Professor Kurt Siehr

International Maintenance and

Child Support Enforcement

Improving the International Recovery of Maintenance

Kurt Siehr*

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I. International Recovery of Maintenance

I need not tell you anything about the virtues of globalisation. Your presence is a good example for the improvement of travelling, of organising international conferences and of joining them. There are, however, also serious disadvantages created by a globalisation of human failings. Taxes are avoided, cheap labour exploited and maintenance obligations are not paid. The easiest way to do it is to emigrate and settle somewhere without giving any address.

II. Improving Maintenance Recovery

1. Jurisdiction

The twelfth session of the Hague Conference, sitting in 1972, prepared two conventions on maintenance, one on the applicable law (1973 Convention on the Law Applicable to Maintenance Obligations = LAMO)[1] and the other on recognition and enforcement of foreign maintenance decisions (1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations = REDMO).[2] At this session, serious concerns were raised as to potential abuses of the conventions by the creditor's forum shopping by moving to a maintenance paradise, instituting a suit for maintenance at his place of habitual residence and enforcing it at the debtor's domicile or in any other country where assets of the debtor may be seized.[3]

These pessimistic anticipations did not realise. Up to now there is no published case in which there is clear and convincing evidence that the maintenance creditor maliciously moved to a maintenance haven in order to get better maintenance than in his former place of habitual residence.

Another strange experience has been made. According to the Hague Maintenance Recognition Convention (REDMO), foreign maintenance decisions are recognised even if they were given by the court at the plaintiff's residence where the court could apply the lex fori as the law applicable to the maintenance claims. The plaintiff, however, could also file the suit at the defendant's place of habitual residence. This court could not decline jurisdiction because of the burden to apply foreign law on maintenance and foreign guidelines to fix the amount of maintenance to be paid to the plaintiff. It would have been easier, so they said, if the plaintiff had brought his claim in the country of his own residence and had asked to enforce this decision in the defendant's place of residence. Because the plaintiff failed to pursue this more convenient strategy, a Swedish court charged the successful plaintiff with paying the costs of the court at the defendant's residence.[4]

2. Law Governing Maintenance

a) Multilateral Sources

There are four important multilateral conventions on maintenance obligations:

- the New York Convention of 1956 on the Recovery of Maintenance;[5]
- the Nordic Convention of Oslo of 1962 on the Recovery of Maintenance;[6]

- the Hague Convention of 1973, as already mentioned;[7] and
- the Inter-American Convention of Montevideo of 1989 on Support Obligations.[8]

Only the Hague and the Montevideo Conventions formulate choices of law-provisions.

Articles 4 to 6 of the Hague Convention read:

> Article 4 Hague Convention 1973
>
> The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to in Article 1.
> In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.
>
> Article 5 Hague Convention 1973
>
> If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply.
>
> Article 6 Hague Convention 1973
>
> If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seized shall apply.

Quite different is the approach of the Montevideo Convention of 1989. Article 6 of this instrument reads:

> Article 6 Montevideo Convention 1989
>
> 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.

If foreign law is applicable and violates public policy, it may be disregarded under Article 22 of the 1989 Convention.

The main difference between these two set of rules is the method of favouring the maintenance creditor. The Hague Convention formulates a rule in Article 4 and provides two subsidiarily applicable rules: common national law and lex fori. The Montevideo Convention serves a menu of four choices alternatively applicable whichever is the most favourable to the creditor. Common to these two set of rules is the *"favor creditoris"*.

b) Children as Creditors

As far as the Hague Convention is concerned, the Convention and the Articles 4 – 6 of the 1973 instrument worked well. In the early days of the predecessor convention of 1956[9] and of the 1973 Convention, one special problem had to be solved. In many countries, children of unmarried mothers can only file a successful law suit for maintenance against their father if paternity has been established beforehand. As such matters of status had been excluded by the 1973 Convention (Article 2), every forum applied to the paternity suits national conflict rules and, if paternity had been established, awarded maintenance payments to the child. If such a decision had to be enforced abroad, the foreign court, asked to recognise and enforce the award, had to make up its mind whether this could be done although, because of different rules for paternity suits, no maintenance would have been awarded in the recognising state had the suit been brought to court in the latter. Fortunately, the foreign courts, asked to

recognise foreign maintenance decisions, correctly applied the 1973 Hague Maintenance Recognition Convention and recognised the maintenance obligation in a "delibazione parziale" and declined to recognise any paternity decision. They "partially" recognised the foreign judgement.

c) Partners as Creditors

In recent years, many countries passed statutes on registered partnerships between homo- and heterosexual partners. All of these partnership statutes provide that partners have reciprocal support duties similar to those of a married couple.

