

## **Conclusions and Recommendations of the Applicable Law Working Group**

- 1 The Applicable Law Working Group (ALWG) on the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (2007 Maintenance Obligations Protocol) met on 22 January and from 25 to 27 January 2021 to review the practical operation of the Protocol. The meeting was held via videoconference and was attended by 34 participants representing 16 Members and members of the Permanent Bureau (PB).
- 2 Mr Andrea Bonomi (Switzerland) was proposed as Chair and was elected by consensus.
- 3 Participants to the ALWG unanimously approved the following Conclusions and Recommendations (C&Rs) prepared by the Chair:

### **I. Introduction**

- 4 In the light of the responses received to [Prel. Doc No 2 of August 2019](#) - Questionnaire on the practical operation of the *Protocol of 23 November 2007 on the Law applicable to Maintenance Obligations* - compiled in [Prel. Doc. No 5 of June 2020](#) - Compilation of responses received to the August 2019 Questionnaire on the 2007 Maintenance Obligations Protocol - it was agreed that in general, the 2007 Maintenance Obligations Protocol works well.
- 5 Nonetheless, it is recognised that efforts need to be made in order to promote common understanding of the 2007 Maintenance Obligations Protocol on the part of judges, lawyers and administrative authorities, as well as creditors and debtors using the Protocol.
- 6 It was underlined that the 2007 Maintenance Obligations Protocol should be interpreted having regard to its autonomous nature and in the light of its purpose, taking into account that it supplements the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Child Support Convention).
- 7 The continuing importance of the Explanatory Report was emphasised as an aid to the interpretation and understanding of the 2007 Maintenance Obligations Protocol.

### **II. The law applicable to preliminary / incidental questions (e.g., establishment of parentage, establishment of certain family relationships)**

- 8 The 2007 Maintenance Obligations Protocol is silent on this matter. Two trends were noted in this respect in accordance with State practice, namely the application to preliminary / incidental questions:
  - of the law governing the principal issue relating to maintenance obligations as designated by the 2007 Maintenance Obligations Protocol; and,
  - of the law applicable to the issue arising on a preliminary / incidental basis as designated by the generally applicable rules of conflict of laws of the forum.

(See also Explanatory Report, para. 24, and C&R of the 1995 Special Commission meeting on the operation of the Hague and New York (1956) Conventions on maintenance obligations ([C&R No 29](#)) and of the 1999 Special Commission meeting on Maintenance Obligations ([C&R No 6](#)))

It was noted that legal doctrine is to the effect that, if possible, between the two options, the one most favourable to the creditor should be used, especially in the case of child support.

- 9 Article 1(2) of the 2007 Maintenance Obligations Protocol, which provides that “[d]ecisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1”, was recalled.

### **III. Issues concerning applicable laws that do not provide for certain relationships (e.g., same sex unions, social family / parentage)**

- 10 It was recalled that the 2007 Maintenance Obligations Protocol does not expressly refer to relationships such as same sex unions, social family / parentage, and that the question of its applicability to those relationships was left open (Explanatory Report, para. 31).

- 11 The application of the 2007 Maintenance Obligations Protocol to such relationships is to be encouraged, as is already the case in a number of States, based on the understanding that it is for the applicable law to determine whether, to what extent and from whom the creditor may claim maintenance (Art. 11(a)), and that decisions rendered in application of the Protocol shall be without prejudice to the existence of any of the relationships referred to in the Protocol (Art. 1(2)).

- 12 The public policy exception (Art. 13) should be used in a cautious and limited way. To that effect, some experts recalled the relevant supranational courts decisions concerning such relationships.

- 13 In order to avoid difficulties arising from the non-application of the 2007 Maintenance Obligations Protocol to such relationships, the creditor seeking maintenance is recommended to seize - subject to the applicable rules of jurisdiction - the court of the State where the specific relationship is provided for under domestic law.

### **IV. Interpretation and scope of “habitual residence”**

- 14 The determination of what is the “habitual residence” must respect the principle of uniform interpretation (Art. 20) based on the purpose of the 2007 Maintenance Obligations Protocol and not on internal law (Explanatory Report, para. 41).

- 15 The State of habitual residence is the State which is the focal point of a person’s life. The question of habitual residence is one of factual interpretation to be determined by a combination of factors which denote a certain stability of residence and sufficient connection to the State in question. It was agreed that, at any given time, a person can only have one habitual residence.

- 16 A mere presence or temporary residence in a State, for example for work or study purposes only, does not amount to habitual residence and is not sufficient to determine the applicable law to a maintenance obligation. This is confirmed by the fact that the 2007 Child Support Convention makes a distinction between “residence” and “habitual residence” and excludes mere “presence” (Art. 9 of the Convention and Explanatory Report, para. 43).

- 17 In the case of a request to establish child support in the context of a child abduction, the location of the habitual residence of the child is determined in accordance with the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1980 Child Abduction Convention) and / or the *Convention of 19 October 1996 on Jurisdiction, Applicable Law,*

*Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (1996 Child Protection Convention). The importance of Article 16 of the 1980 Child Abduction Convention was recalled. In this case, urgent or provisional financial support can be ordered under Articles 11 and 12 respectively of the 1996 Child Protection Convention (see e.g., para. 62 of the Guide to Good Practice Child Abduction Convention: Part VI - Article 13(1)(b)) with the understanding that the law applicable is the law designated in accordance with rules of the 1996 Convention.

