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**INFORMATION NOTE AND QUESTIONNAIRE CONCERNING
A NEW GLOBAL INSTRUMENT ON THE INTERNATIONAL RECOVERY
OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE**

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Introduction

Family relations in Brazil have the same rules throughout the country, there is since 2002 a new Civil Code that has a uniform regulation for the matter. This Code has replaced the 1916 Civil Code, but maintained the same rules for child support. The procedural aspects of support obligations have a special law, also uniformly used by the state judiciary. The matter is mainly upon the jurisdiction of the state courts. The Federal Courts also have jurisdiction in relation to support obligations when an international agreement is being applied.

In the Brazilian system all the decisions on alimony are sanctioned by a judge in a court proceeding, even when the parties agree on its terms. Only judge orders have the quality of being mandatory and enforceable.

As for international obligations, Brazil is a party to the New York Convention. It signed was in 1958, and ratified by the Decree nº. 56.826 of 02/09/1965. It is also a party to the Inter-American Convention since 1997. It is important to note that the Bustamante Code, which has two specific articles on support obligations, is still in force, although it is seldom used by the Judiciary.

In the matter of multilateral and bilateral cooperation agreements that may apply in cases of international support obligations, Brazil is a party to various agreements. For example, the Mercosur Protocol's of Las Leñas on Interjuridical Cooperation and the one on Interim measures. Although not intended for family matters, both deals with instruments as letters rogatory and enforcement of judgments that may be applied on family matters.

PART II QUESTIONS CONCERNING NATIONAL SYSTEMS OF MAINTENANCE OBLIGATIONS IN RESPECT OF CHILDREN AND OTHER FAMILY MEMBERS

Form of maintenance decision

1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member?

The maintenance obligation is mostly paid on a monthly basis. In special circumstances, when determined by the judge, the support obligations could be met by housing and providing for expenses.

In particular, are they confined to periodic payments of money?

No, they are not confined to periodic payments, but this is the common rule.

If a support obligation is determined in relation to a spouse, monthly payment may be substituted by real state. Art. 1701 of the Civil Code also permits housing to be a substitute to a pension, in special circumstances and when determined by the judge.

Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Yes, firstly, to serve as a guarantee for future payments.

Eligibility

2 Who is eligible in your country to benefit from a maintenance decision? (e.g. child, spouse, other relative, etc).

Child, grandchild and other members of the family, and, reciprocally, father, grandfather and other relatives. Spouses, and even partners who live like spouses. Recently there are isolated decisions (of local courts) that grant maintenance to partners of the same sex ("union livres"). And people who are, by other causes, economically dependent of the debtor. See art. 1694 of the Civil Code.

3 What is your definition of a "dependent" child for child support purposes?

Biologically until 18 years old; educationally until graduation, generally not exceeding the age of 25; mentally when not capable, without any age limitation.

4 Which is the law applicable to the question of eligibility of (a) child and (b) a spouse or other family member to obtain maintenance?

In Brazil, the Introductory Law to the Civil Code from 1942, Decree Law nº. 4.657 of 04/09/1942, has all the rules on Private International Law. The rule applied to family matters, capability and personality is the law of the domicile of the person, irrespective of their nationality. (Art. 7o.)

Procedures for the initial assessment of maintenance

5 Is child support determined through an administrative or a judicial process?

Through a judicial procedure. Parties may in fact enter particularly in agreement, but it is not enforceable until the judge decides upon it. There is no provision for administrative measures in family matter in Brazil.

6 Is the process different where either the applicant or the respondent live abroad? If so, please give details.

No. But, if the applicant or respondent lives abroad, there are additional difficulties for processing the case. Brazil is a party to the New York Convention and the Federal Public Ministry (Ministério Público Federal) is the central authority to this convention. Foreign decisions in order to be enforced need to be admitted by the Brazilian Superior Court of Justice by a procedure called homologation (homologação de sentença estrangeira). If the case is initiated out of Brazil, the service of process of the person not domiciled in Brazil must be by letter rogatory. The rules of jurisdiction in Brazil establishes that the Brazilian Courts are competent when the defendant is domiciled in Brazil or the obligation is to be fulfilled there.