Problems arise in cases of an international setting. Imagine a partnership created in Norway and afterwards emigrated to some warmer place in Italy. The Italian sun also melts the partnership bonds and a maintenance suit is filed in Italian courts by the deserted partner against the disloyal adulterous partner. Italian courts will look into the Hague Maintenance Convention (LAMO) and decline to award maintenance under the Italian law as the law of the actual habitual residence of the maintenance creditor because there is no support obligation between registered partners in Italy. Italian courts may apply the partners' common national law under Article 5 of LAMO. This may help if the partners are Norwegians because the Norwegian statute on registered partners provides support obligations. What, however, if there is no common national law? This blind alley is due to the new phenomenon of registered partnerships which do not exist everywhere. Therefore, a subsidiarily applicable rule should be created in order to escape the blind alley. Maintenance obligations should be awarded according to the law

under which the partnership has been created. This *"lex originis"* should apply. It can be qualified as a contractual or quasi-contractual obligation which exists besides the potential sources of family and partnership law.

d) Ex-Partners as Creditors

One of the most problematic provisions of the Hague Convention LAMO is Article 8 which reads:

> Article 8 Hague Convention 1973
>
> Notwithstanding the provisions of Articles 4 to 6, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations.
> The preceding paragraph shall apply also in the case of a legal separation and in the case of a marriage which has been declared void or annulled.

Post-nuptial maintenance obligation are petrified insofar as they are fixed to the law governing divorce at the time of divorce. The same would be true by analogy to the termination of a registered partnership.

The problems of Article 8 (1) LAMO are twofold: is it correct and fair to tie the maintenance obligations to the law governing divorce? Very often the divorce decree is given by the forum at the plaintiff's or defendant's place of habitual residence and the lex fori governs divorce. It is very unlikely that this law has the closest connection with the maintenance dispute. Therefore, Article 8 (1) LAMO should be revised and post-nuptial maintenance obligations should be governed by the law governing support immediately before the divorce.

The other problem is whether the post-nuptial maintenance obligation should be fixed immutably to the time of divorce. Some courts deviated from this concept by applying either a new common national law,[10] or by recognising a choice of law by the parties.[11] Of course, the parties are free to stipulate a contract and insert a choice of law-clause. Without such an agreement, the law governing post-nuptial maintenance should be governed immutably by the law governing the last nuptial support payments.

3. Legal Assistance to Enforce Maintenance Decrees

Law enforcement in international affairs is a crucial problem. We all know this from the UN Convention of 1956 on the Recovery of Maintenance. In many countries, lack of personnel and lack of funds for attorneys' fees jeopardise many incoming requests for enforcement from not being enforced. Therefore, the European Communities try to establish a network of national Central Authorities in charge of collecting, transmitting and enforcing foreign decisions on maintenance obligations.[12] This instrument has not yet entered into force. Without common endeavours to improve international legal assistance, all efforts in the area of private international law may be in vain.

III. Summary

1. There are several multilateral conventions on maintenance obligations. The most important are the Hague Convention of 1973 on the Law Applicable (LAMO) and the Enforcement of Foreign Support Decrees (REDMO).

2. Problems to apply the LAMO Convention to children have been solved.
3. The LAMO Convention cannot be the exclusive instrument for maintenance obligations between registered partners. Subsidiarily, the *lex originis* (whether qualified as contract or status) has to be applied.
4. Post-nuptial maintenance should be governed by the law governing the last maintenance obligations owed as spouses.
5. Central authorities should be established in order to streamline international legal assistance for recovery of maintenance.

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[1] Conférence de La Haye (ed.), Collection of Conventions (1951 – 1996), (The Hague 1997) No. XXIV.

[2] Collection (supra no. 1) No. XXIII.

[3] Actes et documents de la Douzième Session (1972), vol. IV (The Hague 1973) p. ....

[4] Tingsrätt Malmö, Der Amtsvormund 1973, 515.

[5] 268 U.N.T.S. 3 and 32; 649 U.N.T.S. 330.

[6] Reproduced in: *Essén/Pålsson* (eds.), Konventionssamling i internationell privaträtt, (3rd ed. Lund 1988) p. 70.

[7] Supra no. 1.

[8] Reproduced in: 56 Rabels Zeitschrift 157 (1992).

[9] Collection (supra no. 1) No. VIII.

[10] OLG Hamm 11 (March 1993, FamRZ 1994, 573 = IPRspr. 1993 Nr. 77.

[11] Hoge Raad 21 February 1997, Nederlands Internationaal Privaatrecht 1997 No. 70; and *Boele-Woelki*, IPRax 1998, 492 – 495.

[12] Draft Convention of 6 November 1990 on the Simplification of Procedures for the Recovery of Maintenance, reproduced in: *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht (10th ed. Munich 2000) No. 221.