

CUESTIONARIO

PARTIE II QUESTIONS CONCERNANT LES SYSTEMES NATIONAUX RELATIFS AUX ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE

Nature de la décision relative à des aliments

- 1 Quelle forme une décision relative à des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille peut-elle prendre ? L'une ou l'autre se limite-t-elle notamment à un paiement périodique ? Existe-t-il des circonstances dans lesquelles un versement unique, un transfert de propriété ou une ordonnance similaire peuvent tendre à assurer les obligations alimentaires ?**

Le paragraphe se réfère à trois questions différentes :

- La décision qui fixe les aliments adopte toujours la forme de résolution judiciaire. Ce peut être une « sentence » si elle termine le litige ou une « ordonnance » lorsqu'il s'agit d'une mesure provisoire.
- Selon l'Article 149 du Code Civil, la personne obligée à payer une pension alimentaire pourra, selon son choix, soit payer la pension qui est fixée, ou recevoir et entretenir dans sa propre maison celui qui y a droit. Lorsque les aliments sont fixés par jugement ils sont habituellement concrétisés en paiements périodiques de caractère mensuel. La loi se réfère textuellement à des « mensualités anticipées ».
- La loi ne prévoit aucun cas de paiement unique ni de transfert de biens comme paiement d'aliments, ce qui ne veut pas dire que cela ne puisse pas être établi en exécution d'obligations alimentaires non payées.

Eligibilité

- 1 Dans votre pays, qui est en droit de bénéficier d'une décision relative à des aliments ? (Par ex. : l'enfant, l'époux, un autre parent, etc.)**

Selon l'Article 143 du Code Civil, sont obligés à se donner réciproquement une pension alimentaire :

- 1.- Les conjoints.
- 2.- Les ascendants et descendants.

3.- Les frères se doivent les aides nécessaires pour la vie lorsqu'ils les nécessitent pour n'importe quelle cause qui ne soit pas imputable au créancier d'aliments (celui qui donne les aliments), et elles comprendront, le cas échéant, les aides qu'ils nécessitent pour leur éducation.

- Ont également droit à la pension alimentaire les mineurs qui vivent avec un adulte en tant qu'accueil simple ou accueil pré-adoptif, et ceux qui sont sujets à la tutelle par d'autres parents.

- Dans les régions qui ont des lois propres sur les unions stables de couple ou des pactes civils de solidarité, le droit aux aliments existe aussi entre les personnes qui vivent ensemble de fait.

1 Quelle est votre définition d'un enfant « à charge » dans le contexte des aliments envers les enfants ?

Dans cette catégorie sont inclus :

- Les enfants propres mineurs (c'est à dire moins de 18 ans) en tout cas.
- Les enfants propres majeurs (plus de 18 ans), qui cohabitent avec l'un des géniteurs, pourvu que : a) ils n'aient pas de biens, de travail ou de revenus propres, et b) qu'ils n'aient pas terminé leur phase de formation dû à une cause qui ne leur soit pas imputable.
- Les mineurs qui ont des liens de dépendance en raison d'accueil simple ou pré-adoptif ou qui soient soumis à tutelle.

1 Quelle est la loi applicable pour déterminer l'éligibilité (a) des enfants (b) l'époux ou d'autres membres de la famille à se voir octroyer des aliments ?

1. La loi interne de la résidence habituelle du créancier d'aliments régit les obligations alimentaires.
2. En cas de changement de la résidence habituelle du créancier, la loi interne de la nouvelle résidence s'applique à partir du moment où le changement est survenu.
3. La loi nationale commune s'applique lorsque le créancier ne peut obtenir d'aliments du débiteur en vertu de ce qu'on vient de dire.
4. La loi interne de l'autorité saisie s'applique lorsque le créancier ne peut obtenir d'aliments du débiteur en vertu des points 1,2 et 3.

Procédure d'évaluation initiale des aliments

1 Les décisions en matière d'aliments envers les enfants sont-elles rendues dans le cadre de procédures administrative ou judiciaire ?

- En tout cas par des procédures judiciaires.

1 Si le demandeur ou le défendeur vit à l'étranger, la procédure est-elle différente ? Dans l'affirmative, merci de bien vouloir préciser.

- Non, la procédure est la même. On n'applique uniquement les prévisions légales pour que l'assignation soit effective et que l'on puisse assurer que le défendeur a été dûment cité ce qui signifie, en particulier, une plus grande lenteur dans la célébration du jugement.

1 La procédure relative à une demande en matière d'aliments envers l'époux ou d'autres membres de la famille diffère-t-elle de celle envers les enfants ? Dans l'affirmative, merci de bien vouloir annexer les deux procédures.

- Il n'existe aucune différence substantielle, sauf que si le mineur réclame, il doit être représenté par la personne qui exerce l'autorité parentale ou la tutelle.

Méthodes de calcul des aliments

1 L'estimation des aliments envers les enfants est-elle basée sur une formule, des lignes directrices ou d'autres critères ? Merci de bien vouloir préciser les principaux éléments déterminant une évaluation.

- Le calcul pour concrétiser la quantité de la pension alimentaire est effectué conformément à une règle légale abstraite qui se base sur une triple proportionnalité : a) les besoins du créancier d'aliments ; b) les possibilités du débiteur d'aliments, et c) les possibilités d'autres personnes qui soient également obligées de contribuer à la pension alimentaire (co-créanciers d'aliments) au même degré que le défendeur.

1 Lorsque (a) le demandeur ou (b) le défendeur vit à l'étranger, les critères d'évaluation employés sont-ils différents

- Non, ils sont identiques.

1 La méthode de calcul des aliments envers l'époux ou d'autres membres de la famille diffère-t-elle de celle envers les enfants ?

- Le Code Civil n'établit aucune différence quant à la méthode de calcul des aliments des époux et des enfants. Ce qui existe est une préférence dans l'ordre des personnes auxquelles on doit donner les aliments, au dernier paragraphe de l'article 145. Ainsi, quand deux créanciers d'aliments ou plus, réclament des aliments d'une même personne obligée à les donner par la loi, et si celle-ci n'avait pas suffisamment pour les satisfaire tous, on gardera l'ordre établi à

l'article antérieur, à moins que les créanciers d'aliments soient le conjoint et un fils sujet à l'autorité parentale, et dans ce cas celui-ci aura une préférence sur celui-là.

1 Quelle est la loi applicable à l'évaluation des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille ?

Voir question numéro 4 du questionnaire.

Réévaluation / ajustement / modification des décisions ou des évaluations relatives aux aliments

2 Le montant et la fréquence des versements de la pension alimentaire envers les enfants ou l'époux et d'autres membres de la famille font-ils l'objet d'une réévaluation automatique, et dans l'affirmative, par qui et avec quelle fréquence ?

- Le droit à la pension alimentaire se concrétise habituellement en une pension à caractère mensuel. Dans la résolution judiciaire où elle est fixée, on doit établir les bases d'actualisation. Cette actualisation agit de façon automatique par le simple passage du temps et c'est la personne qui est obligée de payer celle qui doit appliquer l'actualisation. Si le débiteur d'aliments n'effectue pas l'actualisation, le tribunal l'effectuera, avec demande préalable du créancier d'aliments.

1 Ces versements font-ils l'objet d'une réévaluation automatique en fonction de critères objectifs comme l'index du coût de la vie, et dans l'affirmative, quels en sont les mécanismes et la périodicité ?

- Effectivement, le critère qui est généralement appliqué est celui des indices des prix moyens à la consommation que le gouvernement publie. L'actualisation est normalement annuelle. Exceptionnellement le critère d'actualisation peut être autre, comme par exemple, l'accroissement du salaire du débiteur d'aliments ou celui des pensions de retraite que le débiteur d'aliments puisse avoir comme reconnues.

1 Dans quelles circonstances la décision en matière d'aliments envers les enfants ou l'époux et d'autres membres de la famille ou l'évaluation de ces aliments peut-elle être revue / modifiée à la hausse ou la baisse ? Cela se fait-il par la même autorité ayant rendu la décision initiale ?

Il y a deux questions :

- La quantité de la pension alimentaire peut être modifiée, (toujours à la demande préalable de la partie intéressée), lorsque les bases qui ont servi pour la fixer sont altérées substantiellement : a) il est pertinent de la réviser vers la hausse lorsque le débiteur d'aliments améliore sa position économique ou quand la situation du créancier d'aliments s'aggrave et qu'elle nécessite une prestation supérieure (par exemple, aggravation d'une maladie) ; b) il est pertinent de la rabaisser lorsque la situation du débiteur d'aliments s'aggrave ou lorsque le créancier d'aliments améliore ses propres moyens de vie : Enfin, la pension peut arriver à l'extinction lorsque la cause qui l'a motivée disparaît.
- Il n'est pas nécessaire que ce soit la même autorité, puisque pour réviser la permanence, provenance et maintien du droit on doit suivre la même procédure qui a été suivie pour l'établir, mais on doit avoir recours à l'autorité judiciaire compétente. Si le débiteur d'aliments a changé de domicile ou si le créancier d'aliments a changé de domicile aussi, on doit avoir recours au tribunal qui résulte compétent au moment où la révision est demandée.

1 Dans quelles circonstances une décision ou une évaluation étrangère peut-elle être revue / modifiée par la demande d'un débiteur résident ?

- Lorsqu'ont été altérées les bases dont on a tenu compte pour reconnaître le droit à la pension alimentaire et pour concrétiser sa quantité (principe *rebus sic stantibus*), et, en plus, que le Juge espagnol résulte compétent.

Détermination de la paternité

2 Quelle est la loi applicable à la détermination de la paternité dans le cadre des procédures en matière d'aliments envers les enfants ?

- La Loi applicable est celle personnelle de l'enfant. Si on ne peut pas déterminer quelle est sa loi personnelle, on applique la loi de résidence habituelle de l'enfant.

1 Veuillez résumer les exigences administratives et judiciaires relatives à la détermination de la paternité dans le cadre de procédures en matière d'aliments envers les enfants ?

- Avec caractère général, la détermination de la paternité dérive toujours de l'inscription au Registre Civil qui agit comme présomption « *iuris tantum* ». Contre la filiation inscrite on ne peut admettre aucune opposition si, en même temps, on ne conteste pas la filiation au moyen d'une procédure judiciaire.

