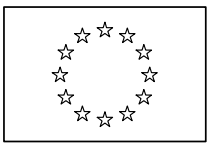

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.4.2004
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GREEN PAPER

Maintenance obligations

(presented by the Commission)

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1. PURPOSE OF THE GREEN PAPER

The purpose of this Green Paper is to launch a wide-ranging consultation of circles interested in the legal and practical questions arising in situations with an international element in matters of maintenance obligations.

It proceeds from a study commissioned by the European Commission, from contributions from experts in the Member States of the European Union and from information gathered in the course of work at the Hague Conference on Private International Law.

It sets out the various aspects where there is an apparent need for Community rules, or new conventions in cases transcending the borders of the European Union, and suggests avenues to be explored. Gathering the reactions and opinions of all those concerned by the question should provide input for the discussion of the objectives to be pursued both in the Community and in the Hague Conference.

2. CONSULTATION PROCEDURE

The Commission invites all persons interested to send their replies to the questions in the Green Paper, a full list of which is given at the end of the document. The list is obviously not exhaustive, and all comments on additional points will be welcome.

Replies and observations should be sent by 30 September 2004. But in the run-up to negotiations to be held at the Hague Conference on Private International Law in June 2004, it would be very helpful if they could be sent to the Commission as quickly as possible, and preferably by 15 May, to the following address:

European Commission
Directorate-General Justice and Home Affairs
Unit JAI.C.1 (LX46 0/26)
B – 1049 Brussels

Fax: + 32 (0) 2 299 64 57
E-mail: jai.coop.jud.civil@cec.eu.int

Persons interested are requested to send their contribution in a single copy and by a single means of communication – post, e-mail or fax.

You are specifically asked to state if you do not wish your reply or observations to be published on the Commission's website.

The Commission is planning to organise a public hearing.

3. INTRODUCTION

3.1. General background

3.1.1. Planned work in the Community

The Tampere European Council on 15 and 16 October 1999 called on the Council to establish, on the basis of Commission proposals, special common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning, in particular, maintenance claims. Among other things it recommended abolishing intermediate measures needed for the recognition and enforcement in one Member State of a judgment given in another Member State.

The Programme of Measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, which refers to the Tampere conclusions, stresses that the question of maintenance obligations directly concerns the everyday lives of citizens and that guaranteeing effective recovery of claims is essential for the welfare of many people in Europe, and recommends the abolition of the exequatur procedure. Maintenance creditors are already eligible for the provisions of the Brussels Convention of 1968, now incorporated in Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. Article 5(2) of that Regulation provides: *"A person domiciled in a Member State may, in another Member State, be sued ... in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties"*. Maintenance creditors can thus opt to sue either in the court for the Member State where the debtor is domiciled or in the Member State where they are domiciled or habitually resident. Where the debtor sues, the only possibility is to sue in the courts for the Member State where the other side is domiciled.

The question of maintenance obligations is thus one of the areas partly covered by existing Community instruments, where the Programme provides for the adoption of a series of measures including the introduction of provisional enforcement and of interim measures of protection.

The Programme further states in general terms that "*It will sometimes be necessary, or even essential, to lay down a number of procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States' legal systems*" and even that "*discussions should be directed towards a certain degree of harmonisation of the procedures*". It envisages the adoption of a "*series of ancillary measures [which] would consist in seeking to make more efficient the enforcement, in the requested State, of judgments delivered in another Member State*", notably by allowing "*precise identification of a debtor's assets in the territory of the Member States*" so that mutual recognition can operate in the context of "*enhancing cooperation between Member States' courts*", and measures for the "*harmonisation of conflict-of-law rules*".

To gather the information needed for this programme, the Commission had a study done on the recovery of maintenance claims in the Member States of the European Union.[1]

The summary report concluding the study done for the Commission states that *"The recovery of maintenance claims in the Member States accounts for a vast mass of litigation as a result of the fragile state of family relationships"* and *"a Community problem as a result of the free movement of Community citizens"*.

Even so, the statistics relating to cooperation between Member States do not appear to reveal the true volume of cases requiring them to take action.

As the report on the study says, *"a detailed analysis of the French figures throws up a few surprises. Last year France received 11 requests from Germany, where it sent five. It received four cases from the United Kingdom and sent six. The German and English reports contain comparable figures. We are bound to be surprised by these low numbers of cases. Given the size of the population of these three States, their geographical proximity and their close links, it can reasonably be assumed that there must be thousands or even tens of thousands of potential cases"*.

There are no European statistics on the number of maintenance claim cases requiring cross-border recovery, but a number of figures offer interesting pointers.

According to Community statistics, in 1999, about six million citizens of Union Member States resided in another Member State.

In many Union countries the number of divorces per 1000 inhabitants is close to half the number of marriages.

The report on the study for Italy records that in 2000 the courts handled 155 621 divorce or separation petitions. Yet that year Italy had a divorce rate of 0.7 per 1000 inhabitants, which is four times lower than that for ten of the fifteen Member States.

The Spanish report shows that 80% of the divorce or separation orders award maintenance, but that it is not actually paid in 50% of cases.

And the report for Sweden, which has a population of 8.8 million, states that in 2001 about 21 000 maintenance debtors registered at the social security authorities resided abroad. The total maintenance payments made by them were approximately €7 million.

All these figures together give an idea of the importance, in several respects, of the question of the recovery of maintenance claims in the European law-enforcement area.

Large numbers of people are concerned; the difficulties met by some of them can be extremely costly to them, both in material and in psychological terms; and the sums that States have to pay out to make up for the defaults of certain debtors are considerable.

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[1] It can be consulted on the website of the Directorate-General Justice and Home Affairs at: http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

It is true that the cross-border recovery of maintenance claims does not always demand cooperation between States, either because debtors pay up spontaneously or because creditors apply individually for the enforcement measures available to them. But many creditors probably do not insist on their rights because they are unaware of the cooperation mechanisms on which they can call, because there are no assistance facilities in their case, as in the case of an adult debtor residing in a country that provides cooperation only for minors, or because they give up after years of trying in vain.

The study report shows that the cross-border recovery of maintenance payments in the European law-enforcement area encounters all manner of difficulties even before the judgment awarding maintenance is given, on account of the deficiencies in cooperation between States, or at the actual enforcement stage.

Merely abolishing the exequatur would not suffice to remove all obstacles to recovery of maintenance claims in the European law-enforcement area, and other measures would have to be put into effect.

3.1.2. Work done at the Hague Conference

The Hague Conference on Private International Law[2] has also launched work on maintenance obligations so as to modernise the rules in the existing Conventions – a series of regional and bilateral agreements and five international conventions.

These are:

– The Hague Convention of 24 October 1956 *on the law applicable to maintenance obligations towards children* (ratified by Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Portugal and Spain);

– The Hague Convention of 15 April 1958 *concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* (ratified by Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal, Spain and Sweden);

– The Hague Convention of 2 October 1973 *on the Law Applicable to Maintenance Obligations* (ratified by France, Germany, Italy, Luxembourg, the Netherlands, Spain and Portugal). This Convention replaces the Hague Convention of 24 October 1956 *on the law applicable to maintenance obligations towards children* in relations between the States that are parties to it;

– The Hague Convention of 2 October 1973 *on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* (ratified by Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain Sweden and the United Kingdom). This Convention replaces the Hague Convention of 15 April 1958 *concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* in relations between the States that are parties to it;

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[2] The Hague Conference on Private International Law. Permanent Bureau: 6 Scheveningseweg, 2517 KT The Hague, Netherlands. Website: http://www.hcch.net

and:

– The New York Convention of 20 June 1956 *on the Recovery Abroad of Maintenance*, concluded in the UN[3] (ratified by all the European Union Member States).

In 1995 the Hague Conference convened a Special Commission at which a set of recommendations were addressed to the States parties to these Conventions. Four years later another Special Commission unfortunately had to conclude that little improvement had been made to the set of Hague and New York Conventions. It suggested preparing a new instrument that would *"be comprehensive in nature, building upon the best features of the existing Conventions"*.

Following the conclusions of this second Commission, the Special Commission on General and Policy Affairs of the 19th Diplomatic Session of the Hague Conference in April 2002, accepting the conclusions of the previous meeting, held in 2000, decided to enter as a priority agenda item the preparation of a new general convention on maintenance obligations.

An initial Special Commission to exchange views between the delegations of the Member States of the Conference met in May 2003, and a second meeting is scheduled for 2004.

3.2. Relationships between the Community instruments and the Hague Conventions

The commencement of work at the Hague Conference in parallel with work in the Community inevitably raises questions of the relationship between the two. As the Commission sees it, the relationship should be seen in terms of the search for possible synergies between them. The Community should be in a position to adopt a coherent strategy in the negotiations at the Hague so as to make a positive contribution to improving international cooperation in the recovery of maintenance claims.

In April 2003 the Commission accordingly presented the Council with a recommendation for a decision authorising it to open negotiations on behalf of the European Community for the adoption of a Convention on maintenance obligations in the Hague Conference.

The Commission regrets that to date the Council has not decided to give the Commission that authorisation and that the Community is therefore absent from the negotiating table.

Certain Member States consider that priority should be given to work at the Hague Conference over work done at Community level. They feel it would be preferable to await the results of the Hague negotiations before proceeding to give effect to the Tampere conclusions and the Mutual Recognition Programme.

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[3] Incidentally, a Convention on the simplification of procedures for the recovery of maintenance claims was adopted by the Member States in 1990 but never came into force.

