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THE EU MAINTENANCE REGULATION: JURISDICTION, APPLICABLE LAW, PUBLIC BODIES AND THE LINK TO THE HAGUE

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1. The Hague Protocol on the Law Applicable to Maintenance

The achievement of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations did not come about due to external pressure from non-EU States in The Hague. Very few non-EU States cared about the Protocol. The plenary negotiations were at times somewhat surreal and certainly not of the usual very high standard at The Hague. Admittedly the Working Group that prepared the Protocol before the Diplomatic Session was made up of excellent experts chaired by Professor Bonomi and it produced very high quality work. However at the Diplomatic Session most of the key negotiations took place at the EU co-ordination meetings. In the plenary sessions only a few of the other States were significant contributors to the debate, eg Switzerland, Japan and China (particularly Macau).[1] What The Hague provided for the EU was a time limit to achieve agreement on choice of law rules on maintenance. This was a very difficult and at times heated negotiation within the EU but the rhythm of the Hague Conference that works towards having to finish a Treaty at the Diplomatic Session put pressure on the EU States to agree among themselves in order to avoid the embarrassment of a failure to achieve a treaty on applicable law at The Hague. It was likely that if the EU Member States could agree among themselves by consensus they would be able to take Switzerland and the few other interested States with them in the plenary session without having to make large concessions.[2] Another aspect of the

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[1] Some Latin American countries showed an interest but they already have a regional agreement on maintenance that contains a choice of law rule that is very pro-maintenance creditor and has universal application. Article 6 of the Inter-American Convention on Support Obligations of 1989 provides that: '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 favorable 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.'
Therefore it is not at all likely that they will ratify the Protocol and even if they do it will have no effect because of Article 19 of the Protocol unless they make a contrary declaration giving the Hague Protocol effect.

[2] After all only the Swiss had a strong interest in ratifying the Protocol and Switzerland had a very strong interest in avoiding failure given that its delegation had the honour of having the chairman of the part of the

rhythm of the Hague Conference also helped. By bringing the key negotiators to The Hague for 3 weeks for the final Diplomatic Session mutual trust is built up between the EU delegates as they meet early each morning in the Hague Peace Palace to try to agree positions by consensus. The time spent together over coffee breaks, lunches and dinners also helps to build a rapport that lends itself to compromise solutions being arrived at between experts. This rarely happens in internal EU negotiations in Brussels where meetings take place over one or two days and people do not have enough time to get to know each other and discuss drafts informally. It might even be pointed out that the age of chivalry is not dead. Two of the key EU delegates were pregnant. At the eleventh hour in the negotiations their view, that it was best to prevent vulnerable adults from being able to have a right to party autonomy in relation to choice of law for their maintenance obligations, was accepted in the EU coordination meeting by the EU delegates who wanted to give party autonomy to vulnerable adults.[3]

The choice of law rules in the Protocol will apply throughout the EU - except the UK and, probably, Denmark – and will enable the abolition of exequatur within the EU for those States that apply the Protocol rules.[4] The original Commission proposal for a Regulation did envisage harmonisation of applicable law rules in Articles 12-21. Agreement may eventually have been reached on harmonised applicable law rules in the EU but these would have been no better than those agreed in The Hague and would have taken longer. The merit of doing it in The Hague is that it has kept alive the hope of a universal solution to choice of law harmonisation and, more practically, has given an input into the process of devising the rules to any of the EU's friends who care about harmonising these choice of law rules. It also demonstrates the added value of the EU becoming a member of the Hague Conference on Private International Law. Solving the applicable law problem in The Hague also created the momentum for finding a solution in the EU Maintenance Regulation that the UK could opt in to.

The Hague Protocol on Applicable Law is of universal application, ie it applies even if the applicable law is of a non-Contracting State to the Hague Protocol.[5] The general rule on applicable law in Article 3 of the Protocol is that maintenance obligations are governed by the law of the habitual residence of the creditor.[6] As the maintenance creditor is able to sue in

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Diplomatic Session dealing with the Protocol who was also the Rapporteur for the Protocol. So far only the EU has ratified the Protocol and Serbia has signed it, see http://www.hcch.net/index_en.php?act=conventions.status&cid=133. One of the surreal elements of the negotiations was the spectacle of a delegate from one of the Member States of the Hague Conference turning up near the very end of the negotiations and in his wakeful moments raising fundamental issues that threatened to undermine carefully crafted consensus positions. The chair of the plenary session on the Protocol was skilful in defusing the risk of unsatisfactory late changes.

[3] See Article 8(3) of the Protocol. Several attempts had been made to find a compromise whereby vulnerable adults could be given party autonomy if safeguards were put in place to avoid their representatives entering into an agreement on their behalf if they had a conflict of interest. However none of these compromises achieved consensus and the decision had to be made simply to include vulnerable adults within the scope of party autonomy or to exclude them. One partially persuasive reason why the EU co-ordination meeting agreed in the end to their exclusion was that the whole idea of party autonomy on choice of law on maintenance was new within the EU and therefore it is better to err on the side of the status quo rather than on the side of innovation if there is no consensus for the latter.

[4] See the final version of the EU Maintenance Regulation, the Council Regulation No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O.J. 2009 L7/1.

[5] Art. 2.