- Quant à la détermination de la filiation il existe une grande diversité de cas : a) pour la filiation matrimoniale, on présume que les enfants de la femme mariée sont nés du mariage, sans besoin de déclaration de la part du père (et sans préjudice du droit de celui-ci de contester la filiation par le moyen d'une procédure judiciaire. b) la filiation en dehors du mariage nécessite la déclaration expresse de la mère et le père admettant la filiation (soit de façon administrative devant le Registre Civil ou par testament) ou, en cas de dispute, un jugement judiciaire qui déclare la filiation est nécessaire.

L'article 128.2 du Code Civil prévoit que dans le jugement de filiation on puisse adopter des aliments provisoires à la charge du défendeur.

1 Veuillez préciser les procédures judiciaires et les méthodes (y compris les procédés scientifiques) par lesquelles la paternité peut être établie dans le cadre des procédures en matière d'aliments envers les enfants. Veuillez indiquer également : les coûts généralement induits ; qui devrait les assumer ; si ces coûts peuvent être couverts par une aide judiciaire ; et, si une distinction est faite sur cette question entre les résidents et les non-résidents ?

- La filiation peut être établie par la procédure prévue dans la Loi de Procédure Civile qui a cette finalité spécifique, ou, exceptionnellement, par une procédure pénale, comme conséquence civile d'un délit de viol, stupre ou abus sexuels.
- La filiation est établie sur la base des principes, établis dans la Constitution espagnole, de liberté d'investigation et d'admission de toute sorte de preuves.
- Les preuves les plus fréquentes sont les présomptions judiciaires, parmi lesquelles se trouvent la reconnaissance présumée et la possession d'état, et les preuves scientifiques pour la détermination biologique de la paternité, dans toute son extension, depuis les positives ou négatives de caractère « gemologico », même celle de l'ADN.
- Les frais des preuves scientifiques peuvent atteindre les 1000 euros, et 2000 euros en plus, les frais des avoués et des avocats. La Loi prévoit que les dépens et frais doivent être payés par la partie contre laquelle on rend le jugement, mais il est nécessaire de les avancer.
- Il existe le bénéfice de la justice gratuite pour toutes les personnes qui ont des revenus mensuels inférieurs à 1000 euros plus ou moins. L'Etat dans ce cas est celui qui se rend responsable du paiement des preuves et du paiement des avocats.
- Il n'y a pas de distinction entre résidents et non résidents à ces effets.

1 La reconnaissance et l'exécution d'une décision étrangère relative à des aliments envers les enfants peuvent-elles être refusées (a) si une recherche en paternité est un élément nécessaire ou (b) si une loi ou une méthode employée pour cette recherche est différente de celle utilisée dans votre pays ? Dans l'affirmative, veuillez en expliquer les raisons.

- Il n'est pas possible de rejeter l'exécution pour cette cause à condition que la décision étrangère soit susceptible d'être reconnue, étant donné que le contrôle de celle-ci est uniquement de caractère formel. Ce n'est que s'il existait déjà une résolution judiciaire espagnole sur la filiation en sens contraire ou si l'on apprécierait une violation de principes d'ordre public (se référant aux principes constitutionnels), que l'on pourrait refuser la reconnaissance ou l'exécution.

Aide juridique et assistance judiciaire et administrative

1 Quels types d'assistance (y compris l'assistance administrative, l'aide juridique et l'assistance judiciaire) sont disponibles dans votre pays pour :

- a un résident requérant des aliments envers des enfants ;**
- b un requérant d'aliments envers des enfants résidant à l'étranger.**

- dans les deux cas l'assistance prévue est pour le cas où le requérant manque de moyens économiques et puisse avoir le droit au bénéfice de la justice gratuite (qu'il gagne généralement 1000 euros ?? mensuels). L'assistance consiste dans le fait qu'on lui facilite un avocat commis d'office (à la charge de l'Etat), pour effectuer la réclamation judiciaire.
- dans le cadre administratif, les politiques d'assistance sociale des Mairies et des Communautés Autonomes prévoient des aides alimentaires conjoncturelles, le PIRMI (Plan d'Insertion pour Revenus Minimums), dont la quantité ne dépasse pas les 250 euros mensuels par enfant.
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21 Veuillez spécifier les principales conditions d'éligibilité, y compris tous les tests relatifs aux moyens (financiers), pour les différentes formes d'assistance disponibles.

- Pour l'assistance juridique, la requérant bénéficie de l'aide légale s'il obtient des revenus inférieurs à 1000 euros par mois. (Le calcul, le cas échéant, est familial).
- Pour la reconnaissance d'une pension d'assistance la personne intéressée doit se compromettre à suivre un programme d'insertion sociale. Ce sont les autorités administratives, par l'intermédiaire de travailleurs sociaux, celles qui évaluent chaque cas concret.
- Dans les deux cas on demande de disposer de permis de résidence.

22 Les règles et procédures concernant l'aide juridique ou l'assistance judiciaire ou administrative sont-elles différentes pour les demandes d'aliments envers l'époux ou d'autres membres de la famille ?

- Non, il n'existe pas de différence.

Frais de justice et autres dépenses

23 Quels types de frais de justice et autres dépenses (y compris les honoraires d'avocats et les frais de tribunaux) entraînent une demande pour des aliments envers les enfants ou l'époux et d'autres membres de la famille ? Pouvez-vous indiquer comment ces frais et ces dépenses varieront depuis la demande initiale jusqu'aux diverses procédures d'appel ou de révision ?

- En Espagne il n'existe pas de frais judiciaires pour cette classe de procédure dans lesquelles la justice est gratuite, à l'exception des honoraires des avocats, avoués et experts.
- Les honoraires d'avocats et avoués sont en relation avec la quantité de la réclamation. Cette quantité est calculée, au cas où l'on réclame la reconnaissance de pensions périodiques, comme le sont les aliments, sur la base de la somme de dix annualités, (règle 7^{ème} de l'article 251 de la Loi de Procédure Civile), modérée par la prévision de durée de la prestation. Si on réclame une quantité concrète en tant qu'arriérés, c'est celle-ci qui sert de base. Sur la quantité qui sert pour le calcul, la moyenne des droits d'avocats et de l'avoué est de 8% de son montant total. Les honoraires dans la phase de recours en appel du jugement sont le 50% du coût de la première instance. Dans ces litiges il n'existe pas de recours en cassation, et la révision est très exceptionnelle.

24 Est-il possible de recouvrer les frais de justice et autres dépenses à travers les versements d'une pension alimentaire ?

Selon le Code Civil, la pension qui ne dépasse pas la quantité signalée pour le salaire interprofessionnel minimum n'est pas susceptible d'être saisie. Par conséquent, tout ce qui dépasse cette quantité pourra être objet de saisie.

Accords relatifs au recouvrement et transfert et exécutions des décisions

25 Comment le paiement et le recouvrement des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille sont-ils organisés dans votre pays ?

- En Espagne la transaction sur aliments futurs n'est pas possible et tout accord doit être approuvé judiciairement, en garantie des droits du créancier d'aliments. Cependant il est fréquent d'arriver à des accords dont on demande l'approbation aux tribunaux (avec intervention du Ministère Public si le bénéficiaire est mineur) seulement quant à la modalité de paiement. Si on réclame des pensions en retard, on peut substituer le paiement en liquide avec la remise de biens.
- Pour les pensions futures on ne peut pas convenir d'une quantité moindre que celle établie ni une périodicité différente, bien que oui, la modalité du paiement, par exemple, par l'engagement du débiteur d'aliments de payer des frais concrets du créancier d'aliments, comme collèges, location d'appartement, voyages, ou avec la formule spéciale de les payer en recevant chez lui le créancier d'aliments pour qu'il vive en sa compagnie (dans ce cas le créancier d'aliments doit accepter cette solution).
- Quand le débiteur d'aliments travaille pour le compte d'autrui, il est fréquent de passer un accord que la propre entreprise ou l'entité bancaire qui réalise le paiement, retienne la partie du salaire et paye la pension au bénéficiaire.

26 Quels accords particuliers, le cas échéant, sont appliqués lorsque les paiements sont effectués ou recouvrés depuis l'étranger ?

- Il n'existe pas de régime juridique particulier, sauf en matière de garanties pour la non exécution du paiement, comme c'est le cas de l'inscription du jugement sur le registre de la propriété, ou l'hypothèque « de máximo » en garantie des dettes futures.

27 Quelle sont les procédures en vigueur pour faire exécuter des décisions relatives à des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille ?

- La procédure d'exécution est la générale pour obligations de paiement en argent (articles 538 et suivants de la Loi de Procédure Civile) qui est renforcée avec des amendes coercitives que le Juge peut infliger en cas de non exécution (Article 776.1) et avec un type délictueux pénal de non paiement de pensions.

28 Veuillez dresser une liste des méthodes disponibles pour l'exécution de décisions relatives à des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille ? Veuillez indiquer les méthodes d'exécution / de prélèvement qui, parmi celles listées ci-dessous et en plus de celles-ci, sont disponibles dans votre pays :

En Espagne tous les moyens d'exécution qui sont décrits sont implantés :

- saisie sur salaire ;

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- prélèvement sur remboursement ou d'autres sources ;
- saisie arrêt de comptes bancaires ou d'autres sources ;
- déduction sur versement de sécurité sociale ;
- vente publique ;
- partage des revenus de pension ; et
- incarcération.

29 Quels sont les frais bancaires types engagés dans le transfert et les paiements des aliments de / vers votre pays ?

La pratique bancaire établit un prix moyen d'environ 3 euros pour chaque paiement mensuel.

30 Des accords sont-ils mis en place dans votre pays, par le secteur public ou privé, afin de faciliter les virements au moindre coût de / vers l'étranger ?

Il n'existe pas de pratique généralisée sur cette question.

PARTIE III QUESTIONS CONCERNANT LES ELEMENTS À INCLURE DANS LE NOUVEL INSTRUMENT

31 Veuillez énumérer toutes les lacunes du processus actuel, pour l'obtention ou le recouvrement à l'étranger, par des personnes résidant dans votre ressort, d'aliments envers les enfants ou d'autres membres de la famille, auxquelles on pourrait remédier ou qui pourraient être améliorées dans le nouvel instrument.