The Commission cannot share this view. In the past the Hague Conference has been an important instrument for reinforcing judicial cooperation between the Member States of the European Union. In the absence of powers conferred on the Community by the Treaties in matters of judicial cooperation, the Member States were obliged to use treaty instruments such as the Treaties concluded between themselves (the Brussels Convention of 1968 or the Rome Convention of 1980, for instance) or negotiated in various international organisations, the Hague Conference being foremost among them.

But with the Amsterdam Treaty, the Member States decided to confer direct powers on the Community to adopt instruments and take action for judicial cooperation in civil matters. Since Amsterdam, the construction of the European law-enforcement area in civil matters no longer depends on international conventions being negotiated and ratified but on regulations, directives and decisions being adopted.

The Hague Conference has thus lost one of the functions that it exercised over the decades: a forum where the Member States pursued an objective of closer integration with each other. It is interesting that Article 65 of the Amsterdam Treaty refers expressly to two specific areas previously governed by Hague Conventions extensively ratified by the Member States – the service of documents and the gathering of evidence, where two Community Regulations have now been adopted.

Even so, the Hague Conference has not ceased to be of interest to the European Community. For the European Community this international organisation, which has absorbed many new members in recent years, represents an international forum for the development of a policy of cooperation with the world at large in the area of civil justice. This is, of course, why the Community decided to apply for accession to it, and negotiations are ongoing, conducted by the European Commission.

The experience of the Hague Conference in private international law and the discussion forum that it constitutes for a large number of countries are an inestimable source of inspiration for work being done in the European Community.

This is especially obvious in the specific case of maintenance obligations, where the Commission is glad to have had the benefit of the Hague Conference's preparatory documents and the discussions held in May 2003, where it had observer status.

While it is quite possible that in certain areas the Hague negotiations might yield results reducing the need for a Community instrument – as would be the case for the conflict-of-laws rules if satisfactory solutions were adopted, provided the Community could accede to the Convention – the difference as regards the level of integration between the Member States as compared with non-member countries and the scale of the objectives pursued raises the need to seek specific Community solutions. Cooperation between the Member States, which have at their disposal not only a more fully consistent and more complete system of rules of direct jurisdiction and recognition of judgments but also an operational European Judicial Network, can without doubt be closer than with non-member countries.

But while the ambitions and possibilities clearly remain different, there is both scope and a need for excellent synergies in work done in the community and in the world at large respectively.

The Commission has accordingly decided to launch a general debate on the two exercises by issuing this Green Paper.

4. SCOPE OF THE FUTURE INSTRUMENTS

The scope of an instrument is difficult to define when its content has not yet been determined. Very different rules in matters such as the applicable law, legal aid, or cooperation might be adopted, depending on the scope of the instrument.

But some of the questions that will arise can already be identified. They are the definition of maintenance obligations and the nature of the claims to which the future instruments should apply, the categories of decisions or acts, and the people to be affected.

4.1. Concept of maintenance obligations

On the concept of maintenance obligations, the Court of Justice of the European Communities, in a case concerning the Brussels Convention of 1968, took a broad view. In *L. de Cavel v J. de Cavel*[4] the Court held that the "compensatory payment" after divorce provided for by French law was to be treated as a maintenance obligation since it was "*fixed on the basis of their respective needs and resources*". Likewise, in *A. Van den Boogaard v P. Laumen*,[5] it held that "*a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance ... if its purpose is to ensure the former spouse's maintenance*". But the Court felt no need to rule on maintenance obligations in the succession context. For the avoidance of doubt, it might be necessary to define the maintenance obligations covered by a future European instrument.

The Hague Conventions and the New York Convention do not define maintenance obligations**.** But there is a specific provision in Article 8 of the 1973 Convention *on the Law Applicable to Maintenance Obligations* that removes all ambiguity as to the application of the Convention to maintenance obligations between divorced spouses.[6]

4.2. Arrears

The question of arrears, that is to say the recovery of maintenance awarded by a court but not actually paid, arises in a number of cases.

Difficulties can arise in particular if the law of the country where the judgment is to be enforced provides that the judgment awarding maintenance can be enforced, after exequatur, only for future payments, or permits the recovery of arrears only in respect of a limited period.

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4 Third Chamber, Case 120/79 [1980] ECR 731 (judgment given on 6 March 1980).

5 Fifth Chamber, Case C-220/95 [1997] ECR I-01147 (judgment given on 27 February 1997).

6 Hague Conference on Private International Law. Preliminary Document No 1, September 1995. Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance, page 8, which states that the uncertain nature of the maintenance allowance to a divorced spouse (which, according to the State, may have the character of maintenance or of an indemnity, or a mixed character) justified the Convention containing a special solution.

4.2.1. The Community project

Regarding the recognition and enforcement in one Member State of a judgment given in another Member State, the abolition of the exequatur procedure would not change the current position whereby the effects of the judgment in the requested State are the same as in the State of origin.

But as enforcement procedures are governed by the law of the requested State, the question of the possibility of having an earlier decision enforced and therefore obtaining payment of arrears can arise in States where the limitation rules are regarded as procedural.

4.2.2. Draft Hague Convention

At the Special Commission in May 2003, the question of arrears was raised, and several delegations pointed out that difficulties can arise where a judgment is to be enforced abroad on account of the major divergences between the different systems of law and the absence of clear rules in the common law systems.

Article 11 of the Hague Convention of 1973 *on the recognition and enforcement of decisions relating to maintenance obligations* provides: *"If a decision provided for the periodical payment of maintenance, enforcement shall be granted in respect of payments already due and in respect of future payments"*, and this could be taken over in the future Convention.

On the international scale there is a further difficult in that some States refuse to recognise and enforce certain foreign judgments because they consider that the court that gave them lacked jurisdiction, and they accordingly commence new proceedings on the merits. If the new judgment does not order the payment of arrears, part of the amount due to the creditor under the initial judgement can no longer be claimed from the debtor.

4.3. Persons to whom the future instruments should apply

An analysis of the rules of domestic law in the European Union Member States shows that the types of relationship that can generate a maintenance obligation between two people vary from one State to another, since sometimes only parents and their children or spouses or ex-spouses are concerned whereas elsewhere the family circle is broader, extending even to cohabiters and "registered partners".

Moreover, the recovery of maintenance is sometimes handled by public agencies, acting either on behalf of the creditor or subrogated to the creditor's rights or seeking recovery of welfare benefits paid to help the creditor meet his or her needs in the event of default by the debtor. But certain Member States refuse to cooperate in recovering sums that these agencies claim. The assistance given to maintenance creditors by public bodies, whatever its form, is based on a policy of national solidarity. It is costly, and the sums paid to maintenance creditors should not be left to be borne definitely by States where the debtor has the means to settle the debt.

In *Gemeente Steenbergen v Luc Baten*,[7] the Court of Justice of the European Communities interpreted the first paragraph of Article 1 of the Brussels Convention of 27 September 1968 *on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* as meaning that *"the concept of 'civil matters' encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations"*. It also held that the concept of 'social security' does not encompass the action, as it is excluded from the scope of the Convention. But it held that *"Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters'"*.

This question is also being considered in the Hague Conference. The two most recent Hague Conventions went for a broad scope, as they 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"*. The Convention of 2 October 1973 *on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* adds that it applies *"to a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising ... between:*

1. a maintenance creditor and a maintenance debtor; or

2. a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor."

But both Conventions provide for the possibility of entering reservations as to their application to maintenance obligations between persons related collaterally or by affinity. Several States, including certain Member States of the European Union, have exercised this right when ratifying the Conventions.

The question also arose at the first Special Commission to elaborate a draft Convention at the Hague Conference on Private International Law in May 2003, given that the cooperation obligations imposed on the States by a broad scope would be very heavy.

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[7] Case C-271/00 (Fifth Chamber) [2002] ECR I-10489 (judgment given on 14 November 2002).

It could also arise in the European Community, as certain Member States seem reluctant to accept the idea of providing assistance to adults or public bodies in the enforcement of foreign judgment given for them.

Question 1

Should the future instruments:

a. – define the concept of maintenance obligations? If so, how?

b. – apply to the recovery of arrears?

c. – apply to public bodies, in particular as regards cooperation?

d. – apply to all persons likely to enjoy maintenance claims in the different legal systems?

Should distinct solutions be adopted for the future Community instrument and the future Hague Convention? If so, what solutions?

5. RULES OF PRIVATE INTERNATIONAL LAW

5.1. Direct jurisdiction

5.1.1. Community rules

As has already been seen, Regulation (EC) No 44/2001 is applicable to maintenance obligations, and Article 5(2) lays down special rules of jurisdiction alongside the general rule.

When Regulation (EC) No 2201/2003 of 27 December 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*[8] was being drafted, the question arose whether Regulation (EC) No 44/2001 should specify that actions concerning parental responsibility were included within the concept of actions relating to the status of persons so as to enable the relevant authorities ruling on such cases to rule also on the related maintenance claims.

The possibility of joining the two types of action, concerning parental authority and maintenance obligations, could be very useful. By way of example, judgments giving one of the parents custody of the child commonly award maintenance against the other parent, and the simplest solution is clearly to confer jurisdiction over the two questions to the authorities of the same State.

[8] OJ L 338, 23.12.2003.

At the end of the day the conclusion was that questions relating to parental authority were already covered by Article 5(2) of Regulation (EC) No 44/2001. To avoid all ambiguity, the eleventh recital to Regulation (EC) No 2201/2003 reads: "*Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Regulation (EC) No 44/2001".*

Most questions relating to the direct jurisdiction of the authorities empowered to rule on applications for the determination or modification of maintenance claims have thus been settled as regards the Community.

5.1.2. Draft Hague Convention

The rules set out above, of course, do not apply in relations between Member States of the European Union and non-member countries.