[6] Art. 3(2) provides that if the creditor's habitual residence changes then the law applicable changes from the moment when the change occurs.

his or her habitual residence under the EU Maintenance Regulation this usually means that the forum will be applying its own law. This is reinforced by Article 4(3) of the Protocol in that where the maintenance creditor chooses to sue the defendant at the defendant's habitual residence then the law of the forum applies to maintenance obligations between parents and their children (unless that law does not allow the creditor to obtain maintenance from the debtor).[7]

The general rule applying the law of the habitual residence of the creditor is displaced by Article 5 of the Protocol for "spouses, ex-spouses or parties to a marriage which has been annulled" if one of the parties objects to the application of the general rule and can demonstrate that the "law of another State… has a closer connection with the marriage." This closer connection standard gives a lot of leeway to the judge in the individual case. The only guidance from the text of the Protocol is the relevance of the "State of their last common habitual residence". However, the last common habitual residence of the parties will not always have a closer connection to the marriage than the current habitual residence of the creditor (because, for example, the parties might have lived together for a long time in the place where the creditor is not habitually resident before moving for only a relatively short time to the place where they had their last common habitual residence).[8] One of the controversial questions in the interpretation of Article 5 will be whether "spouses" can be interpreted to include same sex persons in a same sex marriage or even in a same sex registered partnership.[9] The drafters of the Protocol assumed that a non-uniform interpretation will be given to this issue in that some States will extend the definition of "spouses" to same sex marriage and to same sex registered partners (perhaps also to opposite sex registered partners). However, as the EU has ratified the Protocol it has become an EU law measure within the EU and therefore the Court of Justice of the European Union may give "spouses" a uniform meaning.[10]

In relation to maintenance obligations other than for child support or spousal maintenance Article 6 of the Protocol creates a special defence. The "debtor may contest a claim from the creditor on the ground that there is no such maintenance obligation under both the law of the State of the habitual residence of the debtor and the law of the State of the common nationality of the parties, if there is one." This defence helps to deal with the reality that the type of maintenance obligations permitted varies from one EU country to another. Thus it is the case that in the UK children are never required by law to maintain their parents whereas that is a common obligation in many Member States. Similar variations apply as to whether siblings are required to maintain each other. If a father and son are both UK nationals but the father retires to France and then becomes so poor that he requires maintenance the father can seek maintenance from the son in the French courts (Article 3 of the Regulation) but the French courts will not grant maintenance if the son invokes the Article 6 defence under the Protocol because under the common nationality law of the UK and the UK law of the habitual

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[7] See the Bonomi Explanatory Report on the Protocol http://www.hcch.net/upload/expl39e.pdf at para. 61 to understand what is meant by "unable to obtain" in this context. In rare cases where the creditor cannot get any maintenance under the law of the habitual residence of either the creditor or the defendant then the law of the common nationality of the parties applies (Art. 4(4)). For the purposes of Ireland common nationality means common domicile here and in Art. 6 (see Art. 9) and http://www.hcch.net/index_en.php?act=status.comment&csid=1065&disp=resdn .

[8] Art. 5 of the Protocol. See the Bonomi Explanatory Report at paras. 85-89.

[9] The Bonomi Explanatory Report addresses this issue at paras. 92-93.

[10] The Court may be cautious about giving a uniform interpretation to the concept of "spouses" because what constitutes a marriage is still a matter for national law as emphasised by recital 21 of the EU Maintenance Regulation which states that: "The establishment of family relationships continues to be covered by the national law of the Member States, including their rules of private international law."

residence of the son no such maintenance obligation exists. This would still be the case even if the father had given up his UK nationality and become a French citizen because the requirement that there be no such obligation under the law of the common nationality only applies if the parties have a common nationality.[11]

Articles 7 and 8 of the Protocol do allow for some party autonomy in the choice of law applicable to a maintenance obligation. Article 7 provides considerable flexibility to choose forum law to govern a dispute for the purpose of a particular proceeding. This can even be done before the proceedings have commenced if the agreement is signed by both parties. In relation to a general designation of the applicable law this can be done under Article 8 but the restrictions are quite extensive. Firstly there has to be one of the connections listed in Article 8(1) between the agreement and the parties; secondly, the agreement must be signed by the parties; thirdly, it cannot apply to a maintenance obligation in respect of a person under 18 or an adult who is incapacitated in such a way that he or she is not in a position to protect his or her interests; fourthly, the creditor cannot renounce his right to maintenance unless that is permitted by the law of his habitual residence; fifthly, the chosen law will not apply if it leads to manifestly unfair or unreasonable consequences for any of the parties unless at the time of the designation of the law applicable the parties were fully informed and aware of the consequences of their designation.[12]

It is worth remembering that Article 13 of the Hague Protocol permits Member States who are bound by it to refuse to apply the law determined under the Protocol 'to the extent that its effects would be manifestly contrary to the public policy of the forum.' Thus a Member State that objects to maintenance payments having to be made by one same sex registered partner to another may refuse to award such maintenance payments even though the maintenance creditor is habitually resident in a country that does make such awards and that is the applicable law under the Protocol. Normally it will not need to resort to public policy because the Article 6 defence will apply as the debtor will usually be habitually resident in the country where the creditor is suing him if the creditor is not suing in his own habitual residence. Public policy might come into play when the jurisdiction is based on Article 3(c) or (d) of the Regulation. Those courts would be able to exercise jurisdiction over a person that has a connection with that country that is not purely nationality and yet falls short of habitual residence and who seeks a declaration that his status is single and, as an ancillary point, he owes no maintenance to a specified man. In such an unlikely case the court might apply public policy to refuse to make a maintenance award even though the Protocol would otherwise require the court to apply the law of the habitual residence of the creditor that does award maintenance.