Le nouvel instrument devrait contenir d'amples règles de coopération entre les autorités centrales : information, conseil de sa normative interne, assistance juridique sans exceptions, facilité dans l'utilisation de l'anglais et du français dans les communications de routine.

32 Veuillez énumérer toutes les lacunes du processus actuel, en vertu duquel un requérant étranger cherche à obtenir ou à recouvrir, auprès d'une personne résidant dans votre ressort, des aliments envers les enfants ou d'autres membres de la famille, auxquelles on pourrait remédier ou qui pourraient être améliorés dans le nouvel instrument.

Les lacunes de la procédure actuelle utilisée en Espagne sont objet d'étude pour son amélioration future. Cependant nous considérons que les points essentiels contemplés à l'article 33 sont déjà appliqués dans la procédure espagnole : coopération entre autorités, reconnaissance et exécution, assistance juridique gratuite

33 Gardant à l'esprit que le nouvel instrument doit être « complet et fondé sur les meilleurs aspects des Conventions existantes », et que sa structure

exacte n'a pas encore été déterminée, veuillez indiquer vos points de vue préliminaires sur les éléments clefs qui doivent y être pris en compte. A cette fin, il pourra vous être utile d'utiliser la liste suivante et d'indiquer l'importance que vous attachez à chacun des points énumérés :

- a dispositions relatives à la coopération administrative ;
fondamental ; de très grande importance
- b dispositions pour la reconnaissance et l'exécution des décisions étrangères
important
- c principes de loi applicable ;
important
- d règles uniformes de compétence directe applicables pour déterminer et modifier la décision relative à des aliments ;
important
- e dispositions spécifiques d'aide qui doit être fournie à un requérant provenant d'une autre partie contractante ;
ce n'est pas essentiel. Nous considérons que l'aide doit être donnée à l'autorité expéditrice.
- f dispositions concernant l'aide et l'assistance judiciaires qui doivent être fournies à un requérant provenant d'une autre partie contractante ;
très important. Spécifier si l'assistance va être automatique ou s'il faudra appliquer les règles d'assistance juridique gratuite internes.
- g dispositions relatives à la coopération pour la recherche en paternité ;
la paternité devrait être prouvée avec la demande. La Convention a pour objet le paiement des aliments, non la détermination de la paternité.
- h dispositions concernant la coopération en matière de virement international de fonds au moindre coût ;
la détermination de cette coopération ne correspond pas aux autorités expéditrices, ni intermédiaires, ce pour quoi nous considérons que l'on pourrait faire abstraction de ce point dans la Convention.
- i dispositions permettant aux parties contractantes d'éviter d'octroyer des services au requérant étranger lorsque ceux-ci ne sont pas disponibles sur une base réciproque ;
au lieu d'appliquer le principe de réciprocité dans l'application de la Convention, il serait plus adéquat d'inclure certains articles sur lesquels on pourrait réaliser une réserve.
- j formules modèles ;

très importantes

- k* dispositions visant à assurer le respect des obligations en vertu de l'instrument ;

Important.

- l* dispositions relatives aux institutions publiques qui poursuivent le remboursement de prestations fournies au créancier d'aliments ;

pas très étendues, car dans des pays déterminés ces institutions n'existent pas.

- m* autres. Merci de bien vouloir préciser.

il serait intéressant de faire mention des langues dans lesquelles les demandes et documents doivent être transmis.

34 Au regard de la structure générale de ce nouvel instrument et en gardant à l'esprit que celle-ci devrait « combiner l'efficacité maximale avec la flexibilité nécessaire pour assurer une large ratification »,

- a* quels éléments parmi ceux que vous avez mentionnés sous la question No 33 devraient être introduits comme éléments « centraux », dans le sens où toutes les Parties contractantes devraient sans exception s'y soumettre ;

Les alinéas suivants : a, b, c, d, f, j, m.

- b* quels sont, parmi ces éléments, ceux qui devraient être facultatifs, dans le sens où les Parties Contractantes devraient avoir la liberté de s'y soumettre ou non ; et
le reste.

- c* êtes-vous en faveur d'un principe général par lequel, la reconnaissance d'une décision existante n'étant pas possible dans le pays où le débiteur réside, les autorités de ce pays devraient être obligées de fournir assistance au créancier pour obtenir une nouvelle décision ?
Oui.

35 Pour les Etats ayant conclu des accords bilatéraux ou régionaux, veuillez indiquer les éléments de ces accords que vous souhaiteriez voir repris dans ce nouvel instrument ?

Aucun en particulier.

36 Hormis les Etats membres de la Conférence de La Haye et les Etats parties à la Convention de New York de 1956 (une liste complète est fournie en Annexe II) quels autres Etats souhaiteriez-vous inviter à prendre part aux négociations du nouvel instrument ?

Nous considérons que l'on devrait inviter le plus grand nombre d'Etats possible.

37 Seriez-vous disposés à contribuer à un fonds permettant (a) aux Etats moins bien nantis de prendre part aux négociations (b) de produire en espagnol les principaux documents et d'assurer une interprétation simultanée en espagnol en session plénière ?

Nous considérons extrêmement positive la traduction et interprétation simultanée en espagnol. Cependant, nous ne sommes pas en mesure de répondre à cette question.

38 Disposez-vous d'un site Internet ou de brochures qui fournissent des informations sur les systèmes de pensions alimentaires et d'autres formes d'aliments envers d'autres membres de la famille dans votre pays ? Dans l'affirmative, veuillez nous transmettre les détails ou une copie de toute publication.

Pour le moment, nous ne disposons pas de brochures ni de page web en la matière.

ANNEXE I

Document préliminaire No 1 à l'attention de La Commission spéciale d'avril 1999

QUESTIONNAIRE SUR LES OBLIGATIONS ALIMENTAIRES

(Parties I à III seulement)

PARTIE I LA CONVENTION DE NEW YORK DU 20 JUIN 1956 SUR LE RECOUVREMENT DES ALIMENTS A L'ETRANGER

Section A – Questions adressées aux Etats Parties

39 Les autorités de votre pays considèrent-elles la Convention de New York comme complémentaire (c'est-à-dire à utiliser en combinaison avec) d'autres traités internationaux telles les Conventions de La Haye de 1958 et de 1973 concernant l'exécution des décisions relatives aux obligations alimentaires ou les Conventions de Bruxelles et de Lugano?

Oui, la Convention de New York est utilisée de façon complémentaire au reste des instruments internationaux d'application en la matière.

40 Lorsqu'elles agissent en tant qu'Etat requis, les autorités de votre pays exigent-elles une « décision » de l'Etat d'origine avant de prendre des

mesures de recouvrement des aliments?

Non. Il suffit que le droit du demandeur pour obtenir des aliments apparaisse reconnu dans la législation interne de son Etat. Cependant, la plus grande partie des demandes que nous recevons incluent le jugement qui reconnaît le droit et qui règle le paiement des aliments.

41 Quels documents exigez-vous d'une Autorité expéditrice? Quels sont les documents requis en original?

Les documents exigés sont les suivants :

- demande où figurent prénoms et noms de famille du demandeur et du défendeur, lieu et date de naissance, profession, domicile, compte bancaire.
- Objet de la prétention.
- Exposition détaillée des motifs sur lesquels se base la prétention du demandeur (jugement judiciaire, décision régulatrice, exigence légale etc.)
- Situation économique et familiale.
- Liste détaillée des quantités dues (retards) et de celles payées par le débiteur.
- Document justificatif du droit à percevoir les aliments (acte de naissance, mariage, jugement etc.)
- Pouvoir autorisé à l'Autorité Intermédiaire pour agir au nom du demandeur.
- Photographie des intéressés.

42 Quelle est la procédure type qui suit la réception d'un dossier d'une Autorité expéditrice?

Les démarches sont les suivantes :

- Etude de la demande et traduction en espagnol, le cas échéant, des documents.
- Si le débiteur n'est pas localisé, on demande la collaboration d'Interpol pour déterminer l'endroit où il habite.
- Une fois le débiteur localisé, le dossier est envoyé au Parquet Général, qui remettra la demande au Ministère Public de la province où se trouve le débiteur.
- Dans une première phase, le Ministère Public convoquera le débiteur et lui demandera le paiement volontaire des ses obligations.
- S'il n'accepte pas. La phase judiciaire commencera. Dans celle-ci, le Ministère Public présentera une demande devant le Juge de Première Instance, qui décidera les obligations du défendeur de payer les aliments.
- Dans les cas où il existe un jugement étranger définitif, et où l'autorité requérante qui transmet ne désire pas que l'on invite le débiteur au paiement volontaire, on initie l'exequatur de ce jugement. Dans ces cas, on envoie le dossier au Service Juridique de l'Etat pour qu'il procède à demander la reconnaissance et exécution en Espagne du jugement étranger.

La procédure décrite ci-dessus est objet, actuellement, d'une étude détenue, dans le but d'augmenter l'efficacité et l'agilité dans l'application de la Convention.

43 Les questions se sont-elles présentées au sujet des catégories de personnes en droit d'être considérées comme « dans le besoin » ou « dépendantes »?

Nous n'avons pas constance de problèmes d'interprétation de ces termes.

44 Utilisez-vous des formulaires standards, que vous agissiez en tant qu'institution intermédiaire ou Autorité expéditrice? (Si oui, merci de nous adresser des copies.)

Oui. Nous comptons avec des formulaires traduits en différentes langues, dans le but d'assouplir l'envoi des demandes et de réunir d'une façon claire, toute l'information du cas.

45 Vos autorités permettent-elles à des organes/agences publics de recourir aux procédures de la Convention pour le recouvrement d'aliments au nom du créancier ou pour le recouvrement des montants qu'ils ont déjà versés au créancier? Si oui, à quelles conditions (y a-t-il, par exemple, nécessité d'une procuration)?

La procédure est unique. Voir question n° 4.

46 L'aide judiciaire:

a. Fournissez-vous une aide judiciaire au demandeur?

Oui.

b. Si oui, sous quelle forme?

L'assistance juridique gratuite est prêtée par l'Autorité Intermédiaire, à travers le Ministère Public ou l'Avocat de l'Etat. On n'utilise pas la voie de l'assistance juridique gratuite par l'intermédiaire des avocats commis d'office avec constatation préalable des revenus du demandeur, mais on la concède de façon automatique.

c. Des conditions ou des limitations sont-elles imposées?