And the various international conventions applicable in certain Member States of the European Union do not contain provisions on the direct jurisdiction of the original court, that is to say provisions designating the country whose authorities have jurisdiction to rule on applications for the determination of maintenance obligations where a case involves an international element, and the question arose of the need to introduce such rules in the future Hague instrument.

In general terms, the absence of rules of direct jurisdiction binding the States parties to an international instrument leaves a degree of uncertainty as to the law since recognition and enforcement can be refused abroad on the ground that the trial court lacked jurisdiction. The parties to a case might elect to go to the authorities of different States to obtain a judgment. There would then be a difficulty when recognition and enforcement are applied for abroad as each of the parties seeks the application of different judgments. The adoption of rules of direct jurisdiction would avoid these problems and indeed facilitate the recognition and enforcement of judgments.

The current absence of uniform rules binding the Member States of the Hague Conference generates two types of difficulty.

5.1.2.1. Initial applications

Regarding initial applications, that is to say the original application to the relevant authority by one person for determination of a maintenance claim against another, a very substantial number of Hague Conference Member States apply similar rules of jurisdiction (jurisdiction of the court or other authority for the debtor's or creditor's domicile or residence). This is the case of the Member States of the European Union and also of the Latin American States.

But other States do not recognise the jurisdiction of the authorities of the State of the maintenance creditor's habitual residence. In the United States, for example, the courts for the creditor's domicile or residence consider that the American constitutional principle of due process does not allow them to accept the jurisdiction if they do not have a sufficient connection with the debtor.

Where a maintenance creditor is habitually resident in the United States, unlike the debtor who has no connection with that country, the American authorities ask the authorities of the State of the debtor's domicile or residence to take proceedings for the determination of the maintenance obligation or the paternity of the child for whom maintenance is applied for.

Since the New York Convention of 1956, Article 6 of which provides "*The Receiving Agency shall, subject always to the authority given by the claimant, take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance ...*", is not applicable in their relations with the United States,[9] where it has not been ratified, certain States consider that they are not required to provide the relevant cooperation.

The result for certain American litigants who cannot afford legal representation and court costs abroad is that they cannot obtain a judgment determining their maintenance claim.

5.1.2.2. Applications for modification

In the Member States of the Hague Conference, various rules of jurisdiction apply as regards applications for modification of the initial decision determining maintenance obligations.

Regulation (EC) No 44/2001 allows creditors to sue the debtor either in the courts for their own domicile or habitual residence or in the courts for the debtor's domicile, whereas the debtor can sue the creditor only in the courts for the creditor's domicile. The Regulation also allows prorogation of jurisdiction.

The Inter-American Convention of Montevideo of 15 July 1989 *on support obligations* makes a distinction between applications to increase the amount of the maintenance, applied for by the creditor, who has an option, and applications to discontinue or reduce support, generally made by the debtor, where the authorities of the State that set the amount of support have sole jurisdiction. But prorogation of jurisdiction is allowed.

Certain States maintain the jurisdiction of the court that rules on the initial claim, provided one of the parties still resides within the area of its geographical jurisdiction at the time of the application for modification.

Consequently difficulties can arise from differences between the rules applicable in the different systems where the parties change their domicile or residence. This can generate conflicting judgments where different courts are recognised as having jurisdiction, and in some cases it can be impossible for the parties to obtain a judgment if no court accepts the jurisdiction.

Certain Commonwealth States have a system in which all judgments on the initial claim or applications for modification are given in two stages, the first of them in the creditor's country of residence and the second in the debtor's country of residence. This system has also been adopted in agreements with a number of other States that are not Commonwealth members. Obviously a system like this can operate only if the States of the creditor's and the debtor's residence apply the same rules. Where the State of the debtor's residence does not have this system, the first stage of the trial process is not followed up and there can be no enforceable judgment.

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9 But the United States has cooperation agreements with several States.

Certain States consider that some of these difficulties could be settled by means of rules of cooperation.

Others, in their replies to the Hague Conference questionnaire or at the meeting of the Special Commission in May 2003, stated their wish for the future convention to contain rules of direct jurisdiction.

Cases where the American courts decline to rule on claims by creditors residing within their geographical jurisdiction will be relatively few and far between as recent legislation has determined a fairly extensive list of cases in which they can accept the jurisdiction for maintenance obligations even though the debtor resides abroad.

There are a variety of possible solutions: insert no rules of direct jurisdiction in the future convention but include provisions only for modification judgments, endeavour to devise universally acceptable rules without weakening the principle of the jurisdiction of the court for the creditor's place of residence, adopt rules inspired by Regulation (EC) No 44/2001 or the Montevideo Inter-American Convention, provide for the possibility of a general reservation or a reservation applicable solely in specific cases, or insert optional rules of direct jurisdiction in the future convention.

Question 2

Should the future Hague Convention:

a. – contain a full set of rules of direct jurisdiction? If so, what rules should be adopted?

b. – contain rules of direct jurisdiction applicable only to application for modification of an earlier judgment? If so, what rules should be adopted?

5.2. Recognition and enforcement of judgments

As regards judgments concerning maintenance obligations, the Programme of Measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, as already seen, expressly provides for the abolition of the exequatur, that is the procedure that must be followed in the courts of a State to have judgments given in other States recognised and enforced. Means of facilitating the recognition and enforcement of judgments are also being sought at the Hague Conference.

The question arises differently in the Community, where the movement of judgments has been fairly free for some years now, especially since Regulation (EC) No 44/2001 came into force, and as between Member States of the Hague Conference, which are not always bound by the same Conventions, which have sometimes very different legal systems and levels of development and which are to be found in all four corners of the globe.

But in both cases it is clearly indispensable to seek out means of enabling judgments to be recognised and enforced as quickly as possible. It must be borne in mind that the settlement of a maintenance claim is always rather urgent and that, as long as debtors have a remedy allowing them to defend their rights in the event of a dispute, the creditor's rights must be regarded as predominant.

5.2.1. Community project

5.2.1.1. Abolishing the exequatur

A European instrument abolishing the exequatur could be inspired by Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, or by the draft Regulation establishing a European enforcement order for uncontested claims.

Both instruments provide that relevant judgments given by the courts of a Member State are to be recognised in the other Member States without any declaration of enforceability being required and without any possibility of opposing recognition.

If the idea of abolishing the exequatur for maintenance judgments comes up, there will be the question whether there are difficulties to preclude it.

Council Regulations (EC) Nos. 1347/2000 and 44/2001, which contain rules relating to the exequatur procedure, provide that the defendant in the principal action may oppose recognition and enforcement of judgments given in another Member State, in particular where they are manifestly contrary to the public policy of the requested State or where defence rights have not been respected.

On the first point, the report on the study done for the European Commission shows that, even if there are "several potential conflicts, the concept of international public policy is a false problem rather than a real barrier. It is clear from the national reports that the concept is applied in only a handful of cases".

A few questions might remain for certain States, such as the recognition and enforcement of judgments accepting a maintenance claim from parties to the new forms of marriage and partnership recently introduced.

Regarding defence rights, the report on the study done for the European Commission states that no decisions taken in certain countries by mediators were notified. By the same token, the administrative authorities of certain countries issue certificates of entitlement unknown to the debtor. Elsewhere the service of procedural documents is handled by a guardian *ad litem* where the debtor cannot be traced, which certain requested States would regard as an unacceptable procedure.

The question is whether there are real difficulties here and, if so, what solutions would remove them. It must be borne in mind that the Mutual Recognition Programme calls for the adoption in certain areas, and particularly where abolition of the exequatur is planned, of minimum procedural guarantees to ensure that the requirements for a fair trial are strictly observed. This is reflected in, for instance, Regulation (EC) 2201/2003, which provides for judgments relating to rights of access to be recognised and enforceable in another Member State without the need for a declaration of enforceability if all parties concerned, and in particular the child, were given an opportunity to be heard.

Question 3

Are there considerations that might make it difficult to abolish the exequatur in the Community on grounds of:

a. – public policy?

b. – failure to respect defence rights?

If so, how could these difficulties be solved? Should certain procedural guarantees be adopted or reinforced?

5.2.1.2. Provisional enforcement

The legislation of certain Member States provides that judgments relating to maintenance obligations are automatically provisionally enforceable; in other States' systems, provisional enforcement is merely an option for the courts; and in some systems the possibility does not exist. Where there is no provision for provisional enforcement, it is sometimes possible for the creditor to obtain a provisional decision applicable from the beginning of the procedure until the judgment on the merits has become final.

Generally speaking, the very subject-matter of a judgment making a maintenance order, the aim of which is to enable creditors to cover their basic daily needs, would justify a general possibility for the court to order provisional enforcement, and consequently for the judgment to be enforced immediately after being given.

The possibility of ordering payment of maintenance by a decision made in the course of proceedings until final judgment is given on the merits is even more effective since it enables the creditor to be paid maintenance from the very beginning of the proceedings until the time allowed for an appeal has expired or an appeal has been brought, but it would not genuinely facilitate the recovery of maintenance abroad as it would require the enforcement of two successive judgments. Generally speaking, where maintenance claims are to be recovered abroad, the existence of time limits in judicial cooperation procedures makes it all the more necessary to seek means of expediting the procedure as a whole. Provisional enforcement of the judgment at least assures the creditor that the judgment can be served immediately on the relevant authority in the debtor's country of residence for enforcement.

There are a number of reasons why it is clearly difficult to contemplate provisional enforcement being available only for judgments likely to come up for enforcement abroad. After all, when judgment is given, the situation may not already be an international one. But the fact remains that there is no good reason for applying solutions that are less favourable to creditors simply on the ground that the debtor is abroad.