Finally it is important to be aware of Article 14 of the Hague Protocol when deciding how much maintenance to award. The decision maker must take into account "the needs of the creditor and the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments… in determining the amount of maintenance" even "if the applicable law provides otherwise". This provision seems to be a uniform substantive law rule rather than an applicable law rule. It is not a derogation to the law of the forum from the otherwise applicable law. Article 11 (c) refers the question of the basis of the calculation of the amount of maintenance and indexation to the applicable law. After doing what is required by Article 11(c), Article 14 requires the decision maker to take into account the factors mentioned there before finalising the amount to be paid. Thus it

[11] For a detailed analysis of Art. 6 see the Bonomi Explanatory Report at paras. 95-108.
[12] For adetailed analysis of Arts. 7 and 8 see the Bonomi Explanatory Report at paras. 109-151.

appears that if the applicable law does not give sufficient attention to the means of the debtor or the needs of the creditor or to any capital settlement the debtor may have received from the creditor then the decision maker can change the quantum to meet any or all of those three concerns.[13]

2. The EU Maintenance Regulation utilised key achievements in the Hague Convention and Protocol

The EU Maintenance Regulation makes significant use of the ideas and the wording adopted by the Hague Convention for administrative cooperation, legal assistance (aid), public bodies, and restrictions on the jurisdiction a debtor can use to modify or make a new decision. The Regulation also fully utilises the Hague Protocol by indicating that the European Union will become a party to it and that those Member States bound by the Protocol will benefit from the abolition of exequatur.[14] The Hague Protocol and the Maintenance Regulation have exactly the same scope provision.

This part will not attempt a comprehensive analysis of the new Hague Maintenance Convention but rather will deal with the provisions that have been particularly influential on the new EU Maintenance Regulation. It will also give some edited highlights of the Convention and make appropriate contrasts with the provisions in the EU Maintenance Regulation.

a) Aims and Objectives

The EU Maintenance Regulation does not have an 'object' provision or a preamble. However, the recitals provide assistance to the competent authorities and courts in interpreting the aims of the Regulation. The overarching objective of the Regulation appears in recital 9 which states that:

'A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities.'

b) Scope

The EU Member States were able to agree a wide scope for the EU Maintenance Regulation because here they were not constrained by the needs of the US and other States to keep the free services of Central Authorities applying only to children and spousal support when it is connected to an application for child support. Article 1(1) of the Regulation provides that: 'This Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity.'[15]

c) Effective access to procedures-Legal Assistance (Aid)

[13] For a detailed analysis of Art. 14 see the Bonomi Explanatory report at paras. 179-183.

[14] Recital 20 to the Regulation says that: 'The 2007 Hague Protocol will be concluded by the Community in time to enable this Regulation to apply.' The bulk of the Regulation applies from 30 months after the date of its adoption, ie from June 2011, see Article 76. See also *supra*.

[15] Recital 11 of the Regulation adds these important words after repeating the words in Article 1(1) 'in order to guarantee equal treatment for all maintenance creditors.' The broad scope at EU level is exactly what was achieved at global level in Article 1(1) of the Protocol because the States that were interested in the Protocol in The Hague wanted a broad scope.

Articles 14-17 of the Convention on effective access to procedures are vital and include the key obligation to provide free legal assistance for child support applications.

The EU Maintenance Regulation in Articles 44-47 on legal aid follows the Hague Convention provisions on legal assistance. The Regulation adds some value by giving a list of what the content of the legal aid 'shall cover as necessary' in Article 45. Another example of added value is that the provision in Article 17 b) of the Hague Convention, which applies in cases concerning maintenance obligations other than those arising from a parent-child relationship towards a person under the age of 21, has been strengthened. Article 17 b) of the Hague Convention provides that:

'an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.'

Article 47(2) of the Regulation has transformed this from an equivalence provision into a most favourable treatment provision:

'a party who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in any proceedings for recognition, enforceability or enforcement, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.'[16]

Some States were concerned during the negotiations in The Hague about the problem of very wealthy people taking advantage of the provisions on free legal aid for child support applications. Much talk focused on the possibility of Bollywood or Hollywood actors or actresses making claims for international child support for their children and it being funded by the taxpayer through legal aid. Most people felt confident that such very wealthy applicants would still prefer to hire their own lawyers rather than get those prepared to work for legal aid. Also many felt that it would not be cost-effective to create an administrative system to handle claims for legal aid in child support cases that would only be designed to weed out a few claims from very wealthy applicants. In The Hague the problem was resolved by allowing the possibility of *ex post facto* recovery of costs rather than *ex ante* exclusion from legal aid. Thus Article 43(2) of the Hague Maintenance Convention provides that:

[16] Article 47(3) also clarifies what happens when a party does not need legal aid to establish the maintenance decision because 'the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.' (Article 14(3) of the Hague Convention and Article 44(3) of the Regulation) and tries to get the decision enforced in another EU country. In order to benefit from Article 47(2) of the Regulation the party seeking enforcement has to 'present a statement from the competent authority in the Member State of origin to the effect that he fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.' This means that a competent authority in the State of origin has to certify that the applicant would have got legal aid had the proceedings in that State required it rather than being so simple that no legal aid was required. This may not be an easy matter and weakens the value of low cost administrative proceedings if the State has to incur costs, by checking what may be a lot of complicated financial data and deciding what is the means test that is appropriate if different means tests apply for legal aid in that country, in helping people to get their decision enforced in other EU Member States.

