred to in Article 1.

Article 3

The law designated by this Convention shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a Contracting State.

CHAPTER II — APPLICABLE LAW

Article 4

The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to in Article 1.

In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.

Article 5

If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply.

Article 6

If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seized shall apply.

Article 7

In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the

creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence.

Article 8

Notwithstanding the provisions of Articles 4 to 6, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations.

The preceding paragraph shall apply also in the case of a legal separation and in the case of a marriage which has been declared void or annulled.

Article 9

The right of a public body to obtain reimbursement of benefits provided for the maintenance creditor shall be governed by the law to which the body is subject.

Article 10

The law applicable to a maintenance obligation shall determine *inter alia* –

- (1) whether, to what extent and from whom a creditor may claim maintenance;
- (2) who is entitled to institute maintenance proceedings and the time limits for their institution;
- (3) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor.

Article 11

The application of the law designated by this Convention may be refused only if it is manifestly incompatible with public policy ('ordre public').

However, even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance.

CHAPTER III — MISCELLANEOUS PROVISIONS

Article 12

This Convention shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State.

Article 13

Any Contracting State may, in accordance with Article 24, reserve the right to apply this Convention only to maintenance obligations –

- (1) between spouses and former spouses;
- (2) in respect of a person who has not attained the age of twenty-one years and has not been married.

Article 14

Any Contracting State may, in accordance with Article 24, reserve the right not to apply this Convention to maintenance obligations –

- (1) between persons related collaterally;
- (2) between persons related by affinity;
- (3) between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled if the decree of divorce, legal separation, nullity or annulment has been rendered by default in a State in which the defaulting party did not have his habitual residence.

Article 15

Any Contracting State may, in accordance with Article 24, make a reservation to the effect that its authorities shall apply its internal law if the creditor and the debtor are both nationals of that State and if the debtor has his habitual residence there.

Article 16

Where the law of a State, having in matters of maintenance obligations two or more systems of law of territorial or personal application, must be taken into consideration – as may be the case if a reference is made to the law of the habitual residence of the creditor or the debtor or to the law of common nationality, reference shall be made to the system designated by the rules in force in that State or, if there are no such rules, to the system with which the persons concerned are most closely connected.

Article 17

A Contracting State within which different territorial units have their own rules of law in matters of maintenance obligations is not bound to apply this Convention to conflicts of law concerned solely with its territorial units.

Article 18

This Convention shall replace, in the relations between the States who are Parties to it, the Convention on the Law Applicable to Maintenance Obligations in Respect of Children, concluded at The Hague, the 24th of October 1956.

However, the preceding paragraph shall not apply to a State which, by virtue of the reservation provided for in Article 13, has excluded the application of this Convention to maintenance obligations in respect of a person who has not attained the age of twenty-one years and has not been married.

Article 19

This Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party.

CHAPTER IV — FINAL PROVISIONS

Article 20

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 21

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with the first paragraph of Article 25.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 22

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 23

A Contracting State which has two or more territorial units in which different systems of law apply in matters of maintenance obligations may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 24

Any State may, not later than the moment of its ratification, acceptance, approval or accession, make one or more of the reservations referred to in Articles 13 to 15. No other reservation shall be permitted.

Any State may also, when notifying an extension of the Convention in accordance with Article 22, make one or more of the said reservations applicable to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 25

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 20.

- Thereafter the Convention shall enter into force
- for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;
 - for each acceding State, on the first day of the third calendar month after the deposit of its instrument of accession;
 - for a territory to which the Convention has been extended in conformity with Article 22, on the first day of the third calendar month after the notification referred to in that Article.

Article 26

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 25, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 27

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 21, of the following -

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 20;
- (2) the date on which this Convention enters into force in accordance with Article 25;
- (3) the accessions referred to in Article 21 and the dates on which they take effect;
- (4) the extensions referred to in Article 22 and the dates on which they take effect;
- (5) the declarations referred to in Article 23, as well as modifications of them and the dates on which these declarations and their modifications take effect;
- (6) the denunciations referred to in Article 26;
- (7) the reservations referred to in Articles 13 to 15 and 24 and the withdrawals of the reservations referred to in Article 24.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of October, 1973, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.