It might be possible to envisage making provisional enforcement generally available for judgments relating to maintenance obligations given in the Member States.

This, incidentally, is the solution recommended by the study done for the Commission on making more efficient the enforcement of judicial decisions within the European Union.[10]

Article 41 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, relating to access rights, provides: "*Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal*". Article 42, relating to the return of children removed illegally, contains a similar provision.

These provisions could be taken as a model for a future European instrument on maintenance obligations. But a provision merely giving the court the option of ordering enforcement might not be sufficient, given the interests at stake, and it would be better to provide for judgments relating to maintenance obligations to be automatically eligible for provisional enforcement.

> Question 4
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> Are there specific difficulties that would preclude the principle of automatic provisional enforcement of judgments relating to maintenance obligations?

5.2.1.3. Enforcement procedure as such

In certain States, the facilities for enforcing a judgment awarding maintenance can be put into effect by a professional officer as soon as the judgment is enforceable; in others, once the judgment has been given and has become enforceable, it is enforced by officials of the court under the authority of a judge, who must authorise enforcement by a decision that may be appealable. This procedure is also applicable to foreign judgments declared enforceable by the exequatur procedure.

The need for a judicial procedure for enforcement and the redress procedures and remedies available to the defendant are probably serious brakes on the enforcement of the judgment, not only because enforcement can be suspended during the proceedings but also, more generally, because of the long time taken by proceedings in some Member States.

[10] Accessible on the website of the Directorate-General Justice and Home Affairs at: http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

The recommendations of the Tampere European Council calling on the Council to abolish "*the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State ... for maintenance claims*"[11] and to "*establish ... special common procedural rules for simplified and accelerated cross-border litigation on ... maintenance claims*"[12] are difficult to reconcile in certain cases with the slowness of the procedures for authorising enforcement of a judgment in an area where speedy enforcement is truly necessary.

The first question is whether it might be possible to simplify and expedite the procedure in the court of enforcement. It might be possible to simplify certain formalities or to set time limits.

Without wishing to deprive the debtor of all the possibilities for challenging seizure of his assets where he has settled the debt in full or if he voluntarily makes the maintenance payments to which he has been ordered, for example, it could be provided that no action would basically suspend enforcement. Suspension might, of course, be warranted in some cases, but would then be ordered only exceptionally, on application.

Question 5

As regards the enforcement of judgments, can provision be made for:

a. simplification of procedures for the enforcement of judgments that exist in certain Member States? Time limits to be set?

b. enforcement to be suspended only in exceptional cases?

5.2.2. Enforcement measures

The study on making more efficient the enforcement of judicial decisions within the European Union, mentioned above, suggests that the principle of territoriality of enforcement measures be abandoned in favour of a principle of universality and of a degree of mutual recognition of enforcement measures.

It recommends a number of improvements, some of which could usefully be deployed in the recovery of maintenance claims.

In particular it suggests introducing a European Statement of Assets for debtors, based on the measure that exists in certain European Union Member States and enables creditors to question the other side on their assets. It also mentions a European Bank Account Seizure Order on the basis of an enforceable judgment that could be enforced abroad. Such innovations, the former in particular, would be very useful for the recovery of maintenance claims.

But in this particular area it could also be provided that a salary attachment order in one European Union Member State is enforceable without further proceedings in the other Member States.

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11 Tampere European Council. Presidency Conclusions, point 34.

12 Tampere European Council. Presidency Conclusions, point 30.

Such an innovation would not necessarily be useful for the recovery of claims in States where court bailiffs are responsible for enforcement measures, but elsewhere it would save time since it would obviate the need to apply to a court or other authority for an attachment order on the debtor's salary.

> Question 6
>
> Could it be provided that a salary attachment order against a maintenance debtor in one European Union Member State is enforceable without further proceedings in the other Member States?
>
> What other specific measures would be helpful?

5.2.3. Draft Hague Convention

In accordance with the guidelines agreed by the General Affairs Commission of the Hague Conference in 2000 and 2002, the draft Convention should basically contain rules on the recognition and enforcement of judgments concerning maintenance obligations, based on those in the two Conventions adopted by it in 1958 and 1973. In their replies to the questionnaire sent them by the Conference, a substantial majority of the Member States recommended the insertion of such rules in the future convention. But a variety of delicate questions arise here.

5.2.3.1. Procedures for recognition and enforcement

The Permanent Bureau of the Hague Conference has argued in favour of abolishing the exequatur, as provided by Articles 41 and 42 of Council Regulation (EC) No 2201/2003 *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, though it does wonder about the conditions in which the certificate from the State of origin that is to accompany the judgment under the Regulation is to be issued.

This suggestion has prompted a great variety of reactions, as some delegations agree to the abolition of the exequatur provided the debtor still has a redress procedure after the judgment has been served by the authorities of the requested State or at the enforcement stage, following the process familiar in certain common-law systems, or by the simplified exequatur procedure provided for by Council Regulation (EC) No 44/2001. Others argue that abolishing the exequatur is not possible without harmonisation of the conflict-of-laws and jurisdiction rules, or that it would be impossible internationally on account of the disparities between bodes of domestic legislation.

Many delegations have expressed interest in using quicker procedures.

> Question 7
>
> Should the future Hague Convention provide for a simplified exequatur system similar to the one provided for by Regulation No 44/2001? What other solutions are possible for facilitating and accelerating recognition and enforcement of judgments?

5.2.3.2. Indirect jurisdiction as a condition for recognition and enforcement

The Hague Conventions on the recognition and enforcement of judgments relating to maintenance obligations contain rules of indirect jurisdiction on which their application depends. Both provide for the jurisdiction of the courts for the debtor's or creditor's habitual residence and the court to whose jurisdiction the debtor submits. The 1973 Convention further provides that the authority of a Contracting State which has given judgment on a maintenance claim shall be considered to have jurisdiction for the purposes of the Convention if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognised as having jurisdiction in that matter, according to the law of the State addressed.

There is no controversy about the criteria of the debtor's habitual residence or submission to the jurisdiction of the court in which the creditor brought the action, which are universally accepted or at least could be in the context of an international agreement.

But the criterion of the creditor's habitual residence raises difficulties in relations between the United States and all the other Member States of the Hague Conference. The Hague Conference suggests adopting a "*fact-based*" approach, whereby "*Either State is in effect permitted to apply its own standards. In other words, a decision given in the originating State will be recognised and enforced if, on the same facts, the exercise of jurisdiction would have been possible in the requested State. Under this principle, it would not matter what jurisdictional bases the requesting State's court articulated when it rendered the judgment. The crucial question is whether, regardless of the reason stated by the court of the requesting State, the facts of the case would support jurisdiction under the rules of the requested State. If so, the judgment should be recognised. If not, the requested State should take appropriate steps to establish a new decision.*"[13]

The fact-based approach to indirect jurisdiction raises a practical difficulty, since it presupposes that when examining the application for recognition and enforcement, the relevant authority of the requested State has adequate information on the grounds on which the trial court assumed jurisdiction to be able to make the comparison with the rules of jurisdiction in its own law. This would require the trial court, at the time of judgment, to be familiar with the criteria for jurisdiction taken by the court in the State that is to be requested and to take pains to make clear in the judgment that this or that criterion was indeed present. The difficulty lies in the fact that when the judgment is given the situation is not necessarily an international one.

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[13] Hague Conference on Private International Law, preliminary document No 3, *Towards a new global instrument on the international recovery of child support and other forms of family maintenance*. Report by William Duncan, §76, citing an essay by George G. Spector intituled *Towards an accommodation of divergent jurisdictional standards for the determination of maintenance obligations in private international law*.

The Permanent Bureau report suggests that the information that could help the court entertaining the application for recognition and enforcement to rule on the indirect jurisdiction of the original court be sent by the authorities of the requesting State by way of cooperation measures. The question is obviously linked to the functions that could be entrusted to the authorities in the Contracting States responsible for cooperation. But this still depends on their having the means of gathering the requisite information.

The Permanent Bureau of the Hague Conference proposes adopting the following provisions:

> *"1. A maintenance decision made by a court / authority in one Contracting State (the State of origin) shall be recognised and enforced in all other Contracting States if –*
>
> *a. ...;*
>
> *b. ...;*
>
> *c. the facts in the case would, mutatis mutandis, have supported jurisdiction under the rules of the requested State; or*
>
> *d. the creditor was (habitually) resident in the State of origin at the time proceedings were instituted.*
>
> *2. A Contracting State whose own authorities or courts are not permitted to make a maintenance decision based solely on the residence of the creditor within the jurisdiction may make a reservation in respect of paragraph 1(d)."*[14]

States making the reservation provided for by paragraph 2 should undertake to commence new proceedings to obviate this difficulty. But it must be remembered that this solution would cause two distinct decisions to coexist, having effect in different States, with all the difficulties that could flow from this situation if the debtor changes residence. It might also make the recovery of part of the arrears impossible**.**

Question 8 Would the "fact-based" approach be workable in practice? Is there another preferable solution? If so, what solution?

In the course of discussions at the Special Commission in The Hague in May 2003, three other criteria for indirect jurisdiction were considered – the common nationality of the parties, the divorce, or questions related to parental responsibility. The possibility of leaving the parties with a degree of autonomy was also raised.

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[14] Hague Conference on Private International Law, preliminary document No 3, *Towards a new global instrument on the international recovery of child support and other forms of family maintenance.* Report by William Duncan, § 87.