'A State may recover costs from an unsuccessful party.'

This simple provision means that if a very wealthy applicant gets legal aid to bring a child support application and loses then the State may recover some or all of the costs of the legal aid from that party. During the EU Maintenance Regulation negotiations concerns shifted to the possibility that the equivalent of Article 43(2) of the Hague Convention might be used by a State to recover costs from a not particularly wealthy party who has made a child support application in good faith but was unsuccessful. Thus Article 67 of the Regulation provides that:

'...the competent authority of the requested Member State may recover costs from an unsuccessful party having received free legal aid pursuant to Article 46, on an exceptional basis and if his financial circumstances so allow.'

Recital 36 to the Regulation states that Article 67 would apply 'in particular, where someone well-off had acted in bad faith.'

d) Restrictions on where the debtor can modify a maintenance decision

Article 18 is a major innovation that goes beyond what was previously the position within the EU by limiting the ability of a debtor to modify an existing maintenance decision or to seek a new one when one has already been made in a Contracting State where the creditor is habitually resident. This is the only rule on direct jurisdiction in the Convention. It is very interesting conceptually as it follows the technique of the failed Hague Judgments Convention in having a prohibited basis of jurisdiction but it does it in a very different way. The failed Judgments Convention was, by the time of the draft Convention of 2001, a mixed Convention of what might be called a 'classical' kind. It prohibited several bases of jurisdiction (the black list), it authorised several required bases of jurisdiction (the white list) and it permitted a considerable area of discretion for States to have jurisdiction grounds that were neither prohibited nor required (the grey area). The Hague Maintenance Convention might be categorised as a single Convention (ie recognition and enforcement with only indirect grounds of jurisdiction that only have relevance for recognition and enforcement) plus administrative cooperation and legal assistance. However, Article 18 turns the Maintenance Convention into what can be categorised as a 'flexible' mixed Convention (ie one with a black list and grey area but instead of a white list of direct grounds of jurisdiction found in a 'classical' mixed Convention there is merely a list of indirect grounds of jurisdiction on which recognition and enforcement is based) plus administrative cooperation and legal assistance.[17] Article 18 of the Convention does not create a positive basis of jurisdiction (the habitual residence of the creditor) but if a 'decision' has been made in that jurisdiction then the debtor cannot bring proceedings to modify that decision or make a new decision in another Contracting State as long as the creditor remains habitually resident in the State where the decision was made. However the prohibition does not apply in any of the circumstances described in paragraph 2. It is unfortunate that the term 'decision' is not defined in Article 18. The definition in Article 19 could literally be read as applying only to that chapter (on recognition and enforcement) but it would be helpful to apply it by analogy to what is meant by 'decision' in Article 18. It should only apply to those parts of the 'decision' which concern maintenance obligations (Article 19(2)) and includes decisions of a judicial authority, decisions of administrative authorities and settlements or agreements

[17] See P Beaumont , "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status", (2009) 5 *Journal of Private International Law* 125 at notes 2-9.

concluded before or approved by such an authority (Article 19(1)). This is intended to be a broad definition as 'concluded before' means that something will be classified as a 'decision' as long as the maintenance 'agreement' is reached in the presence of the 'judicial or administrative authority' it does not have to be 'approved' by that authority. The exceptions to the prohibition on the debtor taking his case to another jurisdiction are set out in paragraph 2 of Article 18. They are:

i) Party autonomy. This applies where there is an 'agreement in writing'[18] between the parties to the jurisdiction of the Contracting State in which the debtor is trying to bring the action. However, this party autonomy exception does not apply 'in disputes relating to maintenance obligations in respect of children'. As 'children' is not defined for this purpose it is possible that some child support cases falling within the core scope of the Convention will be caught by the party autonomy exception. This could happen if the adjudicating bodies in a Contracting State were to decide that a case concerning a maintenance obligation in respect of someone aged between 18 and 21 should not be classified as a dispute 'in respect of children' because the person concerned is an adult. States who enter the reservation as to the core scope of the Convention are likely to insist on anyone who is 18 or over being treated as adults and this would, of course, produce entirely predictable results for the parties concerned. For non-reservation States it is harder to predict whether they will treat 18-21 year olds as 'children' for this purpose. In policy terms they want them to get the benefits of the Convention by including them in the core scope and the free legal assistance provisions but it is not so clear that they need to protect them from making bad choices in the context of party autonomy as they are old enough to decide where is the best jurisdiction to resolve their maintenance claims. The policy reason for protecting such young adults would be that they are still the weaker party vis-à-vis their parents or other guardians who are paying for their education, etc and therefore might not make an agreement on jurisdiction that is in their interests. It is worth noting that in the context of the Protocol on Applicable Law and party autonomy for the related issue of choosing the law to govern maintenance obligations anyone aged 18 and above (who is not a vulnerable person) can enter into an agreement designating the law applicable. It is fair to say, however, that the relevant provision in the Protocol, Article 8, contains several safeguards to protect maintenance creditors from their agreement that have no equivalent in Article 18 of the main Convention.