No.

d. Est-ce que les demandes d'aliments pour un époux ou un enfant sont traitées différemment?

L'autorité intermédiaire les transmet de la même façon. Cependant, le Ministère Public ou l'Avocat d'Etat, peuvent les traiter de façon différente au moment de

demander le paiement des aliments en voie judiciaire. généralement on demande de façon séparée pour les enfants et pour le conjoint.

47 Lorsqu'elles agissent comme institution intermédiaire, quels coûts encourus par vos autorités sont mis à la charge de l'Etat d'origine (ou du demandeur)?

Aucun. L'assistance juridique gratuite est totale.

48 Quelles sont vos exigences concernant la traduction des documents soumis par une Autorité expéditrice?

Nous avons besoin que tous les documents apparaissent traduit en espagnol. Cette traduction doit être effectuée par l'autorité expéditrice. Cependant, dans certains cas, nous avons traduit des documents en langue étrangère. Nous avons remarqué qu'à ces occasions, le cours du dossier est ralenti.

49 Quelles sont les langues que le personnel de votre autorité (a) utilise, et (b) accepte?

Sur les écrits de simples formalités, pour demander des informations, par exemple, nous n'exigeons pas la traduction en espagnol, à condition que l'écrit soit rédigé en anglais ou en français. Pour les autres documents, nous nécessitons une traduction en espagnol.

50 Est-ce que votre autorité assume la responsabilité des transferts/réceptions de paiements d'aliments effectués au nom du créancier?

Non, généralement, l'Autorité qui transmet nous facilite un numéro de compte bancaire où le débiteur devra verser les quantités exigées. Si le paiement est effectué de façon volontaire, le débiteur devra remettre les justificatifs de paiement au Ministère Public. Si le paiement est exigé par voie judiciaire, ce sera le Juge chargé de vérifier que ce paiement se produit (recevant les justificatifs de paiement ou, dans des cas déterminés, avec la saisie des biens du débiteur.)

51 Quelles sont les règles/procédures applicables à la conversion des paiements d'aliments dans la monnaie de l'Etat du créancier?

Les règles générales de conversion de monnaie étrangère.

52 Quelles sont les méthodes de transfert de fonds les moins coûteuses pour le créancier d'aliments?

Généralement on réalise un virement bancaire au numéro de compte que le créancier indique.

53 Avez-vous eu connaissance de cas où des membres du personnel des Nations Unies, d'une autre organisation internationale ou d'une ambassade ont invoqué leur immunité dans le cadre de la Convention? Si oui, comment ces cas ont-ils été résolus?

Nous n'avons la preuve d'aucun cas.

54 Quels sont les pouvoirs ou procédures dont dispose votre autorité pour localiser le lieu où se trouve ou travaille le débiteur de l'obligation alimentaire?

Si l'autorité expéditrice n'indique pas d'adresse où pourrait se trouver le débiteur, nous demandons la collaboration d'Interpol pour la localisation.

55 Quelle est votre politique face à un débiteur d'une obligation alimentaire dont les revenus proviennent exclusivement d'une aide des pouvoirs publics?

La procédure est la même. Nous envoyons la demande au Ministère Public. Si le débiteur ne veut pas faire face à ses obligations volontairement, on entame un jugement verbal. Le Juge, appliquant la législation en vigueur, sera celui qui détermine quelles aides ou pensions publiques peuvent être objet de saisie pour le paiement des aliments.

56 Votre autorité, a-t-elle le pouvoir de prendre ou de demander des mesures provisoires ou conservatoires?

Le Procureur, réalisant les fonctions d'autorité intermédiaire, demandera les mesures provisoires qu'il considère pertinentes. D'après l'étude des dossiers qui ont été traités les dernières années, on constate que la demande de telles mesures n'est pas fréquente.

57 Quels sont les pouvoirs ou les procédures dont dispose votre autorité pour déterminer l'étendue des avoirs du débiteur de l'obligation alimentaire?

Une fois le dossier remis au Ministère Public, celui-ci peut initier une investigation sur les biens du débiteur, consultant le Registre de la Propriété, la Sécurité Sociale ou Le Ministère des Finances.

58 Quels sont les principaux problèmes que vous rencontrez (a) en tant qu'Autorité expéditrice, et (b) en tant qu'institution intermédiaire?

- a) Quant à l'autorité expéditrice, les principaux problèmes dérivent du manque de communication avec les autorités intermédiaires étrangères. Soit parce qu'elles n'informent pas du cours de la demande avec la fluidité adéquate soit parce qu'elles ne décrivent pas la procédure utilisée dans leur pays pour percevoir les aliments.
- b) Quant à l'autorité intermédiaire, les problèmes principaux sont causés par la lenteur dans la procédure. Il n'existe pas de limite temporaire pour que le débiteur fasse front à ses obligations volontairement, ce pour quoi, parfois, plus d'un an passe jusqu'à ce que les actions judiciaires pertinentes soient entamées. Ces inconvénients ont été mis en évidence lors de l'étude qui est effectuée pour améliorer la procédure interne d'application de la Convention en Espagne.

59Avez-vous des statistiques indiquant le nombre et l'issue des affaires traitées en application de la Convention de New York? Si oui, veuillez nous les communiquer. Si possible, veuillez distinguer entre les cas où vous agissez en tant qu'Autorité expéditrice et les cas où vous agissez en tant qu'Autorité intermédiaire et indiquer l'autre/les autres Etat(s) impliqué(s).

Depuis 1966, où la Convention a commencé à être appliquée en Espagne, on a traité plus de 2500 demandes. Actuellement, nous sommes en train de traiter environ 1000 dossiers. Dans 850 de ces dossiers nous agissons comme autorité intermédiaire et dans les 150 autres, nous sommes l'autorité expéditrice. Les pays qui demandent avec plus de fréquence l'application de la Convention en Espagne sont la Suède, la Pologne et la France. L'Espagne demande l'application de la Convention principalement en Allemagne, en Suède et au Royaume Uni.

60a-t-il des Etats avec lesquels vous rencontrez régulièrement des difficultés au sujet du fonctionnement de la Convention?

Aucun en particulier. Les difficultés proviennent de dossiers concrets, non des relations avec un Etat déterminé.

PARTIE II LES CONVENTIONS DE LA HAYE DE 1958 ET 1973 CONCERNANT LA RECONNAISSANCE ET L'EXECUTION DE DECISIONS RELATIVES AUX OBLIGATIONS ALIMENTAIRES

Section A – Questions adressées aux Etats parties à l'une ou aux deux Conventions

61Faut-il respecter un délai de prescription pour engager une action en exequatur d'une obligation alimentaire? De quelle loi cette prescription relève-t-elle?

Oui. Il s'agit d'un délai de 20 jours, qui apparaît recueilli à l'Article 548 de la Loi de Procédure Civile.

62 Faut-il respecter un délai de prescription à l'exécution forcée du recouvrement d'une obligation alimentaire? De quelle loi cette prescription relève-t-elle?

L'action exécutive expirera si la demande correspondante d'exécution n'est pas interjetée dans les 5 ans suivant la date où le jugement ou résolution judiciaire a été déclaré définitif. Article 518, Loi de Procédure civile.

63 Vos procédures d'exécution permettent-elles à un débiteur de faire valoir son incapacité à payer?

Dans la procédure d'exécution on ne peut pas alléguer l'impossibilité de paiement. S'il existe impossibilité de paiement pour des causes survenues, le débiteur d'aliments doit initier une nouvelle procédure de révision pour l'extinction ou diminution de la quantité à payer. Les causes d'opposition à l'exécution se trouvent recueillies aux articles 556 et suivants de la Loi de Procédure civile.

64 Vos procédures permettent-elles de modifier le contenu d'une décision enregistrée en application de la Convention de 1973?

La révision du fond de la résolution étrangère n'est pas possible, mais oui la vérification de l'exécution des propres conditions de la Convention.

65 Le débiteur a-t-il le droit d'intenter une action en modification de la décision étrangère? Si oui, sur quelle base juridictionnelle et sur quels fondements?

Le débiteur ne peut pas questionner sur base judiciaire le fond de la décision étrangère, mais oui objecter que les conditions de la convention pour concéder l'exequatur ne sont pas exécutées

PARTIE III LES CONVENTIONS DE LA HAYE DE 1956 ET 1973 SUR LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES

Section A – Questions adressées aux Etats parties à l'une ou aux deux Conventions

66 Quelle loi vos tribunaux appliquent-ils aux questions préalables/incidentes (concernant, par exemple, la paternité d'un enfant) soulevées dans le cadre d'une demande d'aliments en application des Conventions de La Haye?

La Convention de La Haye de 73 ne s'applique qu'au prononcé relatif aux aliments. La Convention sépare la question des aliments des autres questions connexes qui seront résolues conformément à la loi applicable, selon la nature de la question.

67 Dans une décision du 21 février 1997 (Nederlandse Juriprudentie 1998, No 416), la Cour Suprême des Pays-Bas a décidé que l'article 8 de la Convention de La Haye de 1973, à la lumière de son histoire et de la Convention dans son entier, n'était pas incompatible avec le choix par les époux divorcés de la loi applicable, la loi choisie étant celle du pays de leur résidence habituelle pendant une longue période et, en même temps, la loi du for. (La loi néerlandaise, choisie par les parties, a été appliquée plutôt que la loi iranienne qui régissait le divorce.)

Cette décision est-elle cohérente avec la manière dont l'article 8 est interprété par vos tribunaux? Si non, pensez-vous qu'il serait souhaitable de réviser l'article 8 et d'autoriser expressément les parties à choisir la loi qui régira leurs rapports alimentaires?

En Espagne la possibilité du choix, de la part des conjoints, de la Loi applicable au divorce (article 107 du Code Civil) n'existe pas, en conséquence on ne peut pas interpréter l'article 8 de la Convention de cette façon. Oui il serait intéressant de modifier l'article pour que cette option ait lieu.

68 Les tribunaux considèrent-ils la Convention de 1973 comme étant applicable aux obligations d'un époux envers les enfants de l'autre époux et en faveur desquels il ou elle agit in loco parentis?