7 Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?

A spouse depends on proof of need. Brazilian law establishes a presumption that children, under the age of 18, are always considered in need.

Methods of calculating maintenance

- 7 Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.

The Brazilian rule is a balancing one in which the judge will decide analysing the elements of the case: He will weigh the "Needs of creditor and possibilities of debtor". Case law has defined additional guidelines. If the debtor has a fixed income, it will vary from 10% to 40%, according to the number of children, needs, etc. However, the Civil Code determines that the support obligations are a duty of both parents.

- 8 Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?

No, there is no difference between them.

- 10 Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?

There is no difference established by the law, but there is emphasis on the protection of the creditor, when it is a child.

- 11 Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?

The rules of the Civil Code and the law of alimony. For private international law, the law of the domicile of the person.

Reassessment / adjustment / modification of maintenance decisions or assessments

- 12 Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?

Usually the decision already determines the criteria of automatic reassessment. For example, the obligation could be established in "minimum wages" percentages. Thus, annually, when the government determines the increase of the minimum wage, the obligation will follow it. It is important to note that the criteria varies from court to court, but the Superior Court of Justice has issued general criteria and guidelines, followed by judges, when deciding these cases.

As for other types of modifications, it is granted to both sides to claim the reduction or the increase of the amount, anytime, as long as a modification of the factual economic situation of occurs. However, a new lawsuit needs to be filed, it will not be automatic, it will require proof, and will depend on a new judicial decision.

- 13 Are such payments subject to automatic adjustment in accordance with an external marker, such as the cost of living index, and if so, by what mechanisms and with what frequency?

Automatic adjustments (not reassessments) are usually admitted by legal indexes. Art. 1710 provides in this manner. If the debtor does not have a job, the minimum wage is used to determine the pension, which can be a

percentage of it, and every year the government with concurrence of the National Congress, determines its value.

In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards?

If there is a variation on the necessities of creditor or / and in the possibilities of debtor.

Is this done by the same authority that made the original determination?

Not necessarily, because it is a new lawsuit, where there has to be proof of the new financial situation of the debtor or new needs of the creditor. If creditor or debtor have changed domicile, the new suit can be brought in another State of the country.

- 15 In what circumstances may a foreign decision or assessment be varied / modified on the application of a resident debtor?

A foreign decision must be homologated by the Superior Court of Justice to be enforced in Brazil. Once enforced, it is like a domestic decision. Thus, if a modification of the situation occurs, a new lawsuit can be brought to modify it, just like it would be possible in case of a domestic decision. However, when the Superior Court of Justice analyses the foreign decision in the homologation process, it may not modify it. It may accept it or not on the grounds of offence to order public (public order), but cannot change it.

Establishing paternity

- 14 Which is the law applicable to the determination of paternity in the context of child support proceedings?

The law of the child who is pleading. (According to Brazilian rules on Private International Law, it is the law of the child who is pleading.) The general rule concerning Statutory law is the law of the domicile (permanent home) as connecting factor to determine applicable law to family matters as a whole (exceptions are restricted to marriage problems, not affiliation). There is now authority in favour of the most favourable law to establish the parenthood of affiliation.

- 15 Please summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.

Procedural internal law admits that, attended minimum of evidence pointing to a "putative father", courts will grant maintenance orders while not proved by him that he is not to be the father. This situation, however, is not permanent. The putative father may, based solely on biological proof of non-paternity, terminate the obligation. Brazilian law does not admit the "action de subsidies" of the French law (maintenance based only in intercourse or union during the period of conception).

Brazilian law also recognises the biological link of paternity, irrespective of the existence of affection between genitor and child. The interest of the child in knowing who his biological father is prevails. However, there may be some exceptions in a case to case basis.

