

APPLICATION D'UN INSTRUMENT SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE SANS EGARD AU CARACTERE INTERNATIONAL OU INTERNE DE LA RÉCLAMATION D'ALIMENTS

Note établie par Philippe Lortie, Premier secrétaire

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APPLICATION OF AN INSTRUMENT ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE IRRESPECTIVE OF THE INTERNATIONAL OR INTERNAL CHARACTER OF THE MAINTENANCE CLAIM

Note drawn up by Philippe Lortie, First Secretary

*Document préliminaire No 11 de mai 2004
à l'intention de la Commission spéciale de juin 2004
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille*

*Preliminary Document No 11 of May 2004
for the attention of the Special Commission of June 2004
on the International Recovery of Child Support
and other Forms of Family Maintenance*

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Introduction

1. During its 12-16 January meeting, the Drafting Committee asked the Permanent Bureau to prepare a note in relation to the international character of the maintenance claim. The Committee was of the view that such a note would be useful both for its work and for the discussions during the Special Commission of June 2004. The Special Commission may consider whether a provision is needed defining the territorial / personal scope of different chapters with the Convention.¹ See for example Article 2(3) of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* (the 1973 Convention on Recognition and Enforcement) which provides that:

"[The Convention] shall apply irrespective of the international or internal character of the maintenance claim and whatever may be the nationality or habitual residence of the parties."

2. Article 2(3) is two-fold. The first part of the provision deals with the international or internal character of the maintenance claim, which is the subject of this note. The second part of the provision qualifies the reciprocity principle, in relation to recognition and enforcement matters, included in the preamble of the Convention that states "[d]esiring to establish common provisions to govern the reciprocal recognition and enforcement of decisions relating to maintenance obligations ...". Notwithstanding the fact that the 1973 Convention on Recognition and Enforcement applies when, and only when the decision stems from another State Party to the Convention, the nationality and habitual residence of the parties at the time of recognition and enforcement are not taken into consideration.² Experts attending the June 2004 Special Commission may wish to consider including a similar provision in the Working Draft in relation to recognition and enforcement of maintenance decisions.³ However, the issue of reciprocity in the context of co-operation is out of the scope of this note and is considered in part in the context of legal aid and assistance.⁴

3. In the study on the establishment of parentage, the Permanent Bureau took as a working assumption that the international recovery of child support and other forms of family maintenance will generally arise from two different scenarios.⁵ "The first situation consists of the creditor taking measures for the international recovery of maintenance granted, initially, in a purely domestic context, when both the creditor and the debtor were in the same jurisdiction. The second situation is where the creditor is claiming maintenance and seeking a maintenance decision against a debtor situated in

¹ See Prel. Doc. No 7 of April 2004, Working Draft of a Convention on the International Recovery of Child Support and other Forms of Family Maintenance, prepared by the Drafting Committee which met at The Hague 12-16 January 2004, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (the "Working Draft"), footnote 16, available at < <http://hcch.net> > under "Work in Progress".

² Naturally, the nationality of the parties or the place of their habitual residence is taken into consideration with regard to the indirect rule of jurisdiction under Article 7.

³ See Michel Verwilghen, "Explanatory Report to the 1973 Conventions", in *Acts and Documents of the Twelfth Session* (1972), Tome IV, *Maintenance obligations*, at paragraph 12, p. 389, and paragraph 34, p. 398, for additional information in relation to reciprocity.

⁴ See Prel. Doc. No 10 of May 2004, Administrative and Legal Costs and Expenses under the New Convention on the International Recovery of Child Support and other Forms of Family Maintenance, including Legal Aid and Assistance, Report drawn up by William Duncan, Deputy Secretary General, with the assistance of Caroline Harnois, Legal Officer, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance, paragraphs 14-19, 22-24 and 41, available at < <http://hcch.net> > under "Work in Progress".

⁵ See Prel. Doc. No 4 of April 2003, Parentage and International Child Support - Responses to the 2002 Questionnaire and an Analysis of the Issues, Report drawn up by Philippe Lortie, First Secretary, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance, paragraph 2, available at < <http://hcch.net> > under "Work in Progress".

another jurisdiction. In both cases, a question of parentage may arise implicating at least two jurisdictions.”⁶

A) Co-operation Irrespective of the International or Internal Character of the Maintenance Claim

4. While temporarily living in State B, a child Z was conceived and born in a common law relationship between X and Y which had their habitual residence in State A. After several years, X, Y and Z returned to State A where shortly thereafter they separated. X claimed maintenance against Y on behalf of Z. Unfortunately, documentary evidence in relation to parentage was left behind in State B. In this situation, even though both parties reside in the same jurisdiction, the creditor might seek the assistance of the Central Authority in State B in order to obtain the documentary evidence⁷ or to establish parentage.⁸ The example of parentage is one among others where assistance from a foreign Central Authority could be sought in relation to what appears to be a purely domestic maintenance claim.