ii) Submission. This occurs where the creditor expressly submits to the jurisdiction of the court that the debtor has brought his action in or where the creditor defends on the merits of the case without objecting to the jurisdiction at the first available opportunity. The policy behind this exception is like that of party autonomy. It is a consent based jurisdiction. The consent of the creditor can be inferred from the creditor contesting the case without objecting to the jurisdiction at the appropriate time.

iii) Avoiding denial of justice. Where the competent authorities of the habitual residence of the creditor (this must be the meaning of 'State of origin') cannot exercise jurisdiction or refuse to exercise jurisdiction to modify the decision or make a new decision. It is very unlikely that the competent authorities in the creditor's habitual residence will not have jurisdiction to hear a case for modification or for a new decision brought by the debtor. After

[18] This is defined in Article 3 d) as 'an agreement recorded in any medium the information contained in which is accessible so as to be usable for subsequent reference'. Thus emails are included. The EU Maintenance Regulation has a similar form requirement in Article 4(2): 'A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".'

all the creditor is at this point the defendant and almost every legal system in the world allows people to sue defendants in their own forum. The only possibility of jurisdiction not existing might be where the legal system uses a different connecting factor than habitual residence to classify where the defendant's own forum is and the creditor might still be habitually resident in that forum but not be in that forum for the purpose of the forum's jurisdictional connecting factor. It is also very unlikely that a competent authority that has jurisdiction over the creditor in an action for modification would decline to exercise jurisdiction but it could happen in times of war or other emergency. Declining jurisdiction will almost always be inappropriate where the debtor is bringing an action in the place where the creditor is habitually resident and that court has already given a decision on maintenance between those parties.

iv) The original decision is unenforceable in the jurisdiction that the debtor wants to bring his action in. There is unfortunate drafting in this exception by referring to the 'State of origin' but the meaning is clear – as in (c) – it refers to the Contracting State where the creditor is habitually resident.This provision will not apply on the basis of a problem with the lack of a basis for recognition and enforcement under Article 20 unless the State where proceedings to modify the decision or make a new decision has a reservation under Article 20(2) in relation to Article 20(1)(c) – the habitual residence of the creditor. Even then the decision may well be able to be recognised on the basis of other grounds of jurisdiction in Article 20(1) or in Article 20(3) that apply in that case. However, it could be the case that the decision will not be recognised because one of the grounds for refusing recognition and enforcement set out in Article 22 applies. It might be questioned whether the drafters of the Convention have created the wrong test. Arguably, the real issue is whether the decision that the debtor would obtain in the creditor's habitual residence, if the proceedings to modify the decision or to make a new decision were to be taken there, cannot be recognised or declared enforceable in the Contracting State where the debtor would prefer to bring that new action. Since the debtor is suing in the 'respondent's' habitual residence if he sues in the creditor's habitual residence, Article 20(1)(a) is always satisfied and there is no reservation against that. Therefore the only basis on which the debtor would not be able to get an enforceable decision in the creditor's habitual residence would be where this decision is contrary to Article 22. This might arise on any of the grounds in Article 22 including paragraph (e) – where the creditor did not appear and was not given proper notice of the proceedings and an opportunity to be heard – or in paragraph (b) because of fraud in connection with a matter of procedure. However, as we cannot foresee whether Article 22(b) or (e) might apply to a case that has not yet been brought by the debtor in the creditor's habitual residence it is clear that the drafters did not make a mistake. Article 18(2)(d) must be read as applying to the original decision given in the creditor's habitual residence and not to the one that the debtor could bring in that forum to modify that decision or make a new one. This has the unfortunate effect that the original decision might not be recognised in a Contracting State where the debtor wants to bring the new or modifying action if that State has a reservation against Article 20(c) and no other basis of jurisdiction under Article 20 can be applied to that case. On the other hand the debtor can only avoid bringing proceedings in the habitual residence of the creditor if the first decision in the habitual residence of the creditor 'cannot' be recognised in the court he wants to escape to. This could only be verified by that court ruling that recognition and enforcement of the original decision is impossible. Even if the court does this and hears the case its decision may not be recognised in the creditor's habitual residence because the authorities in the creditor's habitual residence may conclude that the new or modified decision is made in a jurisdiction that does not create a satisfactory basis under Article 20 (the only possible basis would appear to be 20(1)(f)) or because it breaches Art 22 where they can take their own judgment about whether the modifying court gave its decision in 'violation of

Article 18' (see Article 22(f)). Therefore it may, regrettably, lead to a situation between Contracting States where the original decision of the habitual residence of the creditor is not recognised in the court where the modifying/new decision is given and the modifying/new decision is not recognised or enforced in the country of the habitual residence of the creditor. It is to be hoped that this arises very rarely.