First, when the child already has an affective father, mainly if the relation coincides with the designation on registration ("adoção à brasileira"), biological affiliation cannot be recognized. Anyway, there is some uncertainty in judicial decisions.

Secondly, non-recognition can take place when the Court identifies in a suit (even if initiated by a pretended son) only patrimonial purposes (i.e., the pretended father is dead, and the son had good education and wealth granted by an affective father), and so repeal it.

- 18 Please outline the legal procedures and the methods (including the scientific methods) by which paternity may be established in the context of proceedings for child support. Please indicate the costs that typically would be involved, who would bear these costs, whether the costs are capable of being covered by legal aid, and whether any distinction is made between residents and non-residents in these matters.

There is full freedom of proof of paternity. It is necessary to observe only that there is low judicial protection to resistance to submission to DNA exams (not as a rule in local courts; but mainly in the High Courts).

- 19 May the recognition or enforcement of a foreign child support decision be refused
(a) if it entails a determination of paternity, or
No.

(b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

No. The foreign decision that had determined paternity will be processed at the Superior Court of Justice as a normal foreign decision and if all the necessary elements for a foreign decision is to be enforced, according to our rules, it will be recognised.

Legal and administrative aid and assistance

- 20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:
- a a resident claimant for child support;
b a claimant for child support who is resident abroad.

a) Every state has its own system to provide free assistance to the needy. But as a general rule, if legal assistance is needed it will be provided by either a public attorney or a common lawyer designated specially for the case.

b) If it is a New York Convention case, the Public Ministry (Procurador da República) that has jurisdiction over the place of residence of the debtor will take care of the case.

- 21 Please specify the principal eligibility requirements, including any means tests, for the different forms of assistance available.

The eligibility requirement is based on the need of person to survive. If paying for assistance would impair the debtor or creditor survival, judicial assistance will be available. See art. 19 of the Procedural Code and art. 1o e 2o. of Law 1060/50.

- 22 Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?

No. Everybody is equal under the law.

Legal costs and expenses

- 23 What are the typical legal costs and expenses (including lawyers' fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you indicate how these costs and expenses will vary from the initial application through any processes of appeal or review?

Judicial costs are uniform throughout the country. Beneficiaries of free legal assistance do not pay these costs.

- 24 Is it possible for payment of costs and expenses to be met from maintenance payments?

Yes, at the end, because the defeated party, most of the time, the debtor, pays the lawyer and cost of the other party, at the end of the case. See art. 20 of Procedural Code.

Collection and transfer arrangements and enforcement of decisions

- 25 How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organised in your country?

Usually through direct collection with employer (wage withholding). Also, through bank deposits made each month.

- 26 What, if any, particular arrangements apply where payments are to be made or collected from abroad?

There is a provision that the payments should be made by an official public bank, like Banco do Brasil or Caixa Econômica in order to lower the costs of charges.

- 27 What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?

There are four means of enforcement. The first, is the discount at the paycheck, by an order of the judge (art. 734 Procedural Code) (wage withholding). If the debtor does not have a job or a fixed income, the second will be through its earnings on real state. (art.17, Law 5478/68). Later, there will be an order by the judge on this real state (article 732, Procedural Code).

Lastly, if the payment is not obtained, and the debtor despite having the means refuses to pay, if in three days he does not justify the impossibility to pay, he may be imprisoned. (art. 733 of Procedural Code). This is a type of civil prison, permitted in Brazil for alimony obligations.

The person is sent to prison only if he/she is in debt for the last three months. For a debt superior of this time, it will be considered as a normal debt, and should be collected by traditional ways.

- 28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other

family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:

- wage withholding; **yes**
- tax refund intercepts; **no**
- garnishment from bank accounts or other sources; **yes**
- deductions from social security payments; **yes**
- forced sale of property; **yes**
- division of pension benefits; and **yes**
- committal to prison. **yes**

29 What are the typical banking costs involved in the transfer of maintenance payments from / to your country?

There are no special bank costs.