None of the delegations wished to maintain the criterion of the parties' common nationality. But the indirect jurisdiction of a court hearing an action to determine personal status did not seem to raise difficulties. And this solution would be perfectly compatible with Community legislation. As for the autonomy of the parties, some experts felt it would be dangerous to allow complete freedom in an area where the relative strengths of the parties might be seriously out of balance and consequently to allow the indirect jurisdiction of a court agreed on by debtor and creditor.

Question 9

Should indirect jurisdiction be based on:

a. the solution adopted by Article 8 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations?

b. the court agreed on by debtor and creditor? Should the parties' freedom of choice be limited?

5.2.3.3. Grounds for refusing recognition

The Hague Conventions of 1958 and 1973 provide that recognition and enforcement may be refused if they are manifestly incompatible with the public policy ("*ordre public*") of the State addressed or if the decision is incompatible with a decision rendered in the State addressed. The 1973 Convention adds two further grounds – fraud in connection with a matter of procedure and the existence of proceedings between the same parties and having the same purpose.

At the Special Commission in The Hague in May 2003, several delegations supported confining the grounds for refusing recognition and enforcement basically to violation of defence rights, violation of public policy, conflicting decisions and *lis pendens*.

But the question of conflicts of decisions is particularly acute in matters of maintenance obligations, as several successive decisions can be given perfectly correctly as the respective situations of the parties evolve. Obviously priority must be given to recognition and enforcement of the latest decision, provided it was given by the proper authority. If this question is not settled by the introduction of a rule of direct jurisdiction in the Convention, it will have to be settled by a rule of indirect jurisdiction.

Apart from that, most States seem to be in broad agreement on rejecting the principle of decisions being reviewed as to substance by the requested State.

But it seems that when the authorities of certain European Union Member States are requested to recognise and enforce a judgment given on the merits, whether in a European Union Member State or elsewhere, they commence new proceedings to determine the maintenance claim, even though the original judgment meets the conditions for recognition and enforcement, arguing that the judgment cannot be enforced as the debtor is insolvent or the respective situations of the parties have changed.

This practice is not compatible with Regulation (EC) No 44/2001 or with the Hague Conventions, which prohibit reviewing the substance of foreign judgments at the exequatur stage, or even with the New York Convention of 1956, which allows fresh proceedings only within the limit of the powers conferred by the creditor.

Question 10

At the exequatur stage:

a. what grounds for refusing recognition and enforcement should be in the future Convention?

b. in the event of a conflict of judgments, how should the judgment to be enforced be distinguished?

c. should there be a strict prohibition on reviewing judgments given in the State of origin, or should exceptions be allowed, and if so, in what circumstances and for what purposes?

5.3. Applicable law

Neither Regulation (EC) No 44/2001 nor any other Community instrument contains conflict-of-law rules concerning maintenance obligations. Article 1 §2 b), third indent, of the Rome Convention of 19 June 1980 *on the law applicable to contractual obligations*, the only instrument of civil law applicable between the European Union Member States containing conflict-of-law rules, excludes from its scope "*rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate*".

The Hague Conventions of 1956 and 1973 on the law applicable to maintenance obligations having been ratified by only some of the European Union Member States, the conflict-of-law rules applicable in the European law-enforcement area are not currently harmonised.

It was planned that the work in hand at The Hague would extend to this question as the General Affairs Special Commission in May 2000 decided to prepare an exhaustive convention improving the existing Conventions, and in particular the two Conference Conventions on the law applicable to maintenance obligations.

Similar questions arise in the Community and in the world at large. But there is the question whether different responses reflecting the specific features of the two exercises might be called for in the Community draft and the future Hague Convention.

5.3.1. The situation today

There are major divergences in the domestic legislation of States, including European Union Member States, as regards maintenance obligations.

The age at which children cease to be eligible for a maintenance claim on their parents varies from one State to another. The legislation of certain countries does not use an age criterion but looks at children's situations and their ability to cover their needs.

Some legal systems provide that at least in certain circumstances one of the divorced spouses has a maintenance claim against the other. But other systems apply the contrary principle.

Certain legislations allow maintenance obligations between different family members or unrelated "near ones", whereas others confine maintenance claims to children and spouses.

The rules of jurisdiction in the different legal systems generally offer the parties an option between the courts of different States, including the State of the creditor's or defendant's residence or domicile. The domestic legislation of many Hague Conference Member States recognises the jurisdiction of the courts of nationality or of domicile in the common-law sense. The European legislation offers litigants a variety of possibilities through the combined effects of Regulations (EC) Nos 44/2001 and 1347/2000. The attempt to harmonise the conflict-of-law rules applicable to situations with a foreign element so as to improve certainty in the law is therefore justified both in the Community and in the Hague Conference on Private International Law.

Yet the two Hague Conventions *on the law applicable to maintenance obligations* have been ratified by very few States, most of which are European Union Member States. The earliest of the Conventions, which was to be replaced by the most recent one, remains applicable in relations between States that failed to ratify the "successor".

This situation is obviously unsatisfactory in more than one way. The existence of two Conventions binding different States is deleterious to the foreseeability of solutions and is a source of difficulty for practitioners. The absence of treaty-based rules between certain other States aggravates matters.

The Special Commissions that met in 1995 and 1999 showed up a number of difficulties flowing from the content of the Conventions.

The case-law consequently tends to diverge as there are no rules designating the law applicable to paternity, where certain courts apply the law designated by their conflict rules while others apply the law applicable to the maintenance obligation. In more general terms, there is the question of the law applicable to maintenance entitlement.

Article 8 of the 1973 Convention provides that "*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*". But this rule, which has the advantage of securing continuity in the treatment of a situation under the same law and thus secures certainty as to the law, was disapplied by a judgment of the Supreme Court of the Netherlands on 21 February 1997 on the ground that it was not incompatible with the possibility for the parties to choose the applicable law.

Lastly, the question of the law applicable to limitation periods has prompted difficulties at the stage of the application for recognition and enforcement or of the implementation of enforcement measures abroad. Certain legal systems regard limitation as a matter of substance governed by their own conflict rules, whereas others see it as a rule of procedure, governed by the *lex fori*.

At the Special Commission in The Hague in May 1999, several delegations representing States in the Roman-Germanic legal tradition were in favour of inserting in the new Convention conflict rules inspired by the rules in the 1973 Convention.

Several arguments have been put forward for this, in particular the need to unify and modernise the current convention-based rules and adapt them in such a way as to make them acceptable to all Conference Member States.

The representatives of the common-law countries, on the other hand, argued that there would be difficulties for the courts and additional costs for the parties as a result of applying a foreign law.

Several solutions were considered, including the insertion in the future Convention of a full set of conflict rules, or just of a few rules to amplify the existing Conventions, the absence of conflict rules and the adoption, between States wishing to be bound by such rules, of a Protocol on the law applicable to maintenance obligations.

The attempt to come up with harmonised solutions could be more complex in the broader context than in the narrower context of the European Union Member States.

> Question 11
>
> Should the future Community instrument or the future Hague Convention contain:
>
> a. a full set of conflict-of-laws rules?
>
> b. conflict rules governing specific problems?

5.3.2. Questions to be settled by conflict rules

5.3.2.1. The principal question

The 1973 Hague Convention, the most recent and the fullest of them, contains a multi-stage system under which maintenance obligations are governed by the law of the maintenance creditor's habitual residence or, in the alternative, if that law does not allow the creditor to qualify for maintenance, by the common national law of the debtor and the creditor, or, if that law does not give the creditor satisfaction, the *lex fori*.

The Montevideo Convention provides for a different system, since Article 6 reads:

> "*Support obligations, as well as the definition of support creditor and debtor, shall be governed by whichever of the following laws the competent authority finds the most favourable to the creditor:*
>
> *a) that of the State of domicile or habitual residence of the creditor;*
>
> *b) that of the State of domicile or habitual residence of the debtor."*

The law of certain countries also provides for a multi-stage approach or for a system like Montevideo. In others, the law of the creditor's nationality governs maintenance entitlement.

At the meeting of the Special Commission in The Hague in May 2003, it was observed that if the jurisdiction of the creditor's *lex fori* was accepted, along with the application of the law of the creditor's domicile or residence, the *lex fori* would be applicable, and this solution would bring the civil and common-law systems into line.

The routine use of the domestic *lex fori* was also contemplated since at the stage of the original claim it is the creditor who chooses the court and it is therefore up to the creditor to decide which is the most favourable law. But this solution would encourage forum-shopping.

Some commentators have also pointed out that States applying Islamic law, for example, might wish to ratify the future Convention and that the best solution for them would be the *lex fori*, including its rules of private international law.

Question 12

What general rules of conflict of laws should be adopted, internationally and for the Community, as regards maintenance obligations?

As regards maintenance obligations between former spouses, the question is whether the solution provided for by Article 8 of the 1973 Hague Convention should be maintained. It came in for much criticism at the time but does not seem to have caused major difficulties in practice.

The Hague Conference has considered the idea of leaving scope for the autonomy of the parties on the basis of the ruling of the Dutch Supreme Court, allowing the parties to designate a law applicable to their maintenance obligations differing from the law applicable to their divorce. If this solution were felt to be appropriate, the question would arise whether the parties should be entirely free or whether there should be some ground rules to ensure that one party cannot impose the application of a law that is particularly unfavourable to the other.

As for divorces ordered by a court having jurisdiction under Regulation (EC) No 1347/2000, rules of applicable law could in future be established by a Community instrument, and the question of maintenance obligations between former spouses will be considered in that context.

> Question 13
>
> What rule to solve the conflict of laws relating specifically to maintenance obligations between spouses or former spouses should be inserted in the future Hague Convention?
>
> Question 14
>
> Should the parties be allowed to choose the applicable law, and if so, should there be rules applicable to the choice?