69 Les difficultés particulières se sont-elles posées lorsque vos tribunaux ont eu à appliquer ou à interpréter les Conventions de 1956 ou de 1973?

11.11.2002

Answer from the Finnish Ministry of Justice (OM 4/85/2002).

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

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? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Answer:

Maintenance to a child

The parents of a child may make a written agreement on the maintenance to be paid by a parent to the child. The agreement shall be submitted to the municipal social welfare board for approval. When the municipal social welfare board has approved the agreement, it can be enforced in the same way as a final judgment issued by a court.

If the parents cannot reach an agreement on the maintenance to be paid to the child, a maintenance proceeding may be instituted in a court. The proceeding may be instituted by the custodian or the guardian of the child. The proceeding may also under certain conditions be instituted by the municipal social welfare board. If the question of maintenance arises in connection with a trial on establishment of paternity, the municipal child welfare supervisor may bring forward a claim on maintenance to be paid to the child.

Maintenance shall be paid in money in advance for each month unless otherwise is agreed by the parents or ordered by the court. As provided in the agreement or in the judgment, the maintenance may be paid in different amounts for different periods. Maintenance may also be paid as a lump sum, if so is stipulated in the agreement or in the judgment.

The maintenance to a child may also be paid in property. Such provisions may be included in the agreement made by the parents or in the judgment issued by the court.

The provisions on maintenance to a child are in the Child Maintenance Act (704/1975).

Maintenance to a spouse

The spouses may make a written agreement on the maintenance to be paid by one spouse to the other. The agreement shall be submitted to the municipal social welfare board for approval. When the municipal social welfare board has approved the agreement, it can be enforced in the same way as a final judgment issued by a court.

If the spouses cannot reach an agreement on the maintenance to be paid by one of the spouses to the other spouse, the spouse asking for maintenance has the right to institute a proceeding in the court in order to obtain a judgment on the maintenance to be paid to him or her.

Maintenance may be paid in money at regular intervals until otherwise agreed upon by the spouses/former spouses or otherwise ruled in a judgment. There may also be a provision in the initial agreement or judgment that maintenance shall be paid in money until the end of a certain period determined in the agreement or in the judgment. Maintenance may also be paid as a lump sum, if so is stipulated in the agreement or in the judgment.

The maintenance to a spouse may also be paid in property. Such provisions can be included in the agreement made by the spouses or in the judgment issued by the court.

The provisions on maintenance to a spouse are in the Marriage Act (234/1929).

Eligibility

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

Answer:

Children

Children have a right to receive maintenance from their parents. No difference is made between children born in wedlock and children born out of wedlock. Stepchildren and foster children have a right to receive maintenance only from their biological parents.

Adopted children have a right to receive maintenance from their adoptive parents. The provisions which are applicable to biological children are, according to Finnish law, also applicable to adopted children.

Spouses

A man and a women who have entered into a marriage with one another have a mutual maintenance obligation towards one another. A spouse may ask for maintenance during the marriage or in connection with divorce.

In a registered partnership of persons of the same sex the partners have a mutual maintenance obligation towards each other. Provisions in an act or a decree which are applicable to a spouse apply, according to the Act on Registered Partnerships (950/2001), likewise to a partner in a registered partnership, unless otherwise is provided in an act or decree.

Other relatives

Other relatives do not have a maintenance obligation towards one another. For example children do not have a maintenance obligation towards their parents.

Cohabiting couples

Partners in a cohabiting couple either of different or same sex do not have a civil law obligation to maintain one another.

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

Answer:

Children under the age of 18 years have a right to receive maintenance from their parents. The parents are also responsible for expenses incurred in the education of the child after the child has reached the age of 18 years, if this is deemed reasonable. The term "education" refers primarily to upper secondary education.

A parent is responsible for the maintenance of the child, even if he or she is not a custodian of the child.

The child's right to receive maintenance from his or her parent may diminish or come to an end even when the child is under the age of 18 years, if the child is able to maintain him- or herself.

- 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?

Answer:

The applicable law in matters on maintenance is also the applicable law on the question of who is eligible for maintenance.

Applicable law on maintenance to a child

If a Finnish municipal social welfare board is competent (*administrative jurisdiction*) to approve an agreement on maintenance to be paid to a child, the board will apply Finnish law in the matter.

If a Finnish court has jurisdiction in a matter on child maintenance,

- a) the court will, when the matter relates to a *child born in wedlock*, apply the law of the state of which the child is a citizen (the section 19 of the Act on Certain International Family Relationships (379/1929))¹,
- b) the court will, when the matter relates to a *child born out of wedlock*, apply Finnish law (section 21 of the Act on Certain International Family Relationships).

Applicable law on maintenance to a spouse

If a Finnish municipal social welfare board is competent (*administrative jurisdiction*) to approve an agreement on maintenance to be paid to a spouse, the board will apply Finnish law in the matter.

If a Finnish court has jurisdiction in a matter on maintenance to be paid to a spouse, it will apply the law of the state in which the spouse, who is entitled to maintenance, is domiciled (subsection 2 of section 128 of the Marriage Act). There are however some restrictions in the application of foreign law. In a matter on maintenance to a spouse, the assessment shall always be based on the need for support of the person entitled to the maintenance and the means of the person liable to provide maintenance, notwithstanding any provisions in the applicable law (section 132 of the Marriage Act).

Procedures for the initial assessment of maintenance

¹ When the parties are citizens of Finland, Denmark, Iceland, Norway or Sweden and habitually resident in one of these countries, the Finnish court will apply Finnish law (*lex fori*) according to article 9 in the Convention between Finland, Denmark, Iceland, Norway and Sweden made in Stockholm 6th February 1931 on Provisions on International Private Law relating to Marriage, Adoption and Guardianship.

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

Answer:

If the parents can reach an agreement on the maintenance to be paid to the child, the matter will be handled through an administrative process. When the parents have made an agreement, they have to submit the agreement to the municipal social welfare board for approval. When the municipal social welfare board has approved the agreement, it can be enforced in the same way as a final judgment issued by a court.

If the parents cannot reach an agreement on the maintenance to be paid to the child, the matter has to be handled through a judicial process. The custodian or the guardian of the child has a right to institute the proceeding in the name of the child. The municipal social welfare board has also, under certain conditions, a right to institute the proceeding in the name of the child. If the question of maintenance arises in connection with a trial on establishment of paternity, the municipal child welfare supervisor may bring forward a claim on maintenance to be paid to the child.

A claim on maintenance for a child may also be presented in connection with a paternity trial in court, a divorce proceeding in court and with a court proceeding on custody and rights of access.

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

Answer:

If the municipal social welfare board or the court has the competence (*jurisdiction*) to handle the matter, the administrative process and the judicial process will be the same for those living in Finland and for those living abroad.

- 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?

Answer:

The administrative process and the judicial process is the same for matters relating to maintenance for a child and to maintenance for a spouse.

Administrative process

When parents, who are married to one another, have made an agreement on the maintenance to be paid to the child and another agreement on the maintenance to be paid by one spouse to the other spouse, the parents can submit the two agreements at the same time to the municipal social welfare board for approval. The board will handle the two agreements as separate matters, but the board can have the same timetable for the approval of the agreements.

Judicial process

When a divorce proceeding is pending at a court, the court may upon request by the spouses or one of them give a judgment on the maintenance to be paid to a child and/or to one of the spouses in connection with the divorce proceeding.

Methods of calculating maintenance

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

Answer:

The assessment of child support (maintenance) is not based on a formula or guidelines.

The assessment of child support (maintenance) is based on the following criteria in the Child Maintenance Act:

1. A child has the right to sufficient maintenance. Maintenance means the satisfaction of the material and spiritual needs of the child as well as his care and education, and the coverage of the resulting costs.
 2. The parents are responsible for the maintenance of the child in accordance with their abilities.
 3. In the assessment of the ability of the parents to provide maintenance consideration shall be given to their age, ability to work and opportunity to take part in gainful employment, the amount of assets available to them and their other statutory maintenance responsibilities.
 4. In the assessment of the ability of the parents to provide maintenance, consideration shall also be given to the ability and opportunity of the child to be responsible for his own maintenance as well as to the circumstances on the basis of which the parents are not burdened with any expenses, or are burdened with only minor expenses, for the maintenance of the child.
- 9 Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?

Answer:

When the maintenance is assessed in Finland according to Finnish law, the same provisions will apply irrespective of in what state the applicant or the respondent lives.

If the applicant (child) lives in another country than Finland, special consideration is given to the costs of living in that state.

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

Answer:

Maintenance to a child and maintenance to a spouse are not calculated by the same criteria.

The criteria for calculating maintenance for a child are described in the answer to question 8.

The criteria for calculating maintenance for a spouse are the following:

In the administrative process:

The municipal social welfare board may approve an agreement on maintenance to be paid by one spouse to the other spouse, if the agreement is deemed reasonable with a view to the spouse's need for maintenance, the ability of the other spouse to pay maintenance and other relevant circumstances.

In the judicial process:

If a spouse during the marriage neglects his or her maintenance obligation or if the spouses are separated, the court may upon request order a spouse to pay maintenance to the other spouse in accordance with the principles laid down in section 46 of the Marriage Act. According to the aforementioned section each spouse shall participate in the common household of the family and the maintenance of the spouses to the best of his or her abilities. The maintenance of the spouses means the fulfilment of the common needs of the spouses as well as the personal needs of each spouse.

When spouses are granted a divorce by a court and a spouse is deemed to be in need of maintenance, the court may upon request order the other spouse to pay the requesting spouse maintenance deemed reasonable with a view to the paying spouse's capability to pay maintenance and other circumstances. Maintenance may be ordered to be paid until further notice or until the end of a period determined in the order. The maintenance may, however, be ordered to be paid as a lump sum if necessary with a view to the financial and other circumstances of the spouse ordered to pay it. The obligation to pay maintenance in periodic instalments shall lapse, if the spouse to whom the maintenance is granted remarries.

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

Answer:

Please, see the answer to question 4.

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?

Answer:

Maintenance payments in respect of children and spouses are subject to automatic reassessment. The reassessment is carried out by the Ministry for Social Welfare and Health. The provisions on the system for automatic reassessment are in the Act on the Linking of Certain Maintenance Payments to the Cost-of-Living Index (669/1966).