## **V. Difference between “domicile” and “habitual residence”**

18 In the 2007 Maintenance Obligations Protocol the use of the concept of “domicile” is limited to Article 9 where it is used to replace the concept of “nationality” in Articles 4 and 6. Thus far, only Ireland has made use of Article 9.

19 Domicile does not necessarily coincide with habitual residence (Explanatory Report, para. 139).

## **VI. Interpretation of “unable to obtain maintenance” under Article 4**

20 Article 4(2)-(4) allow for the application of subsidiary connecting factors when the creditor is “unable to obtain maintenance” under the laws designated in the first place. This condition is not only fulfilled when such laws do not provide for any maintenance obligation arising from the relevant family relationship, but also when they make that obligation “subject to a condition that it is not satisfied in the case at hand” (Explanatory Report, para. 61).

21 It was noted that the CJEU, in case C-83/17, has ruled that this condition is also fulfilled when the creditor is precluded from obtaining maintenance for the past under the law designated in the first place, due to the fact that he or she failed to put the debtor on formal notice. This interpretation appears to be consistent with the purpose of Article 4, which is to favour the maintenance creditor.

## **VII. Interpretation of “closer connection with the marriage” under Article 5**

22 When raised, the objection based on the law which has a closer connection with the marriage has to be determined by the court in each individual case. It was generally accepted that the spouse who raises the objection should assist the court by providing sufficient factual elements supporting the application of the escape clause.

23 The decision on the application of Article 5 should be taken in conformity with the purpose of the rule, which consists of safeguarding the debtor’s legitimate expectations in case of a change of the habitual residence of the creditor (Explanatory Report, para. 78).

24 While Article 5 expressly mentions the law of the last common habitual residence of the spouses, the possibility that the law of the State of another place of common habitual residence, as opposed to the last common habitual residence, may be more closely associated with the marriage should not be ruled out.

25 Where there was no common habitual residence during the marriage, the general rule of Article 3 of the 2007 Maintenance Obligations Protocol should normally apply unless the circumstances clearly show a closer connection of the marriage with the law of another State.

## **VIII. The modification of a decision**

26 The procedure to modify a decision should be available in each Contracting Party to the 2007 Child Support Convention.

27 The law applicable to the modification of maintenance obligations should be the law identified in accordance with the 2007 Maintenance Obligations Protocol. It was recalled that Article 4(3) of the Protocol is not applicable to an application for modification made by the debtor.

28 It was recognised that the applicable law usually requires a change of circumstances to make a modification and that the fact that another law might apply should not be considered as such a change of circumstances for the purpose of the modification of a maintenance obligation.

## **IX. Time of a choice of law under Article 8**

29 The term “any time” under Article 8 should be interpreted according to its regular meaning. Thus, in the case of maintenance obligations between spouses or ex-spouses, the applicable law can be designated under Article 8 before the marriage, during the marriage or following the breakdown of the marriage (Explanatory Report, para. 126).

30 It was recalled that under Article 22 of the 2007 Maintenance Obligations Protocol, “[t]his Protocol shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State”. In that regard, it was recognised that case law under the Protocol is to the effect that choice of law provisions in marriage contracts made prior to the entry into force of the Protocol are upheld by courts.

## **X. The law applicable to limitation periods with regard to enforcement of maintenance orders**

31 Paragraphs 1, 4 and 5 of Article 32 of the 2007 Child Support Convention, which provide for enforcement under internal law, were recalled. They provide as follows:

“(1) Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed”.

[...]

(4) Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation”.

(5) Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.”

32 Specific issues concerning limitation periods and arrears with regard to enforcement of maintenance orders will be subject of discussion at the meeting of the Special Commission ([Prel. Doc. No 3 of November 2020 \(revised version\)](#) - Planning for the First Meeting of the Special Commission, p. 2).

## **XI. Operation of Article 18 – Coordination with prior HCCH Conventions**

33 States which are Parties to the HCCH 1956 and / or 1973 Conventions, but have not yet become Party to the 2007 Maintenance Obligations Protocol, should be encouraged to do so. If the Council on General Affairs and Policy were to endorse a proposal from the Special Commission to that effect, the Secretary General of the HCCH should address the Governments of the States concerned and invite them to join the Protocol.

34 Until all Contracting States to the HCCH 1956 and 1973 Conventions have joined the 2007 Maintenance Obligations Protocol, the interpretation of Article 18 and more specifically the term “as between the Contracting States” rests with competent authorities.

## **XII. Practical issues with regard to the application of Article 11 – access to legal information**

- 35 Solutions with regard to access to legal information include consultation of the Country Profiles under the 2007 Child Support Convention, the EU Justice Portal, contacting for information members of the International Hague Network of Judges or National Contact Points of the European Judicial Network or making use of the *European Convention of 7 June 1968 on Information on Foreign Law*.
- 36 Consideration should be given to add topics to the Country Profiles under the 2007 Child Support Convention to facilitate further access to foreign legal information.