30 Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payments to / from abroad?

No.

PART III QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT

- 31 Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.

If the instrument would have a provision expressing that the enforcement of provisional orders is allowed this would help to make these decisions enforceable under Brazilian law. So far it is not possible because our domestic law has no such provision.

- 32 Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.

The mechanism of the Intermediate Authority is sure to improve the ways to obtain maintenance orders and this is faster and easier than enforcing a foreign decision in Brazil so far.

- 33 Bearing in mind that the new instrument is to be "comprehensive in nature, building on the best features of the existing Conventions", and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:

a provisions concerning administrative co-operation; It is important to some extent since the powers of the administrative bodies are very limited in comparason with other systems

b provisions for the recognition and enforcement of foreign decisions;Very important.

c applicable law principles;Not so important.

d uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;Very important concerning the avoidance of multiple orders.

e provisions specifying the assistance to be provided to an applicant from another Contracting Party;Fairly important.

f provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;Important.

g provisions concerning co-operation in the establishment of paternity;Not so important in this kind of instrument.

h provisions concerning co-operation in the international transfer of funds at low cost;Important.

i provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;Important.

j standard forms;Very important.

k provisions aimed at securing compliance with obligations under the instrument;Very important.

l provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;Not important.

m others. Please specify.

- 34 With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should "combine the maximum efficiency with the flexibility necessary to achieve widespread ratification",

- a* which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them, *B, D, J and K*.
- b* which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them, and *C, G and I*.
- c* do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision? *Yes, very much in favour*.

35 In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument. *Not the case*.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

36 Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument? *No*.

37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions? *No*.

38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications. *No*.

Note: *Respondents are also invited to comment on any other matters which they consider material to the development of the new instrument.*

ANNEX I

Preliminary Document No 1 for the attention of the Special Commission of April 1999

QUESTIONNAIRE ON MAINTENANCE OBLIGATIONS

(Parts I to III only)

PART I NEW YORK CONVENTION OF 20 JUNE 1956 ON THE RECOVERY ABROAD OF MAINTENANCE

Section A – Questions addressed to States Parties

1 Do your authorities treat the New York Convention as complementary to (i.e. to be used in combination with) other international instruments such as the 1958 and 1973 Hague Conventions on the Enforcement of Decisions relating to Maintenance Obligations or the Brussels and Lugano Conventions?

No. Brazil is a party only to the New York Convention and to the Inter-American Convention.

2 When acting as the requested State, do your authorities require a “decision” from the State of origin before taking steps for the recovery of maintenance?

Not necessarily. In Brazil, before enforcement, a foreign decision must go through an *exequatur* proceeding in the Superior Court of Justice. This requires a separate procedure that may take up to an year. Meanwhile, the decision does not have any enforcement in Brazil and alimony cannot be paid. Thus, the central authority has preferred to begin a new action in Brazil, and have a Brazilian decision to enforce. In this new procedure a provisional order for payment can be obtained fairly quickly, before the final decision.

3 What documentation do you require from a transmitting agency? Which documents are required in the original?

It is necessary that all documentation come already translated and in the original. It requires a power of attorney to allow Brazilian’s authority to act.

4 What are your standard procedures following receipt of documentation from a transmitting agency?

An administrative procedure within the intermediate authority is opened. Once all documentation is completed, the case is sent to the local authority which will start judicial proceedings.

5 Are there any issues that have arisen concerning the categories of persons eligible to apply as “in need” and “dependent”?

No.

6 Do you make use of standard forms, whether acting as a receiving or transmitting agency? (If so, could you please supply copies).

No.

- 7 Do your authorities permit public bodies / agencies to make use of the Convention procedures to recover maintenance payments on behalf of the maintenance creditor or to recover monies already paid by that public body / agency to the creditor, and if so, subject to what conditions (e.g. power of attorney)?