The EU Maintenance Regulation, if it were a Convention, would be classified as a strict double Convention (ie a closed list of direct jurisdiction rules (the white list) - all other grounds of jurisdiction are prohibited – enabling recognition and enforcement to be virtually automatic throughout the EU) plus administrative cooperation and legal aid. It is significantly different from its predecessor, the Brussels I Regulation, in that the jurisdiction rules cover all cases, including where the defendant is domiciled outside the EU without reference to national law.[19] The Regulation has, however, incorporated Article 18 of the Maintenance Convention into Article 8 of the Regulation with only drafting and consequential changes. The prohibition on debtors going to another forum to modify a decision given in the habitual residence of the creditor applies whether the decision was given in a Member State of the EU or in a 2007 Hague Convention Contracting State.[20] Article 18 of the Hague Convention was originally proposed by the EU in the Hague negotiations. It is good to see the protection of the weaker party, the maintenance creditor, extended to limit forum shopping by the debtor once the creditor has obtained a maintenance decision.

e) Public Bodies

The provision on public bodies in the Maintenance Convention (Article 36) is very important because in the real world it may well be a State body that has been paying for the upkeep of a child who stands in the shoes of the maintenance creditor to get back the money from the debtor. By reading Article 36 together with Articles 10 and 15 it is clear that a 'creditor' in relation to applications concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21 includes a 'public body', acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance, when the application is for recognition or recognition and enforcement of a decision, or for enforcement of a decision made or recognised in the requested State, or is made in the terms of Article 20(4), ie where establishment is sought because recognition and enforcement is not possible due to an Article 20(2) reservation. Therefore the public body in all these cases is entitled to free legal assistance.

Apart from a few small consequential and drafting changes Article 36 of the Convention has simply been transposed to Article 64 of the EU Maintenance Regulation with no substantive deletions or additions.

3. Jurisdiction rules under the EU Maintenance Regulation

a) Primary grounds: where the creditor or the defendant are habitually resident in the EU, etc

[19] See 3 *infra* for a discussion of the new subsidiary ground of jurisdiction and of the *forum necessitatis*.
[20] Recital 17 clarifies that the rule applies in relation to non-EU Hague Contracting States 'insofar as the Convention is in force between that State and the Community and covers the same maintenance obligations in that State and in the Community.'

Articles 3-5 of the new EU Maintenance Regulation create the primary direct grounds of jurisdiction in the EU. If these three articles do not apply, ie where neither the creditor nor the defendant is habitually resident in an EU Member State, where there is no valid choice of court agreement selecting an EU Member State, where the defendant has not submitted to the jurisdiction of a court in an EU Member State, where there is no valid jurisdiction based on the status of a party or the parental responsibility of the child for whom maintenance is being sought (such a jurisdiction is not possible if it is based solely on the nationality of one party), then the subsidiary grounds of jurisdiction in Articles 5 and 6 can be invoked.

The grounds for a valid choice of court agreement are narrower than its predecessor in Brussels I. The agreement must be in writing – it cannot be made orally and only evidenced in writing. The agreement cannot apply to a dispute relating to a maintenance obligation towards a child under the age of 18. The chosen court must have some connection with the parties as set out in Article 4(1).

b) Subsidiary grounds

In the new Maintenance Regulation the EU has created a subsidiary jurisdiction in Article 6 'Where no court of a Member State has jurisdiction pursuant to the' main rules of jurisdiction (which are consistent with the indirect grounds of jurisdiction in Article 20(1) of the Hague Convention) 'the courts of the Member State of the common nationality of the creditor and the debtor shall have jurisdiction.' A court in the EU that takes jurisdiction on the basis of Article 6 will be taking jurisdiction on a basis that would not be recognised or enforced under the Hague Convention and yet will be automatically enforced within the EU. This could damage the rights of EU nationals who are living in non-EU Hague Contracting States and may even have also become nationals of a non-EU State. Parties A and B could both be nationals of Germany but have emigrated to New Zealand where they met, got married, had children and obtained New Zealand nationality.[21] While the parties and children are still habitually resident in New Zealand, Party A brings proceedings in Germany to get maintenance from Party B. Party B no longer has assets in Germany but has a small house in Italy. Party B's lawyers in New Zealand will have to advise him that if he does not defend the maintenance claim in Germany he is liable to have any decision against him enforced against the house in Italy. Had the Hague 2007 Maintenance Convention disconnection clause not given priority to EU recognition rules then the lawyer would have been advising his client that he need only worry about the German action if he had assets in Germany not anywhere in the EU. This subsidiary jurisdiction rule seems to be a homeward trend rule in the EU permitting EU nationals living abroad to forum shop in the EU even when there is a much more suitable forum outside the EU. In addition there is no international *lis pendens* or *forum non conveniens* rule in the EU Maintenance Regulation.[22] Thus even if Party B had already begun proceedings in New Zealand against Party A and these are nearly concluded by the time Party A brings proceedings against Party B in Germany, the German courts will not be able to decline to exercise jurisdiction.

[21] This is a hypothetical example based on the assumption that it is possible for the parties to hold both German and New Zealand nationality and on the basis that New Zealand will be a Hague Maintenance Convention Contracting State.

[22] Though a discretionary international *lis pendens* rule was seriously considered in the latter stages of the negotiations and had the support of several Member States. It was felt that this issue must be addressed when the Brussels I Regulation is revised.