5.3.2.2. Scope of the applicable law

The 1973 Hague Convention and the 1989 Montevideo Convention provide that the applicable law determines the status of creditor and debtor, who is entitled to institute maintenance proceedings, and the time limits for their institution. The Montevideo Convention adds that the applicable law governs the amount of support due and the timing of and conditions for payment and other conditions necessary for enjoyment of the right to support. The Hague Convention provides that the law applicable to the maintenance obligation also determines the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor.

Under the conflict rules of certain Hague Conference Member States, however, the law of the creditor's domicile governs the question of maintenance claims and the law of the debtor's domicile governs the determination of the conditions of the maintenance claim, and in particular the amount awarded.

In certain countries, maintenance obligations are determined on the basis of sometimes highly complex scales of rates. In others, on the other hand, they are determined on the basis of the creditor's needs and the debtor's resources in accordance with the principle taken by the 1973 Hague Convention.

The question of how maintenance obligations are determined is particularly important when creditor and debtor reside in countries with very different standards of living. The most serious difficulty arises where the creditor resides in a country with a high standard of living while the salary paid in the debtor's country of residence is too low to cover the maintenance.

Article 11 of the 1973 Hague Convention provides: "*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*". Implementing this rule, of course, requires the authority determining the maintenance obligation to have the requisite information, which might involve assistance from foreign authorities. But it would appear difficult to go any further internationally. On the other hand it might be possible to go for a degree of approximation of the rules for determining the amount of maintenance obligations as between European Union Member States.

Moreover, many legal systems have an index-linking scheme that enables maintenance obligations that have been set to be adapted to fluctuations in the cost of living. The procedures for calculating such adjustments vary, of course, from one country to another; they are difficult to understand, and in some cases impossible to apply in a foreign country in the absence of a corresponding reference scale.

It is difficult to envisage international unification of index-linking schemes for maintenance awards. But it might be possible to imagine it in the Community context.

> Question 15
>
> What questions should be governed by the system of conflict of laws?
>
> Question 16
>
> How should the question of setting the amount of maintenance obligations be approached, in particular in the Community?
>
> Question 17
>
> How should the question of index-linking maintenance obligations be approached, in particular in the Community?

5.3.2.3. Specific questions

5.3.2.4. Establishment of "family relationships".

Neither the Hague Conventions nor the Montevideo Convention contain provisions on the law applicable to this question. The 1973 Hague Convention, applicable 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*" provides even that "*Decisions rendered in application of this Convention shall be without prejudice to the existence of any of the relationships referred to in Article 1*."

The application of different conflict rules by the courts in different countries can, of course, engender two paternity decisions in relation to the same child or the recognition of a marriage in one State that is not regarded as valid in another.

On the paternity issue, the question can arise in different terms depending whether States give different effects to decisions given in paternity suits and decisions in maintenance proceedings where paternity arises as a secondary issue.

The Hague Commission meeting in 1995 to study the implementation of the maintenance obligations Conventions recommended that the preliminary issue of paternity be governed by the law applicable to the maintenance obligation, but it does not seem to have had much influence on the case-law in States where the status of persons is governed by the rules of private international law.

At the Special Commission in May 2003, there was some support for adopting a rule whereby the preliminary issue should be governed by the law applicable to the maintenance obligation, but others felt that a decision on the paternity issue given as a secondary decision should never be valid *erga omnes*.

5.3.2.4.1 Mobility conflict

As has been seen, where the creditor or debtor changes domicile or habitual residence, this causes difficulties as to jurisdiction over applications for modification of earlier judgments. The question of the applicable law in such cases now arises.

The 1973 Hague Convention, under which the domestic law of the maintenance creditor's habitual residence is basically applicable, provides: "*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*".

This solution has its advantages, as the creditor's situation can be adapted to the new environment. It can also be seen as inciting creditors to change residence to obtain a change in their claim. The principal conflicts rule to be adopted here will have some effect on this point.

5.3.2.4.2 Agreements between the parties

Certain States encourage agreements between parties whereas others prohibit them. The question therefore arises as to the law applicable to them in terms of both form and substance.

In the absence of specific pointers, it is not clear whether they are governed by the Hague Conventions. In any event the question remains entirely open for States that are not parties to the Conventions.

5.3.2.4.3 Limitation

Limitation is a procedural matter in some legal systems and a substantive matter in others. The solution adopted by the 1973 Hague Convention and the Montevideo Convention is that the limitation of a maintenance action is a matter of substance and therefore governed by the law applicable to the maintenance obligation.

But these instruments do not expressly address the issue of limitation of exequatur and recovery actions, and it is clear from the case-law that their status as procedural or substantive matters is interpreted in divergent ways.

One specific difficulty is that maintenance obligations can subsist between two parties for many years and the need for exequatur or enforcement abroad may become apparent only a long time after the original judgment.

At the Special Commission in The Hague in May 2003, many delegations stated that they wished the various aspects of the problem to be tackled, if need be by the adoption of substantive rules.

> Question 18
>
> Should specific conflict-of-laws rules be adopted on:
>
> a. the family relationships that can engender maintenance obligations?
>
> b. the question of the mobility conflict?
>
> c. agreements relating to maintenance obligations?
>
> d. limitation of maintenance, exequatur and enforcement actions?
>
> Should different solutions be adopted in the future Community instrument and the future Hague Convention?

6. COOPERATION

The Hague Special Commission in May 2003 was extensively devoted to cooperation and, according to certain options, could provide the bulk of the future convention. While there are grounds for doubting whether the establishment of rules of this kind would suffice to overcome the legal difficulties that have been met, it must be acknowledged that preparing rules of law alone will not guarantee the quick and efficient recovery of maintenance claims when creditor and debtor reside in different countries.

The problems to be solved in the international or purely Community context are similar, of course, but much fuller and more effective solutions can be put in place here too, in the Community area.

6.1. Authorities responsible for cooperation

6.1.1. Designation of authorities

The system provided for by many international or Community instruments, whereby central authorities are responsible for cooperation, has proved its worth and should be preserved.

Even so, while there ought to be a single interlocutor – or possibly one in each component of non-centralised States – responsibility for relations with other States on certain important questions, direct communications between regional or local authorities might be preferable in a number of cases. Transmission of documents between successive intermediaries is a source of hold-ups and loss of information.

The review of cooperation in matters of maintenance obligations in the European Union Member States, in the study ordered by the European Commission, shows that many central authorities designated under the New York Convention or other agreements plays only a minor role in the processing of cases, or even serve as no more than a channel for transmission to local authorities.

It is by no means certain that there is scope for substantial simplification of this organisation in the operation of an international instrument.

As regards the European Union Member States, it would be worth considering extensive decentralisation, that is to say the designation of local authorities to be in direct contact with their counterparts in the other Member States. The designation of such authorities would constitute an opportunity for certain Member States to take a fresh look at the effectiveness of the cooperation structure set up under the current instruments. The reports for the European Commission's study on recovery of maintenance claims highlight the delays and malfunctioning that could probably be remedied by structural reforms.

> Question 19
>
> Should provisions be made in the European Union for the designation of "decentralised" authorities responsible for certain cooperation functions?
>
> How can the situation be improved in international terms?

6.1.2. Functions of designated authorities

6.1.2.1. Transmission of cases

Internationally speaking it would be possible to provide at least for a semi-direct system such as that provided for by the Hague Convention of 15 November 1965 *on the service abroad of judicial and extrajudicial documents in civil or commercial matters*. There is no apparent reason why requests for recognition and enforcement from abroad should have to be received by a central authority and retransmitted forthwith to a regional or local authority, provided always that they are ready for immediate treatment. This would mean that the decentralised authorities in the requested State would have to be identifiable by the authorities of the requesting State and that cases would have to be fully prepared and need no further action by the requested central authority.

As regards the identification of decentralised authorities, it would clearly be sufficient for States to notify the Permanent Bureau of the Hague Conference of the relevant information for distribution, as is the case of other Conventions.

As for the content of case files, this would be checked by the central authority of the requesting State, which would be able to do this in the semi-direct system prior to transmitting requests for recognition and enforcement.

In the European law-enforcement area, the role of central authorities could be reduced even further, provided the content of case files was checked by requesting authorities, and direct communications between local authorities could thus be promoted. But there would still have to be a central authority responsible for checking the functioning of the cooperation mechanisms and the general functions provided for by certain Community Regulations.

> Question 20
>
> What mechanisms should be set up for the transmission of cases between requesting and requested State?
>
> In the Community context, would provision be made for direct transmission of case files between authorities with local powers to deal with them?

6.1.2.2. Commencement of proceedings

6.1.2.2. 1 Proceedings for recognition and enforcement of foreign judgments

Working on the principle that, in the Community context, proceedings for the recognition and enforcement of judgments must be abolished, this question needs to considered only in terms of the Hague Conference.

In the system set up in the various States under the 1956 New York Convention, requested central authorities act themselves or via a local service, or instruct lawyers to commence the proceedings.

While there is nothing to choose in terms of principles between the modes of organisation, the two systems do not tend to be equally efficient. Public authorities commonly operate more quickly than lawyers. The reason is that lawyers are usually acting on the basis of legal aid, which entails a preliminary procedure.

Given that there are manifest difficulties in the international recovery of maintenance claims, there is a need to review the effectiveness of existing systems and remove whatever bottlenecks are discovered.

> Question 21
>
> How can the functioning of cooperation on the recognition and enforcement of judgments be improved?

6.1.2.2. 2 Proceedings on the merits

In international relations, as has been seen, certain States which do not acknowledge the jurisdiction of the courts for the creditor's domicile or habitual residence ask the State of the debtor's domicile or habitual residence to commence proceedings to determine the maintenance claim or the paternity of the creditor, being a minor, and certain requested States refuse to do this. But this situation does not arise within the Community, as Regulation (EC) No 44/2001 confers jurisdiction of the authorities for the creditor's domicile or habitual residence.