In our legislation there is no provision for payment of alimony by public bodies. Although the Civil Code has a general provision on recovery, it does not specify it.

- 8 Legal assistance:

(a) Do you provide legal assistance to the claimant? **Yes.**

(b) What form does this take?

Legal assistance is free and available to anyone who proves to have no means to pay for it. The Federal Government and some States have a legal career called "Public Defenders" to act in this manner. If there is no public defender in a certain State, the State will provide a lawyer when needed.

(c) Is it subject to any conditions or limitations?

No. It is requested that the person claims for assistance on the grounds of the lack of financial means.

(d) Are applications for spousal and child support treated differently? **No.**

- 9 What costs incurred by your authorities, when acting as the receiving agency, are charged to the requesting State (or the claimant)?

The Brazilian Central Authority do not charge for any legal costs.

- 10 What are your requirements with regard to the translation of documents submitted by the transmitting agency?

Translation is an issue because all documents must be in Portuguese for the request to be processed. The Central Authority do not have translators and have to make an open bid for it. It usually takes very long and this is a major cause for the delay in such actions, before they are ready to be started.

- 11 Which languages do personnel in your authority (a) use, and (b) accept?

Documents should come with the Portuguese translation. However, the Central Authority will have them translated when arrived.

- 12 Does your authority accept any responsibility with regard to the transfer / receipt of maintenance payments on behalf of the creditor?

No. The Intermediate Authority is not responsible for the transfer. It only informs the debtor the bank account of the creditor.

- 13 What rules / procedures apply with regard to the conversion of maintenance payments into the currency of the creditor's State?

There are no rules/procedures concerning this matter.

- 14 What methods of transferring funds are least costly for the maintenance creditor?

The only way foreign money can legally enter Brazil is by proceedings controlled by the Central bank.

- 15 Are you aware of cases in which UN personnel, or personnel of other international organisations or Embassy staff, have claimed immunity under the Convention? If so, how were these cases resolved?

NO.

- 16 What powers or procedures are available to your authority to locate the whereabouts or place of work of a maintenance debtor / respondent?

None. However, the Federal Police can be called to help.

- 17 What is your policy in respect of a maintenance debtor / respondent whose entire income consists of public assistance payments?

It is not a problem. A percentage of the income will be determined to be the alimony.

- 18 Does your authority have power to take or apply for any provisional or protective measures?

Only once the action has started, it can ask the federal judge for a provisional measure to start payments.

- 19 What powers or procedures are available to your authority to determine the extent of assets of a maintenance debtor / respondent?

All procedures also available for other actions requiring payment.

- 20 What are the principal problems, which you experience in dealing with cases (a) as a transmitting agency, and (b) as a receiving agency?

This office is not the Intermediate Authority for the New York Convention.

- 21 Do you have any statistics indicating the number and outcome of cases brought under the New York Convention? If so, could you please supply them. If possible, please distinguish between incoming and outgoing cases, and indicate the other States involved.

We do not have any statistics.

- 22 Are there any States with whom you experience chronic difficulties in relation to the operation of the Convention?

No.

PART II HAGUE CONVENTIONS OF 1958 AND 1973 ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS

Section B – Questions addressed to non-Party States

- 1 Are there any particular reasons why your State has not ratified / acceded to either of the Hague Conventions? **No.**
- 2 Are there any modifications / improvements to the Hague Conventions which would make ratification / accession a more attractive proposition for your State? **They have all been included in the Draft.**

PART III HAGUE CONVENTIONS OF 1956 AND 1973 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

Section B – Questions addressed to non-Party States

- 1 Are there any particular reasons why your State has not ratified the 1956 or 1973 Conventions? **No. But the ratification of the NY Convention could be a reason.**
- 2 Are there any modifications / improvements to the 1956 or 1973 Conventions which would make their ratification / accession a more attractive proposition for your State? **Not at this point.**
- 3 Are spouses (or any other category of persons) free under your system to choose the law which will govern their maintenance obligations? **No.**