It is also possible that a debtor could try to get a negative declaration in an EU Member State that he does not owe any maintenance based on the common nationality jurisdiction ground and that declaration has to be enforced throughout the EU. This could arise in a case where two parties are cohabiting in a State outside the EU that recognises maintenance obligations between cohabitees. They are habitually resident in the non-EU State and may even have nationality there. The man moves back to the country of his nationality in the EU and seeks a negative declaration there. That country does not provide for maintenance obligations between cohabitees. It is, however, required by the EU Maintenance Regulation to apply the rules of the Hague Protocol to determine the applicable law.[23] Article 3 of the Protocol provides the general rule that maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. This takes us back to the law of the woman and would prevent the man from getting his negative declaration. The special rule in Article 5 applies to 'spouses' and even if it is deemed to apply to cohabitees it will not help the man in this case because the court can only displace the general rule if the law of another State has a closer connection with the marriage. If the court decides that Article 5 does not apply to cohabitees then the special rule on defence in Article 6 might look promising for the debtor because it gives him a right to object to the maintenance obligation that arises under the law of the creditor's habitual residence if 'there is no such obligation under both the law of the habitual residence of the debtor and the law of the common nationality of the parties, if there is one'. He might quickly establish his habitual residence back in the country of his EU nationality. However, Article 6 only helps the debtor when he is the defendant. It says that 'the debtor may contest a claim from the creditor' if the conditions are met. This case illustrates how the Protocol being applied in the EU helps to reduce the types of cases in which the subsidiary jurisdiction will do harm. However, it may be that the debtor will use the common nationality jurisdiction hoping that the creditor will not defend the action and that the applicable law rules might therefore be neglected or incorrectly applied by the court.

The Maintenance Regulation has also created a *forum necessitatis* in Article 7. This jurisdiction is also not reflected in the indirect grounds of jurisdiction in Article 20 of the Hague Convention. However, its philosophy is much more respectful of the jurisdiction of third States than the common nationality subsidiary jurisdiction. Article 7 will in practice only be applicable on an exceptional basis when no EU court has jurisdiction under the other provisions of the Regulation and proceedings 'cannot reasonably be brought or conducted' in a non-EU State to which the dispute is closely connected. The purpose of this provision is to avoid a denial of justice that could arise when the appropriate non-EU forum is not available eg due to a civil war (see recital 16). In these rare cases it seems reasonable that the decision should be recognised and enforced throughout the EU even though it would not be recognised under the Hague Convention rules and the parties may well have strong connections with non-EU Hague Contracting States.

4. Conclusion

[23] This assumes that the Protocol's scope will be interpreted as including maintenance obligations between cohabitees either as 'arising from a family relationship' or 'marriage'. This will ultimately be a matter for the European Court of Justice as the Protocol has been ratified by the European Union. Exactly the same words will have to be interpreted by the European Court of Justice in deciding on the scope of the EU Maintenance Regulation, see Article 1(1). If the matter arose in an EU Member State not applying the Hague Protocol, ie the UK and possibly Denmark, then the national court would apply the *lex fori*. The courts in the UK would only have jurisdiction if both parties were domiciled in a part of the UK, see Art. 2(3) of the Regulation. This is much less likely than both parties still having nationality in the UK.

If one looks back to the impact assessment for the proposed EU Maintenance Regulation we can see what the Commission hoped to achieve by adopting the Regulation. It set out five objectives:

1) Create harmony on recognition and enforcement in the EU by eliminating the application of the Hague Maintenance Enforcement Convention of 1973 between Member States.
2) Abolish exequatur.
3) Simplify enforcement.
4) Enhance co-operation.
5) Clarify what is the applicable law. Although it merely says that it 'could be useful' to establish a full set of conflict of laws rules.[24]

[24] See pages 10-12 of the Impact Assessment, SEC (2005) 1629. It is surprising how something that the Commission thought was merely 'useful' in 2005 has become a *sine qua non* on which the abolition of exequatur is founded. Recital 24 of the Maintenance Regulation provides that: 'The guarantees provided by the application of rules on conflict of laws should provide the justification for having decisions relating to maintenance obligations given in a Member State bound by the 2007 Hague Protocol recognised and regarded as enforceable in all the other Member States without any procedure being necessary and without any form of control on the substance in the Member State of enforcement.' Whereas Recital 26 provides that: 'For decisions on maintenance obligations given in a Member State not bound by the 2007 Hague Protocol, there should be provision in the Regulation for a procedure for recognition and declaration of enforceability. That procedure should be modelled on the procedure and grounds for refusing recognition set out in Regulation (EC) No 44/2001...' The UK reluctantly accepted that the Regulation would continue to apply the exequatur provisions to UK maintenance decisions that require to be recognised and enforced in another Member State. The concessions that the UK won were to introduce some time limits into the declaration of enforceability process that were not contained in Brussels I, see Articles 30 (30 days) and 34(2) ('90 days from the date it was seised, except where exceptional circumstances make this impossible'), and to introduce into the review clause (Article 74) the requirement that within five years of the date of application of the Regulation the Commission will submit a report that inter alia includes 'an evaluation of the functioning of the procedure for recognition, declaration of enforceability and enforcement applicable to decisions given in a Member State not bound by the 2007 Hague Protocol.' It is the UK's contention that it is not necessary to have harmonised applicable law rules for maintenance obligations in order to abolish exequatur in relation to UK maintenance decisions. The only substantive difference brought about by the abolition of the exequatur is the abolition of the public policy defence at the stage of the declaration of enforceability. The vast majority of maintenance decisions in the UK concern child or spousal support and it is inconceivable that these would be regarded as contrary to public policy in other Member States. The only conceivable basis for the use of public policy would be in those Member States that have a strong objection to same sex relationships refusing to enforce a maintenance decision obtained by one UK registered partner against another (particularly where one or more of those partners has a strong connection with the State of enforcement and a different result would have been arrived at had the UK been applying the 2007 Hague Protocol). The UK understands this risk but regards it as being so unusual a case that it is not necessary to maintain public policy just for this purpose. It believes that a report on the operation of the exequatur procedure for UK judgments will reveal that public policy is not used and therefore can safely be abandoned even without harmonisation of choice of law rules. It is worth remembering that Article 13 of the Hague Protocol permits Member States who are bound by it to refuse to apply the law determined under the Protocol 'to the extent that its effects would be manifestly contrary to the public policy of the forum.' Thus a Member State that objects to maintenance payments having to be made by one same sex registered partner to another may refuse to award such maintenance payments even though the maintenance creditor is habitually resident in a country that does make such awards and that is the applicable law under the Protocol. Normally it will not need to resort to public policy because the Article 6 defence will apply as the debtor will usually be habitually resident in the country where the creditor is suing him if the creditor is not suing in his own habitual residence. Public policy might come into play when the jurisdiction is based on Article 3(c) or (d) of the Regulation. Those courts would be able to exercise jurisdiction over a person that has a connection with that country that is not purely nationality and yet falls short of habitual residence and who seeks a declaration that his status is single and, as an ancillary point, he owes no maintenance to a specified man. In such an unlikely case the court might apply public policy to refuse to make a maintenance award even though the Protocol would otherwise require the court to apply the law of the habitual residence of the creditor that does award maintenance.