On the paternity issue, several delegations at the Special Commission in The Hague in May 2003 argued that such a procedure was complex and costly, since it demanded expert assessment measures, and could not therefore be commenced by a central authority on behalf of a creditor residing abroad.

Certain States seem to fear that they will be submerged by all manner of requests relating to questions of parental authority.

As regards judgments on the merits, there is another question: should the authorities responsible for cooperation provide assistance to debtors who wish to obtain a modification of an earlier judgment. This question arises not only in the work on preparation of the future Hague Convention but also for the future Community instrument, as under Regulation (EC) No 44/2001 the debtor has no option but to sue in the courts of the State of the creditor's domicile or habitual residence.

There are some who argue that the debtor, like the creditor, may have financial difficulties preventing him from meeting the costs of proceedings abroad. Others consider that the sole objective is the recovery of maintenance claims and that there is no call for cooperation for other purposes. Incidentally, the possibility of legal aid in such circumstances is provided for by a number of other instruments, in particular Council Directive 2002/8/EC of 27 January 2003.

Question 22

Should the future Hague Convention provide that the authorities of the Contracting State in which the debtor has his domicile or habitual residence must commence proceedings on the merits for the determination of the maintenance claim or the paternity of the creditor, being a minor, where the rules of jurisdiction applicable by the courts of the State where the creditor has his domicile or habitual residence do not allow them to give a ruling?

Question 23

Should this cooperation also be given to a maintenance debtor under the future Hague Convention? Under the future Community instrument?

6.1.2.3. Transmission of information

The processing of case files relating to maintenance obligations can generate a need to gather information abroad on, for example, a debtor's address, assets and resources, on matters requiring expert opinions, in particular to establish paternity, or on the law applicable in another country.

Knowledge of the debtor's address is needed at the time of the initial action to determine the maintenance claim so as to ensure that all parties can make their views known in the proceedings. Knowledge of the debtor's assets and resources enables the authority responsible for ruling on the maintenance claim to set the amount on the basis of the facts.

The creditor does not always have this information and can have difficulties in commencing or winning a case if no help is available to obtain it.

The international and regional instruments currently applicable do not provide that an authority can be required to seek out the address of a debtor in its territory to allow proceedings to go ahead in another country.

Regarding the gathering of information on a debtor's assets, the courts can use the 1956 New York Convention *on the recovery abroad of maintenance*, the 1970 Hague Convention *on the taking of evidence abroad in civil or commercial matters* or Regulation (EC) No 1206/2001 *cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, as the case may be.

These three instruments mainly provide for a system of requests from the judicial authorities of the requesting State to the authorities of the requested State, and only the Community Regulation imposes deadlines on the courts for acting on requests addressed to them. The use of the schemes provided for there is somewhat mismatched with requests for information on debtors' assets, for instance, but better matched to requests for expert opinions on paternity issues.

Article 3 of the 1990 Convention between Member States of the European Communities *on simplification of procedures for the recovery of maintenance claims*, which never came into force, provided that:

> *"2. On receipt of the application mentioned in Article 5 the Central Authority in the State addressed shall take or cause to be taken without delay all appropriate and useful measures to:*
>
> *(i) seek out and locate the debtor or his assets;*
>
> *(ii) obtain, where appropriate, relevant information from Government Departments or agencies in relation to the debtor; ..."*

This provision, however, does not entrust central authorities with an investigation role regarding the debtor's and assets prior to the exequatur stage.

Certain States have population registers so that a person residing in the territory can be traced very quickly. Others operate different forms of registration for company, tax, banking or whatever purposes. These schemes should make it possible to gather the basic information required for processing files on maintenance obligations.

But administrations or courts do not always have access to these different forms of registration as there are data-protection principles of varying strictness, and sometimes the material possibilities are also lacking.

It would be worth taking inspiration from the 1990 European Convention, in particular in preparing the future Community instrument, entrusting the central authorities with the various tasks provided for in it and requiring these to be accomplished also at the stage of the initial application for determination of a maintenance claim. It might also be possible to entrust the central authorities with other tasks not provided for by that Convention.

In the Community context, it would be helpful if the central authorities were supplied with the means they need to gather the information.

Regarding the States' domestic law, the Council of Europe Convention of 7 June 1968 *on Information on Foreign Law* allows the judicial authorities of the States Party to seek information via the central authorities for the purposes of proceedings already commenced. But this Convention, ratified by a large number of European Union Member States, does not seem to have been activated very often.

In the Community area, the transmission of information on national law can be handled by the European Judicial Network in Civil and Commercial Matters.[15]

Internationally, the transmission of information on national law could also be entrusted to the central authorities.

Question 24

Should the central authorities responsible for cooperation in matters of maintenance obligations be entrusted with the transmission of information, locating debtors and seeking other information about their assets? Should they be entrusted with the transmission of other information, in particular about their national law?

Question 25

Should the central authorities be entrusted with the preparation of expert opinions, to enable a court hearing a maintenance claim in respect of a minor to rule on the paternity issue?

Question 26

Should other tasks be entrusted to the central authorities?

Question 27

In what areas could more detailed rules of cooperation be envisaged in the Community?

6.2. Costs

While there is general agreement on the principle that functions carried out by the central authorities in international judicial assistance should be free of charge, the principle being followed with a few exceptions in the international instruments that provide for cooperation rules, opinions differ on the question of costs of exequatur and enforcement proceedings.

These differences proceed in particular from differences in the way requests for cooperation under the existing conventions are handled.

[15] European Judicial Network in civil and commercial matters: http://europa.eu.int/comm/justice_home/fsj/civil/network/fsj_civil_network_en.htm

In certain States, foreign case files are handled at the exequatur and enforcement stages by actual judicial or administrative bodies. In others the requested central authority transmits the request to court auxiliaries acting on a liberal profession basis and the cost of the procedure, which must be paid for, is generally borne by the creditor. Between the two extremes, there is a whole series of intermediate solutions in various States on the basis of their domestic organisation.

Apart from being free of charge for the creditor, the direct handling of requests by the judicial or administrative authorities of the requested State commonly saves much time, provided of course that these authorities are not overloaded. But this cooperation free of charge is commonly available only for maintenance claims for children, and adult creditors often receive no assistance from the authorities in countries that have such a system.

In countries where files are processed by court auxiliaries operating on a liberal-profession basis, creditors may be eligible for legal aid if the relevant international agreements or the State's domestic law allow this, as will be the case between the European Union Member States under the provision transposing Council Directive 2002/8/EC of 27 January 2003. These various sets of provisions generally provide for means-tested legal aid. This system can be beneficial as adults can be eligible for assistance in the same way as minors. It can also have drawbacks, chief among them the major delays in processing files on account of the time taken to examine legal aid applications and of the need to renew them each year, and the fact that the entire family's income is taken into account, even where the application is made on behalf of a minor.

If the aim is to avoid negotiations both for the future Hague Convention and for the future European instrument culminating in the adoption of the solution corresponding to the lowest common denominator, improvements will have to be made to the operation of most of the existing schemes. It must be borne in mind that a creditor residing abroad cannot act to assert his rights vis-à-vis the relevant authorities in the requested State, but in the law of several countries he can do so vis-à-vis the local authorities. Giving creditors residing abroad more extensive rights of access to legal aid cannot therefore be regarded as breaching equality in relation to creditors residing locally.

The most ambitious solution would be, of course, to require all States to bear all the costs that all maintenance creditors have to cover. But there would probably have to be an agreement on what costs would be covered, as it was clear at the Special Commission in The Hague in May 2003, for example, that many States would refuse to bear the costs of expert opinions on paternity. The fears expressed on this point clearly need to be played down, as the cost of the techniques used is likely to decline quite seriously as time goes by.

Another solution might be to make distinctions, for example depending whether the creditor is a child, a spouse or another person.

The principle raised at The Hague that States bound by the same instrument should supply services of an equivalent level irrespective of the means deployed for the purpose should be accepted in any event. The cooperation procedures operated by certain Member States might be reviewed from a cost-cutting angle without impairing the effectiveness of the assistance.

Question 28

Should it be provided that all maintenance creditors are eligible for the provision free of charge by central authorities in the requested State of the measures needed for the recognition and enforcement of judgments given in their favour?

Could different solutions be envisaged in the Community and internationally?

Question 29

Is it possible to envisage establishing less costly cooperation procedures in certain countries than those currently used?

Should or could these specific cooperation procedures be reserved for certain creditors?

Should the future Community instrument provide for more generous conditions than would be applicable under the future Hague Convention in the international context?

7. PRACTICAL MATTERS

The report on the study done for the European Commission and the various meetings in The Hague on maintenance obligations have all revealed that the central authorities regularly face practical difficulties that make the treatment of the files before them more complicated and sometimes even impossible. Solutions must be found to these recurring problems.

7.1. Translations

Translation problems arise in communications between central authorities, but above all with documents that must be in the file on the request for judicial assistance.

7.1.1. Forms

For communications between central authorities, a two-language form has been prepared by the Hague Conference, and this could be taken over with the requisite adaptations for the future Convention.

Specific forms will have to be prepared for the purposes of communications between authorities in the European Union Member States as more languages are involved and the type of information to be transmitted depends on the content of the instruments.

In certain specific cases, the forms might not be enough, and rules will have to be prepared on the use of languages both between States parties to the future Hague Convention and between European Union Member States.