The system of automatic reassessment is bound to an index on cost-of-living. If there has been a rise of at least 5 % in the index on cost-of-living for the month of October in comparison to the index on cost-of living according to which the latest reassessment was carried out, the Ministry for Social Welfare and Health will fix the percentage of reassessment.

If the criteria for a new automatic reassessment are fulfilled, the Ministry for Social Welfare and Health has to make a decision in the matter during the month of November. The reassessment enters into force in the beginning of the forthcoming January.

The municipal social welfare board will upon request make a note of the reassessed maintenance in the agreement or in the judgment.

The court may also upon request make a note of the reassessed maintenance in the agreement or in the judgment, if this is necessary because of the need to have the agreement or judgment enforced in a foreign state.

- 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?

Answer:

Please, read the answer to question 12.

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

Answer:

Children

An agreement on maintenance to be paid to a child may be modified through a new agreement or through a new judgment. *A judgment* on maintenance to a child may be modified through a new agreement or through a new judgment.

The criteria for the modification of an agreement or a judgment on maintenance to be paid to a child are the following: the amount and manner of payment of maintenance may be modified if the circumstances that shall be taken into consideration in confirming the maintenance (please, read the answer to question 8) have changed to such an extent that alteration of the maintenance shall be deemed reasonable in view of the circumstances of both the child and the parent responsible for the payment of the maintenance. In considering the modification of maintenance, the amount of maintenance shall be taken into consideration as adjusted on the basis of the Act on the Linking of Certain Maintenance Payments to the Cost-of-Living Index.

An agreement on maintenance to be paid to a child may also be modified, if the agreement is deemed unreasonable.

Spouses

An agreement on maintenance to be paid to a spouse may be modified through a new agreement or through a new judgment. *A judgment* on maintenance to be paid to a spouse may be modified through a new agreement or through a new judgment.

The criteria for the modification of an agreement or a judgment on maintenance to a spouse are the following: an agreement or a judgment may be modified if necessary due to changed circumstances. An agreement or a judgment on a lump sum may not be modified after the lump sum has been paid.

An agreement on maintenance to be paid to a spouse may be modified if the agreement is to be deemed unreasonable.

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

Answer:

Modification of a foreign agreement/judgement on maintenance for a child

Rules on jurisdiction

Finland is bound by the Brussel I-regulation² and the Lugano Convention³. According to these legal instruments Finnish courts have jurisdiction when the respondent is domiciled in Finland (article 2 in both legal instruments) or when the person entitled to maintenance is domiciled or habitually resident in Finland (point 2 of article 5 in both legal instruments). This means, when these legal instruments are applicable, that a law suite cannot be brought forward by a debtor (the person liable to pay the maintenance) in a Finnish court, if the claimant (the person entitled to maintenance) is not living in Finland.

In cases where the jurisdiction of a Finnish court is not determined by the Brussel I-regulation or the Lugano Convention, the jurisdiction will be determined by the provisions in the Act on Certain International Family Relationships. When the child has been born out of wedlock, a Finnish court has jurisdiction, when the respondent is domiciled in Finland or when the child is a Finnish citizen or when the child permanently lives in Finland. There is no written provision on in what circumstances a Finnish court has jurisdiction in law suites on maintenance to be paid to a child born in wedlock. However, according to the Supreme Court Judgement KKO 2001:109 a Finnish Court has jurisdiction to rule upon a law suite for maintenance for a child born in wedlock, if the child lives in Finland. By analogy the same rules for determining jurisdiction for law suites on maintenance for a child born out of wedlock thus will apply for law suites on maintenance for a child born in wedlock. This means that a law suite cannot be brought forward by a debtor (the person liable to pay the maintenance) in a Finnish court, if the claimant (the person entitled to maintenance) is not living in Finland unless the child is a Finnish citizen.

Rules on applicable law

If the child is born in wedlock the applicable law is, according to section 19 in the Act on Certain International Family Relationships, the law of the state in which the child is a citizen.

If the child is born out of wedlock, the applicable law is, according to section 21 in the Act on Certain International Family Relationships, the Finnish law (*lex fori*).

The applicable law provides the criteria for deciding whether a foreign maintenance order may be modified and how it may be modified. If the applicable law is the Finnish law, then the question whether the foreign maintenance order may be modified will be decided by applying the same criteria as for modifying a Finnish maintenance order (please, read the answer to question 14).

Modification of a foreign agreement/judgement on maintenance for a spouse

Rules on jurisdiction

Finland is bound by the Brussel I-regulation and the Lugano Convention. According to these legal instruments Finnish courts have jurisdiction when the respondent is domiciled in Finland (article 2 in both legal instruments) or when the person entitled to maintenance is domiciled or habitually resident in Finland (point 2 of article 5 in both legal instruments). This means, when these legal instruments are applicable, that a law suite cannot be brought forward by a debtor (the person liable to pay the maintenance) in a Finnish court, if the claimant (the person entitled to maintenance) is not living in Finland.

² The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³ The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988.

In cases where the jurisdiction of a Finnish court is not determined by the Brussel I-regulation or the Lugano Convention, the jurisdiction will be determined by section 126 of the Marriage Act. According to this provision a matter pertaining to maintenance may be ruled admissible by a Finnish court, if the defendant is domiciled or habitually resident in Finland or if the person entitled to maintenance (the claimant) is domiciled or habitually resident in Finland or if the matter is raised in connection with a divorce proceeding. This means that if the claimant (the person entitled to maintenance) is not living in Finland, a law suite cannot be brought forward by a debtor (the person liable to pay the maintenance) in a Finnish court unless it is raised in connection with a divorce proceeding.

Rules on applicable law

The applicable law, which according to subsection 2 of section 128 in the Marriage Act is the law of the state where the spouse entitled to maintenance is domiciled, provides the criteria for deciding whether a foreign maintenance order may be modified and how it may be modified. According to section 132 in the Marriage Act a modification shall nevertheless always be based on the need for support of the person entitled to the maintenance and the means of the person liable to provide maintenance. If the applicable law is the Finnish law, the question whether the foreign maintenance order may be modified will be decided by applying the same criteria as for modifying a Finnish maintenance order (please, read the answer to question 14).

Establishing paternity

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

Answer:

A question on paternity cannot be solved in the context of child support proceedings, but a question on maintenance for a child may be solved in the context of a court trial on paternity.

The applicable law in a paternity trial, when the respondent is a Finnish citizen, is Finnish law (section 21 of the Act on Certain International Family Relationships). There is no provision in Finnish law on which law is applicable when the respondent is a foreign citizen. According to the Supreme Court Decision KKO 1983 II 117 Finnish law (*lex fori*) is applicable when the respondent is a foreign citizen.⁴

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

Answer:

A demand for maintenance for a child may be submitted in the context of a *paternity trial* (please, read the answer to question 16).

The criteria for the establishment of paternity in a *paternity trial* are the following: the court shall establish that a man is the father of the child if it is shown that he had intercourse with the mother at the time of conception, and if, in view of the statements of the mother of the child and the man as well as all the other circumstances, it is deemed proven that the man has conceived the child. The court

⁴ The Ministry of Justice is planning to start a reform on new international private law rules for paternity matters.

shall on its own motion order that all the evidence which the court deems necessary for a ruling on the matter shall be obtained.⁵

Paternity may also be established through a judicial process for *paternity acknowledgment*.⁶ The judicial process is preceded by an administrative process where the locally competent municipal child welfare supervisor has to arrange an investigation of paternity, when he has been notified of the birth of a child born out of wedlock. The mother of the child and the man who wants to acknowledge his paternity may come to a meeting arranged by the supervisor. At this meeting the man may notify the supervisor that he is the father of the child. When the supervisor has finished the investigation of paternity, he shall send the relevant documents to the court, which may establish that the man, who has acknowledged the paternity, is the father of the child. The court may establish the paternity if there is no cause for the court to assume that the man is not the father of the child. The court may not in connection with this process give a ruling upon the maintenance to be paid to the child. The father and the mother may make a separate agreement on the maintenance to be paid to the child or institute a separate proceeding on maintenance in the court (please, read the answer to question 5).

- 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.

Answer:

As explained in the answer to question 16 paternity cannot be established in the context of proceedings for child support (maintenance), but a claim for child support (maintenance) may be put forward in the context of a trial for establishment of paternity.

When the paternity is to be established through *the acknowledgement procedure*, the municipal child welfare supervisor may upon request by the potential father or if the supervisor himself deems it justified, give an order that a blood analysis (DNA) shall be made on the child, the mother and the potential father. The analysis may be carried out only with the consent of the parties. If the supervisor finds it necessary, he may obtain a medical expert statement on the time of conception of the child. The parties do not have to pay for the blood analysis nor for the medical report on the time of conception of the child. These costs will be paid by state funds. If the parties cannot pay for the travel costs for the travel to the municipal health care center, these cost can be paid by state funds. The parties do not have to pay for the service offered to them by the municipal child welfare supervisor nor for the court decision on establishment of paternity through acknowledgment.⁷

When the paternity is established through *a paternity trial*, the court may upon the request of one of the parties or by its own motion order that a blood analysis (DNA) shall be made on the child, the mother and the potential father. The parties may not

⁵ The government has given a bill (HE 76/2002 vp) to the Parliament on Assisted Reproduction. This bill includes inter alia a proposal on the modification of the Paternity Act. According to the proposed modification the father of a child born through assisted reproduction is the man, who gave his approval to the assisted reproduction.

⁶ The government has given a bill (HE 79/2002 vp) to the Parliament with a proposal that the task to establish paternity on the basis of a paternity acknowledgment shall be given to the local civil registrar's office.

⁷ Provisions on blood analysis are in the Act on Certain Analysis on Blood and other Inheritable Characteristics (702/1975).

object to the order. The parties do not have to pay for the blood analysis. The costs for the blood analysis will be paid by state funds. If the parties cannot pay for the travel costs for the travel to the municipal health care center, these cost can be paid by state funds. The parties to a paternity trial are liable for their own legal costs, unless the court finds that there are weighty reasons to render one of the parties liable for the legal costs of the other party and the court finds that such a ruling can be considered reasonable in the light of the economic circumstances of both parties.

