SC 2007 CHILD SUPPORT

MAY 2022

INFO. DOC. NO 2

Title	Position paper of the European Association of Private International Law (EAPIL) – *available in English only*
Document	Info. Doc. No 2 of May 2022
Author	EAPIL
Agenda Item	N/A
Mandate(s)	N/A
Objective	N/A
Action to be Taken	For Decision ☐ For Approval ☐ For Discussion ☐ For Action / Completion ☐ For Information ☒
Annexes	N/A
Related Documents	N/A

European Association of Private International Law (EAPIL)

POSITION PAPER

in response to the Hague Conference on Private International Law's
invitation to participate as an Observer in the
First Meeting of the Special Commission on the practical operation of the

2007 "*Child Support*" Convention and its Protocol on *Maintenance obligations*

11 May 2022

The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has more than 360 members, mostly academics and practitioners, based in more than 60 countries.

By this position paper, EAPIL intends to take part in the discussion launched by the Hague Conference on Private International Law (HCCH) on cross-border recovery of maintenance obligations under the application of the international instruments concluded in 2007 on its own initiative.

The paper was drafted by a Working Group consisting of ***Francesco Pesce*** *(Coordinator - University of Genoa, Italy),* ***Alexandre Boiché*** *(Lawyer in Paris),* ***Tena Hoško*** *(Zagreb University),* ***Anna Nylund*** *(Bergen University),* ***Ian Sumner*** *(Tilburg University),* ***Lara Walker*** *(Warwick University), and* ***Anna Wysocka-Bar*** *(Jagellonian University).*

The paper was approved by the Scientific Council of the Association on ..... May 2022 and will be submitted to the Association's General Assembly for endorsement in accordance with the Association's Statute.

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The European Association of Private International Law (EAPIL) draws the attention of the Special Commission on the following issues:

I. the concept of ***marriage/spouse***, being *de jure* included in the scope of application of the Convention, unlike other family relationships to which the Convention might apply by virtue of declaration under Art. 63 of the Convention, has a pivotal role in determination of the Convention's scope. The main problem arises with reference to **same-sex marriages**. However, other relationships **that could be equated to marriage** in the national law of the State of origin, such as cohabitation, should also be considered. There are two potential options: (i) allow each Contracting State to define the concept based on its national law (so that differences between the law of the State of origin and the requested State can be faced accordingly) or (ii) find an autonomous definition of the concept;

II. the concept of **creditor**: based on domestic experiences, it is clear that there are two opposing models concerning the formal ownership of the legal action. On the one hand, those systems where it is the child him/herself who qualifies as 'creditor' acting for the protection of his/her own interests, even if procedurally through an adult (parent) acting on his/her behalf. On the other hand, some State laws provide that a dependent child cannot be the creditor, so the action for the maintenance recovery is brought by the parent on his/her *own* behalf. It seems that a preference should be (uniformly) given to always granting a **direct indication of the real creditor**, even in case of a child;

III. the concept of **residence**: a more precise explanation seems to be appropriate on (i) the "**minimum threshold"** which can be requested (in addition to the negative definition which is fixed by the second sentence of Art. 9); and/or (ii) the fact that it should be possible for the applicant to be considered as resident in more than just one Contracting State, making him/her able to **apply before different Central Authorities under Art. 9**;

IV. the (uniform) interpretation of **Art. 4 of the Protocol**, considering that the CJEU has explained how this provision should be interpreted when a maintenance debtor applies on the basis of a change in his income, for a reduction in the amount of maintenance awarded by a decision that has become final (see *Mölk*, C-214/17): considering that the CJEU's interpretation is only binding for those Contracting States which are EU Member States, it would be necessary to discuss it with non-EU Contracting States, in order to understand how do they interpret this provision

V. The relationship between the 2007 Child Support Convention and the **Lugano II Convention**, as all EU Member States and **Norway** are parties to both instruments: the instruments seem to suggest different solutions, each pointing to the other one. Considering that Article 52 of the 2007 Child Support Convention allows creditors to select an instrument or arrangement that has more effective rules than the Convention, this could also be interpreted as giving the creditor the **right to choose between** the 2007 Child Support Convention and the Lugano II Convention. The principle of ***favor executionis*** should undoubtedly guide the choices of the court, where the convention to be applied is not directly indicated by the creditor/claimant. In the writers' opinion, it would be appropriate to provide for **a specific duty to inform creditors of the possibility to choose** between the two instruments, in certain situations.

N.B. The abovementioned issues are further explained in the full document that can be downloaded from EAPIL website at https://eapil.org/wp-content/uploads/2022/05/..... (*exact hyperlink to be defined*).