It is worth observing that objectives 4 and 5 have been achieved through international negotiations in The Hague. Objective 3 has only been achieved to a very limited extent in The Hague[25] and little or no further progress has been made on the actual enforcement stage in the EC Regulation.[26] Objectives 1 and 2 are achieved through the Regulation. The new Hague Convention on its own creates the basis for achieving objective 1 because it gives priority to the new Convention over the Hague 1973 Maintenance Enforcement Convention (Article 48) and prioritises the recognition and enforcement rules of the REIO as between Member States of the REIO (Article 51(4)). Therefore the great achievement of the new Maintenance Regulation that could not have been achieved in The Hague is the abolition of exequatur. Yet it is good to remember what the Commission itself said about this objective in its impact assessment. It refers to 'exequatur' as 'intermediate measures' and acknowledges that such measures do not 'significantly contribute to time delays in maintenance claims' and that their abolition 'would do little to accelerate enforcement'.[27] It is also relevant to point out that The Hague, where the applicable law rules were agreed, has laid the foundation for the abolition of exequatur in the EU as between Member States who will become bound by the rules contained in The Hague Protocol.

The Commission also acknowledged in its impact assessment that: 'A considerable number of the Green Paper responses and expert informants were in favour of waiting for the findings of the future Hague Convention (2007), so in fact were advocating the status quo in the interim.'[28]

Had the Commission taken this advice it may have been able to construct its Regulation on the basis of the consensus arrived at in The Hague negotiations and produced a well crafted Regulation that takes as its starting point the two Hague instruments and builds upon it with the two areas of added value, revised direct rules of jurisdiction and the abolition of exequatur. It would have had to create a separate track for the UK and possibly Denmark who will not be party to The Hague Protocol and therefore have to have an exequatur light. This package was agreed in the Council anyway in 2008 so it made little difference whether the EU and Hague negotiations were sequential or parallel apart from a certain amount of wasted resources caused by adopting the latter approach. What is crucial, and it is a great sign of wisdom in the EU that it has happened, is that the Hague negotiations be concluded before the Regulation is adopted. By prioritising the international arena the EU has given respect to the merits of reverse subsidiarity. It has reaffirmed its status as a leading and constructive player in international negotiations. It achieved most of its original objectives for the Regulation at The Hague and paved the way for the one remaining objective to be achieved within Europe, and, perhaps most significantly, has achieved something of far greater practical relevance than it had dared to achieve in its original objectives – free legal

[25] Articles 32-35. Minimum standards for actual enforcement are created for the first time in a multilateral treaty on maintenance. Enforcement must be prompt, effective, the range of measures available for cases under the Convention must no less than that available for domestic cases, and the applicant does not need to take further action to get enforcement when he or she has brought his application through a Central Authority for a decision to be declared enforceable or registered for enforcement.

[26] See Articles 41 to 43 that essentially leave the procedure for actual enforcement to be 'governed by the law of the Member State of enforcement' (Art. 41(1)). This is a much less ambitious result than that envisaged by the Commission proposal and reflects the resistance by many Member States to any harmonisation of enforcement procedures. In comparison to the enforcement provisions of the Hague Convention the added value is that the person seeking enforcement is 'not required to have a postal address or an authorised representative in the Member State of enforcement'.

[27] Op cit n.23 at p.12.

[28] *Ibid* at p.20.

assistance for all child support applications[29] – because of the helpful leverage of an important third State.

[29] The lack of legal aid for creditors was highlighted as a problem in the impact assessment, p.5, but elimination of this problem was obviously not regarded as a reasonable aim for an EU measure.