A party to a paternity trial who is not domiciled in Finland has according to the Decree on Granting Cost-free Court Proceedings in Certain Cases (833/1989) a right to receive cost-free court proceedings in a paternity trial with or without adjacent claims for maintenance to the child. This right is, however, subject to a condition on reciprocity.

If a party to a paternity trial who is not domiciled in Finland does not have a right to receive cost-free court proceedings according to the Decree on Granting Cost-free Court Proceedings in Certain Cases, he or she may apply for completely or partially free legal aid in accordance with the provisions in the Act on Legal Aid (257/2002). According to this act persons, who are domiciled in Finland or who are citizens in the European Union or in a state belonging to the European Economic Area and who are working or in search for work in Finland, have a right, if they fulfil the requirements of a means test, to receive completely or partially free legal aid. Legal aid may, according to the Act on Legal Aid, also be given to other persons, if he or she is involved in a judicial proceeding in Finland or if there are special reasons for giving legal aid. Legal aid will also be provided in accordance with the provisions in the Convention on International Access to Justice done at the Hague 25th October 1980 as Finland is a party to this convention.

A claimant who has been granted completely free legal aid does not have to pay any fees for the judgment of the court. A claimant or a respondent who has been granted completely free legal aid does not have to pay the fees for a legal counsel, if he or she has been appointed a legal counsel according to the provisions in the Act on Legal Aid.

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (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.

Answer:

A

No.

The recognition or enforcement of a foreign child support decision may not be refused on the ground that it entails a determination of paternity. The recognition or enforcement of a foreign child support decision may however, according to section 7 in the Act on the Recognition and Enforcement of Foreign Maintenance Orders (370/1983) be refused, if it is manifestly contrary to the ordre public of Finland.

B

No.

Finland does not have modern provisions on the recognition of paternity decisions issued in other foreign states than Denmark, Iceland, Norway and Sweden⁸. It is likely that such foreign paternity decisions are recognized in Finland which are legally binding in the state where the paternity decision was issued.

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.

Answer:

A. A resident claimant for child support (maintenance)

Administrative process

The municipal social welfare board will help the resident claimant for child support (maintenance) to conclude an agreement with the respondent on the maintenance to be paid to the child as well in a case where the respondent is resident in Finland as in a case where the respondent is resident abroad. When the respondent lives abroad, the Ministry for Foreign Affairs may provide the board with the necessary assistance in the matter.

The municipal social welfare board does not charge fees for counselling and services in matters on maintenance to be paid to a child. Neither does the Ministry for Foreign Affairs charge fees for its assistance in the matter.

Judicial process

If the parties cannot reach an agreement on the maintenance to be paid to the child, the matter may be brought by the claimant to the court.

A person who because of his or her financial situation cannot pay the costs for a judicial process (fees for a legal counsel and fees for judgments) may make a petition to the State Legal Aid Office to receive free or partially free legal aid. The State Legal Aid Office can decide that the applicant will receive completely or partially free legal aid (*means test*). The provisions on the criteria for granting completely or partially free legal aid are in the Act on Legal Aid.

If legal aid is not granted, the claimant resident must him- or herself pay for a legal counsel and for a judgment.

As to the question on the obligation to pay the costs of the other party, the main rule in judicial processes on maintenance is that the claimant party and the respondent party will each have to carry the responsibility for one's own costs, which means that the loosing party will not be ordered to pay the legal costs of the winning party unless there are weighty reasons (chapter 21, section 2 of Code of Judicial Procedure).

B. A claimant for child support (maintenance) who is resident abroad

Administrative process

⁸ Provisions on the recognition of paternity decisions issued in Denmark, Iceland, Norway and Sweden are in the Act on Recognition of Paternity Decisions issued in a Nordic State (352/1980).

If the claimant party for child maintenance is resident abroad, the municipal social welfare boards do not have the competence to approve an agreement even if the respondent party is resident in Finland.

Judicial process

A claimant party for child support (maintenance), who is resident abroad, has according to the Decree on Granting Legal Aid in Certain Cases, a right on the basis of reciprocity to receive completely free legal aid.

If a claimant party is not entitled to cost-free legal aid according to the Decree on Granting Legal Aid in Certain Cases, he or she can apply for completely or partially free legal aid according to the provisions in the Act on Legal Aid. The criteria for approving the application are described in the answer to question 18.

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

Answer:

Legal aid can be given for administrative and judicial processes.

When a person makes an application to receive completely or partially free legal aid according to the provisions in the Act on Legal Aid, a means test is applied. The economic situation of the applicant is evaluated on the basis of the economic resources available to him or her each month (monthly income). Completely free or partially free legal aid is granted to an applicant whose monthly income is below a level fixed by a decree issued by the government.

If the applicant has an insurance that will pay for the legal costs, legal aid will not be granted to him or her.

When the applicant is resident abroad and the legal aid is available to him or her on a reciprocal basis, no means test is applied. The applicant will according to the Decree on Granting Legal Aid in Certain Cases receive legal aid irrespective of the level of his or her monthly income.

- 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?

Answer:

The same rules for legal aid apply for applications on maintenance for children and maintenance for spouses.

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?

Answer:

When a maintenance case has been brought to a municipal social welfare board, the parties appear before the board with or without a legal counsel. Usually the parties appear without a legal counsel. The municipal social welfare board does not charge fees for its services.

When the maintenance case has been brought to a court, the parties may appear before the court with a legal counsel or without a legal counsel. The costs for a trial can roughly be divided into three categories:

1. costs for a legal counsel for the claimant,
2. costs for a legal counsel for the respondent, and
3. a fee for the judgment.

The main rule in judicial maintenance proceedings is that each party pays his or her own costs for a legal counsel. The claimant pays the fee for the judgment.

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

Answer:

Costs and expenses cannot be met from maintenance payments.

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?

Answer:

Finnish payment orders

- (a) Payment and collection of child support (maintenance)

The legal representative for the child may

(1) ask the Bailiff's Office to enforce the payment order or

(2) ask the municipal social welfare board to pay the maintenance in advance according to the provisions in the Act on Maintenance Security (671/1998). When the board has decided to pay the maintenance in advance (according to the Decree 1094/2001 the sum of this benefit is 118,15 € per month), the board has the right to collect all the maintenance payments not yet paid by the parent liable to pay maintenance. The parent liable to pay maintenance may pay the maintenance instalments only to the board.

When the board receives the maintenance instalments, it will pay that part of the instalments which exceeds the monthly benefit ($X € - 118,15 €$) to the child and keep the rest as reimbursement of the paid benefits (118,15 €).

If the parent, who is liable to pay maintenance, does not pay the maintenance instalments at the time of expiration of each instalment, the board shall ask the Bailiff's Office to enforce the payment order by the means available to the Bailiff's Office.

- (b) Payment and collection of maintenance for a spouse

The spouse entitled to maintenance may ask the Bailiff's Office to enforce the payment order.

Foreign payment orders

Maintenance payment orders for children and spouses issued in Denmark, Iceland, Norway and Sweden are treated in the same way as Finnish payment orders⁹. Payment orders issued in other states may be enforced in Finland when the Court of Appeal of Helsinki has declared that the foreign payment order may be enforced in Finland¹⁰.

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

Answer:

Finland is a party to the Convention concluded in New York on 20 June 1956 on the recovery abroad of maintenance. The Finnish Ministry for Foreign Affairs carries out the responsibilities of a central authority as prescribed in the convention. According to the decree 831/1989 the Finnish Ministry for Foreign Affairs acts as a central authority also in relation to other states than those states that are parties to the New York convention.

As the Receiving Agency the Ministry for Foreign Affairs verifies the address of the maintenance debtor, contacts the locally competent municipal social welfare board and requests the board to contact the maintenance debtor and to examine his or her financial situation. The municipal social welfare board also aims at getting the maintenance debtor to voluntarily pay the maintenance. In case where the maintenance debtor is solvent but refuses to pay voluntarily or is not willing to give account of his or her situation for the municipal social welfare board, the Ministry for Foreign Affairs will send the foreign decision to the Court of Appeal of Helsinki, which is the competent authority to decide whether a foreign maintenance order may be enforced in Finland. When the Court of Appeal of Helsinki has decided that the foreign maintenance order may be enforced in Finland, it will send the documents to the Ministry for Foreign Affairs, which will send the enforceable decision to the Bailiff's Office. The Bailiff's Office is responsible for the recovery of the maintenance. The Bailiff's Office will send the recovered maintenance directly to the foreign bank account of the maintenance creditor.

As the Sending Agency the Ministry for Foreign Affairs may provide assistance to the social welfare board in the matter. In almost every case where maintenance is recovered abroad, the mother of the child has been given maintenance support (monthly maintenance benefits) by the social welfare board, in which case the application is made by the social welfare board together with the mother. The Ministry for Foreign Affairs sends the application concerning the recognition and enforcement of the maintenance decision (or an agreement) to the central authority of the state in which the maintenance debtor lives. Maintenance payments received from abroad are requested to be paid into the indicated Finnish bank account. Acceptance of cheques is possible, but bank transfer is preferred.

The Ministry for Foreign Affairs provides its assistance free of charge.

⁹ Provisions on enforcement of payment orders issued in Denmark, Iceland, Norway and Sweden are in the Convention between Finland, Denmark, Iceland, Norway and Sweden made in Oslo 23rd March 1962 on Recovery of Maintenance Payments.

¹⁰ Provisions on recognition and enforcement of payment orders issued in other foreign states are in the Act on Recognition and Enforcement of Foreign Orders on Maintenance Payments (370/1983) and the Decree on Recognition and Enforcement of Orders on Maintenance Payments in Certain Cases (832/1989). The Court of Appeal of Helsinki may, according to section 10 in the Act on Recognition and Enforcement of Foreign Orders on Maintenance Payments, upon a demand by the claimant decide that the claimant shall receive a cost-free legal proceeding, if he or she has received a cost-free legal proceeding in the process where the decision on maintenance was given.

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

Answer:

The Bailiff's Office recovers the maintenance in accordance with the provisions in the Enforcement Act (*ulosottolaki*).

- 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;
- tax refund intercepts;
- garnishment from bank accounts or other sources;
- deductions from social security payments;
- forced sale of property;
- division of pension benefits; and
- committal to prison.