5. Another example would be a request for assistance to locate the debtor.⁹ It could well be that the debtor is hiding in the same jurisdiction as the creditor. However, because he cannot be found the creditor will seek the assistance of the foreign Central Authorities of the jurisdictions where he is most likely to be found. Again, if the debtor receives income from outside the common place of residence or if he has assets outside it, the creditor should be able to seek the assistance of the foreign Central Authorities concerned in order to obtain information concerning these incomes and the location of those assets.¹⁰

B) Recognition and Enforcement Irrespective of the International or Internal Character of the Maintenance Claim

6. Another possible request for assistance could be in relation to recognition and enforcement of a maintenance decision.¹¹ In accordance with Article 8(b) and Chapters IV and V of the Working Draft, after locating other sources of income and learning of other financial circumstances of the debtor, including assets, outside the jurisdiction of common habitual residence, the creditor should be able to seek recognition of the purely internal maintenance claim and to enforce against the debtor's income and assets in the foreign jurisdiction. In that respect, the creditor should have at her / his disposal measures such as the ones listed under Article 35 of the Working Draft. A similar possibility should be given to a public body if reimbursement could be obtained against the debtor by the public body¹² or if it is entitled *ipso jure* to seek recognition or claim enforcement of the decision in place of the creditor.¹³

⁶ *Ibid.*

⁷ Prel. Doc. No 7, Articles 8(j) and 19.

⁸ *Ibid.*, Articles 8(m) and 20. That is if the provision was included in the new instrument. See Prel. Doc. No 5 of October 2003, Report on the First Meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5-16 May 2003), drawn up by the Permanent Bureau, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance, paragraph 126, available at < <http://hcch.net> > under “Work in Progress”.

⁹ *Ibid.*, Article 8(d).

¹⁰ *Ibid.*, Article 8(e).

¹¹ *Ibid.*, Article 8(b).

¹² *Ibid.*, Article 39.

¹³ *Ibid.*, Article 40.

C) Applicable Law

7. Even though the Working Draft does not include at this point a Chapter concerning applicable law, it is worth examining in advance the issue of scope concerning the international or internal character of the maintenance claim.¹⁴ First, in relation to reciprocity, it is worth noting that the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* provides that “*La Convention ne s’applique qu’aux cas où la loi désignée par l’article premier, est celle d’un des Etats contractants*”¹⁵ whereas the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* provides that “[t]he law designated by this Convention shall apply irrespective of any requirement of reciprocity and whether or not it is the law of Contracting State”¹⁶ making these rules universal. Under the 1973 Convention on Applicable Law, a domestic court, in relation to a maintenance claim, could apply the law of a foreign State of the common nationality of the creditor and the debtor because the creditor would be unable to obtain maintenance under the law of her / his habitual residence.¹⁷ Furthermore, the foreign law applied to a divorce or a legal separation could also be applicable to a maintenance claim irrespective of the international or internal character of the maintenance claim at the time.¹⁸ But the new instrument should apply irrespective of the nationality and habitual residence of the parties to the maintenance claim.¹⁹

Conclusion

8. In the light of the examples examined above, it is recommended to include in the Working Draft a provision such as Article 2(3) of the 1973 Convention on recognition and enforcement with regard to the international or internal character of the maintenance claim. Such provision could in any event apply to the chapters dealing with co-operation, recognition and enforcement and public authorities. The inclusion of a provision such as Article 2(3) of the 1973 Convention would provide continuity with respect to that treaty and would have the advantage of avoiding the need to qualify a maintenance claim as international or internal.

¹⁴ See Prel. Doc. No 5 of October 2003, Report on the First Meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5-16 May 2003), drawn up by the Permanent Bureau, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance, paragraphs 95-109, available at < <http://hcch.net> > under “Work in Progress”.

¹⁵ See, the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children*, Article 6.

¹⁶ See, the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, Article 3.

¹⁷ *Ibid.*, Article 5.

¹⁸ *Ibid.*, Article 8. However, that provision has been criticised and may not be retained.

¹⁹ *Supra*, paragraph 2, notes 2 and 3.