7.1.2. Items in the file

Regarding the content of the files, the report on the study done for the European Commission reveals among other things that there are problems on account of the poor quality of the translations of certain important documents. And there are complaints about the high cost of translations borne by the central authorities.

Several solutions have been envisaged at The Hague, in particular translating only the part of the judgment relating to maintenance obligations if a judgment rules on several issues or translating only if specifically requested by the judicial authorities acting on the request for exequatur. None of the suggestions was well received, and many experts argued that all documents referred to their national courts should be in their national language.

The future Community instrument could take over the solutions provided for by Regulation (EC) No 2201/2003 as regards judgments relating to rights of access and the return of a child wrongfully removed. Article 41 of the Regulation provides that rights of access granted by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State if the judgment has been certified in the Member State of origin. The translation of the certificate is required solely as regards Article 10, relating to the exercise of rights of access, and the other sections of the certificate do not have to be translated. Article 42, on the return of the child, contains similar provisions.

The future Community instrument could likewise provide that judgments to be enforced in the requested Member State must be certified by the authority of the Member State of origin. The certificate would contain information allowing the parties to be identified and would incorporate the components of the judgment needed for its enforcement: total amount to be recovered or monthly instalments, index-linking (if any), etc.

Question 30

What should be the solution to the question of the languages to be used in relations between authorities in the States parties to the future Hague Convention and between authorities of the European Union Member States?

Question 31

What should be the solution in the future Hague Convention to the question of the languages in which documents in judicial assistance files should be translated?

Question 32

Could the future Community instrument be based on the solutions adopted in Regulation No…?

7.2. Items to be supplied

Certain central authorities complain about difficulties in relations with their counterparts in certain countries who send incomplete files or demand more and more documents, for example on requests for legal aid.

There are apparently a number of sources for these difficulties: failure by central authorities to check the content of files transmitted, impossibility of obtaining all the requisite documents from the creditor, lack of information on the needs of the authorities of the requested State, failure to understand why the documents matter, etc.

Regarding failures to understand, mutual information systems should be feasible in the context of the future Hague Convention.

In the Community context, information could be obtained via the central or local authorities responsible for the case, but also through the contact points of the European Judicial Network, and even, where general information is concerned, from the EJN website.

At the Special Commission in The Hague in May 2003, several delegations suggested that certain documents be replaced by certificates issued by central authorities. This solution follows the solution adopted by Articles 41 and 42 of Regulation (EC) No 2201/2003. The electronic transmission of certain documents was also raised. But certain experts stated that originals or certified copies of certain documents were needed for procedures to be valid.

But it might be possible to replace certain documents by certificates issued on forms removing the need for translation: for example, certificates of birth, marriage and death or documents establishing the amount of the creditor's or debtor's resources.

But some solutions that are perfectly acceptable in relations between European Union Member States might be more difficult to accept in international relations.

Question 33

How should the flow of information between central authorities be organised?

Question 34

Can solutions such as certificates issued by central authorities in place of original documents be envisaged in the future Hague Convention or only in the future Community instrument?

Question 35

Is it possible to envisage electronic transmission of files or of certain documents in the future Hague Convention or only in the future Community instrument?

7.3. Time limits

At the Special Commission in The Hague in May 2003, several delegations wanted time limits to be imposed on the States parties to the future Convention for processing case files. The report on the study done for the European Commission cites particularly worrying examples of the time taken to process requests for judicial assistance, as in some countries no procedure for initial payment of maintenance can reach a conclusion in less than one, two or even three years, sometimes even more.

Clearly, if the debtor's address is unknown, or the debtor is insolvent, or if there is real property that must be sold, the creditor will not obtain rapid satisfaction. But what is not acceptable, given the interests at stake, is that proceedings where there are no particular difficulties cannot be completed within a reasonable period.

The first question is whether to continue with amicable proceedings against a debtor who has commenced formal proceedings, as is currently the case in certain countries under the New York Convention, Article 6 of which provides that "*The Receiving Agency shall ... take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance*". It might be possible to contemplate imposing deadlines for doing these things.

It might also be possible to contemplate imposing deadlines for the various procedural steps required of them in order to give the relevant authorities an incentive to act with diligence. But this solution raises a number of delicate questions, as several procedural steps, particularly judicial proceedings on which it is difficult to impose time limits, must be gone through on the way to recovering maintenance.

But time limits have been set by certain Community Regulations. Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters lays down time limits for requested entities to advise requesting entities that the requisite action has been taken. Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters likewise provides for time limits within which requested courts must send information to requesting courts, but also for the time limit within which the request for the taking of evidence must be acted on. And Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, provides that the court to which an application for return of a child is made must issue its judgment no later than six weeks after the application is lodged.

> Question 36
>
> Should time limits be set in the future Hague Convention, in the future Community instrument?

8. WELFARE ASSISTANCE

Many European Union Member States have established welfare assistance schemes that can be available to maintenance creditors.

Certain of these schemes apply without discrimination to all persons in difficulty. Others are intended precisely to offset failure to settle maintenance claims.

In Italy, persons in difficulty, in particular children who are maintenance creditors, receive assistance. In Belgium a minimum integration income is paid to persons lacking resources.

The situation of persons who might be eligible for these forms of assistance is considered and their family might be asked to contribute.

In Austria a federal fund pays advances on maintenance for children. In Portugal a "Child support guarantee fund" pays allowances of up to €319 per month to minors who do not receive the maintenance due to them. In Luxembourg a National solidarity fund performs this role for spouses and relatives in the ascending line.

These bodies are generally subrogated to the creditor's rights and can therefore take action against the debtor for reimbursement of sums paid on his behalf.

These systems that pay all or part of the sums due from the debtor to the creditor on the debtor's behalf are certainly effective, partly because they do not require the creditor to prove a lack of resources and partly because they take care of proceedings against the debtor.

Obviously they cannot be made compulsory in the context of the future Hague Convention. But a Community instrument could provide for an obligation for the European Union Member States to adopt such schemes.

> Question 37
>
> Should there be an obligation for the European Union Member States to have maintenance claims taken over by a public body where the debtor defaults?

9. LIST OF QUESTIONS

Question 1

Should the future instruments:

a. – define the concept of maintenance obligations? If so, how?

b. – apply to the recovery of arrears?

c. – apply to public bodies, in particular as regards cooperation?

d. – apply to all persons likely to enjoy maintenance claims in the different legal systems?

Should distinct solutions be adopted for the future Community instrument and the future Hague Convention? If so, what solutions?

Question 2

Should the future Hague Convention:

a. – contain a full set of rules of direct jurisdiction? If so, what rules should be adopted?

b. – contain rules of direct jurisdiction applicable only to application for modification of an earlier judgment? If so, what rules should be adopted?

Question 3

Are there considerations that might make it difficult to abolish the exequatur in the Community on grounds of:

a. – public policy?

b. – failure to respect defence rights?

If so, how could these difficulties be solved? Should certain procedural guarantees be adopted or reinforced?

Question 4

Are there specific difficulties that would preclude the principle of automatic provisional enforcement of judgments relating to maintenance obligations?

Question 5

As regards the enforcement of judgments, can provision be made for:

a. simplification of procedures for the enforcement of judgments that exist in certain Member States? Time limits to be set?

b. enforcement to be suspended only in exceptional cases?

Question 6

Could it be provided that a salary attachment order against a maintenance debtor in one European Union Member State is enforceable without further proceedings in the other Member States?

What other specific measures would be helpful?

Question 7

Should the future Hague Convention provide for a simplified exequatur system similar to the one provided for by Regulation No 44/2001? What other solutions are possible for facilitating and accelerating recognition and enforcement of judgments?

Question 8

Would the "fact-based" approach be workable in practice?

Is there another preferable solution? If so, what solution?

Question 9

Should indirect jurisdiction be based on:

a. the solution adopted by Article 8 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations?

b. the court agreed on by debtor and creditor? Should the parties' freedom of choice be limited?

Question 10

At the exequatur stage:

a. what grounds for refusing recognition and enforcement should be in the future Convention?

b. in the event of a conflict of judgments, how should the judgment to be enforced be distinguished?

c. should there be a strict prohibition on reviewing judgments given in the State of origin, or should exceptions be allowed, and if so, in what circumstances and for what purposes?

Question 11

Should the future Community instrument or the future Hague Convention contain:

a. a full set of conflict-of-laws rules?

b. conflict rules governing specific problems?

Question 12

What general rules of conflict of laws should be adopted, internationally and for the Community, as regards maintenance obligations?

Question 13

What rule to solve the conflict of laws relating specifically to maintenance obligations between spouses or former spouses should be inserted in the future Hague Convention?

Question 14

Should the parties be allowed to choose the applicable law, and if so, should there be rules applicable to the choice?

Question 15

What questions should be governed by the system of conflict of laws?

Question 16

How should the question of setting the amount of maintenance obligations be approached, in particular in the Community?

Question 17

How should the question of index-linking maintenance obligations be approached, in particular in the Community?

Question 18

Should specific conflict-of-laws rules be adopted on:

a. the family relationships that can engender maintenance obligations?

b. the question of the mobility conflict?

c. agreements relating to maintenance obligations?

d. limitation of maintenance, exequatur and enforcement actions?

Should different solutions be adopted in the future Community instrument and the future Hague Convention?

Question 19

Should provisions be made in the European Union for the designation of "decentralised" authorities responsible for certain cooperation functions?

How can the situation be improved in international terms?

Question 20

What mechanisms should be set up for the transmission of cases between requesting and requested State?

In the Community context, would provision be made for direct transmission of case files between authorities with local powers to deal with them?

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Question 37

Should there be an obligation for the European Union Member States to have maintenance claims taken over by a public body where the debtor defaults?