Answer:

The Bailiff's Office may make a wage withholding, a tax refund intercept and a garnishment from a bank account and other sources. The Bailiff's Office may also make a decision on a restraint on property for a forced sale of the property.

The Bailiff's Office may not make deductions from social security payments nor send a debtor to prison.

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

Answer:

Payments from Finland to a foreign country

When the debtor pays the maintenance payments directly to the recipient abroad he or she pays a banking fee depending on the means of payment and which country the payment is to be made to.

The most advantageous way of payment is to use net bank and electronic funds transfer to the recipient's bank account (6,50 – 8,50 € depending on the bank group and payer's custom). When the payment is made in a bank office, fees are higher (11,00 - 13,00 €). Payments can be made also by using Swift-checks (12.00 – 16.00 €).

When the Bailiff's Office carries the responsibility for the recovery of the maintenance, the Bailiff's Office will pay the banking costs resulting from the transfer of the recovered maintenance from Finland to a foreign country.

Payments from a foreign country to Finland

Finnish banks charge a fee of 4.00 – 7.00 € when depositing a payment from abroad to the recipient's account. When paying a check from abroad the minimum fee is usually 11,00 – 13,00 €.

- 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?

Answer:

Finland is bound by the Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro and the Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on crossborder credit transfers. These legal instruments make it possible to have an easy and low-cost transfer of payments between EU-members.

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.

Answer:

1. Requesting and Requested States should have central authorities for administrative assistance in international maintenance affairs. Central authorities should offer services to national and foreign competent authorities and to debtors and creditors.
2. Requested States usually require that the whole maintenance order must be translated into the official language of the Requested State. This practice leads to very high translation expenses. Efforts should be made to reduce the expenses for translation. It should be possible for Requested States to accept that only the relevant parts of the maintenance order need to be translated. The relevant parts could be presented in an abstract of the maintenance order or in an internationally accepted form containing the relevant information of a particular maintenance order.
3. Some Requested States allow foreign maintenance orders to be modified upon request by the person liable to pay maintenance (the debtor). This practice leads to two conflicting maintenance orders in the same case. Such practice should not be allowed by appropriate rules of jurisdiction.
4. When a debtor, who because of substantial changes in his or her financial circumstances cannot pay maintenance as prescribed in a maintenance order, it might be appropriate to consider, whether the Requested State should have an obligation to help the debtor upon his or her request by sending his or her modification request to the central authority of the Requesting State. The Requesting State would then have an obligation to institute proceedings in order to change the maintenance order.
5. Some Requested States are slow in initiating the process for recovery of maintenance. It would be desirable that the new instrument would provide a reasonable time-limit in which the Requested State must initiate the proceedings for recovery.
6. There are also many other problems in the present administrative co-operation between Requesting and Requested States:

- o Administrative co-operation should be permitted not only between central authorities but also between enforcement authorities and between other competent authorities (e.g. courts and municipal social welfare bodies).
 - o The present system for transmitting of information should be made more efficient. An effort should be made to make the transmission of information faster e.g. by allowing the use of e-mail and other electronic methods for the rapid transmission of information.
 - o Requested States should provide such services as assisting more efficiently in locating debtors and with the hearing of the debtor. Requested States should also upon demand by the Requesting State take contact with the debtor and gather information on his or her financial situation. These services should be available also before the recovery process is started.
 - o Requested States should have an obligation upon request to provide information on the different stages that the recovery matter is going through. It is for example important for the Requesting State to know when it can expect to receive the recovered maintenance.
- 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.

Answer:

Please, read the answer to question 31.

- 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;

Comment:

Administrative co-operation is of utmost importance. The services should be provided already before the recovery process is started. Assistance should be provided to both creditors and debtors.

b provisions for the recognition and enforcement of foreign decisions;

Comment:

The provisions on recognition and enforcement of foreign decisions should provide for a very simple procedure for recognition and enforcement of foreign decisions. It might be appropriate to consider a provision that would encourage Contracting Parties to the new instrument to apply the same provisions also to other states than Contracting Parties. If provisions on indirect jurisdiction are included in the new instrument they should not be as lenient as those in the Hague Convention of 1973.

c applicable law principles;

- d uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;

Comment:

Uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance are important and it would be desirable that such provisions were included in the new instrument.

- e provisions specifying the assistance to be provided to an applicant from another Contracting Party;

Comment:

It is very important that an applicant from another country receives assistance in the Requested State.

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

- g provisions concerning co-operation in the establishment of paternity;

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

Comment:

Please read the answer to questions number 29 and 31.6.

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

- j standard forms;

Comment:

Standard forms and procedures are important: they facilitate the process and reduce the costs. The standard forms should be easily available in different languages.

- k provisions aimed at securing compliance with obligations under the instrument;

Comment:

The training of judges, the personnel of the Bailiff's Office and the personnel of other authorities involved is important.

- l provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;

Comment:

Provisions concerning a right for public bodies to claim reimbursement of benefits paid to the maintenance creditor are very important.

- m others. Please specify.

Comment:

It would be desirable that the new convention would provide for regularly held follow-up conferences, where the Contracting Parties could exchange information on the application of the convention in the different states bound by the convention.

- 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,

Comment:

- administrative co-operation between the Contracting Parties
- the courts and other competent authorities of the Requested States should not have a right to review the merits of a foreign decision upon the request of a debtor resident in that state
- Contracting Parties should be obliged to provide administrative assistance also to debtors and not only creditors
- the new instrument should require Contracting Parties to provide upon request information on the progress of pending maintenance cases and recovery cases.

- 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 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?

Comment:

Yes. In the above mentioned case the authorities of the Requested State should help the creditor to obtain a new decision, which is enforceable in the Requested State.

- 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.

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?
- 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?
- 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.

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

Questionnaire concernant un nouvel instrument mondial sur le recouvrement international des aliments.

Partie I - Actualisation du questionnaire présenté en 1999

Il n'y a pas de modification ou d'éléments nouveaux à apporter aux réponses faites au questionnaire de 1999 .

Partie II – Questions concernant les systèmes nationaux relatifs aux aliments envers les enfants et d'autres membres de la famille

Nature de la décision relative à des aliments

Question 1

La fixation d'aliments envers des enfants, l'époux ou d'autres membres de la famille peut prendre la forme soit d'une convention amiable entre les parties concernées, soit d'une décision judiciaire.

En matière de contribution à l'entretien et l'éducation des enfants, la loi n° 2002-305 du 4 mars 2003 relative à l'autorité parentale prévoit expressément la possibilité pour les parents de saisir le juge des affaires familiales afin de faire homologuer la convention par laquelle ils fixent la contribution à l'entretien et l'éducation de l'enfant.

Le versement d'aliments prend en principe la forme d'un paiement périodique.

Cependant, en matière de contribution à l'entretien et l'éducation d'un enfant, la loi prévoit que la pension alimentaire peut, en tout ou partie, prendre la forme d'une prise en charge directe de frais exposés au profit de l'enfant et qu'elle peut être servie sous forme d'un droit d'usage et d'habitation. En outre, lorsque la consistance des biens du débiteur s'y prête, la pension alimentaire peut être remplacée, en tout ou partie, par le versement d'une somme d'argent entre les mains d'un organisme accrédité chargé d'accorder en contrepartie à l'enfant une rente indexée, l'abandon de biens en usufruit ou l'affectation de biens productifs de revenus.

Question 2

Différentes personnes peuvent bénéficier d'aliments :

- Un époux de la part de son conjoint, l'obligation pécuniaire résultant dans ce cas de l'exécution du devoir de secours qui pèse sur chacun d'eux du fait du mariage.

Cette obligation persiste dans le cadre d'un divorce pour rupture de la vie commune ou d'une séparation de corps.

- Les enfants, de la part de leurs parents ou de leurs descendants, qu'il s'agisse d'une parenté légitime, naturelle ou adoptive.

Dans ce dernier cas, il convient de distinguer selon que l'adoption est plénier ou simple. En cas d'adoption plénier, l'enfant est assimilé à un enfant légitime. Dès lors, une obligation alimentaire existe entre l'adopté et ses parents adoptifs ainsi qu'avec tous les descendants de ces derniers. L'obligation alimentaire entre l'adopté et les membres de sa famille d'origine, quant à elle, disparaît, sauf s'il s'agit de l'adoption de l'enfant du conjoint, celle-ci laissant subsister la filiation. En cas d'adoption simple, aucun lien de parenté n'est créé entre l'adopté et la famille et l'adoptant. Dès lors, l'obligation alimentaire n'existe qu'entre l'adopté et sa famille d'origine, même si elle présente un caractère subsidiaire par rapport à l'obligation de l'adoptant.

- Indépendamment de l'établissement de tout lien de filiation, un enfant de la part de celui qui a eu des relations avec sa mère pendant la période légale de conception.

- Les père et mère et autres descendants de la part de leurs enfants.

Cette obligation alimentaire ne s'impose qu'en ligne directe, mais à l'infini. Ainsi, les enfants peuvent être tenus de verser des aliments à leurs parents, grands-parents, arrière-grands-parents.

- Le beau-père et la belle-mère de la part de leurs gendres et belles-filles.

En effet, le mariage engendre une obligation alimentaire entre chacun des époux et les descendants au premier degré de l'autre, quelle que soit la nature de la filiation établie entre le conjoint et ses descendants. La nature du régime matrimonial est également sans incidence.

Cette obligation cesse lorsque celui des époux qui produisait l'affinité et les enfants issus de son union avec l'autre époux sont décédés, ces deux conditions étant cumulatives.

Elle cesse également en cas de divorce, à compter du jour où le jugement prend force de chose jugée.

- L'époux survivant non divorcé qui est dans le besoin.

En effet, la succession de l'époux précédent doit des aliments à l'époux survivant qui est dans le besoin, le délai pour les réclamer étant d'un an à partir du décès et pouvant se prolonger, en cas de partage, jusqu'à son achèvement. La volonté du défunt est sans effet sur le droit alimentaire du conjoint, qui est d'ordre public.

Question 3

Il n'existe pas de définition de l'enfant « à charge » dans le code civil et le juge apprécie souverainement la réalité de cette situation au vu des éléments de fait qui lui sont soumis.

Il peut être précisé cependant que l'accès à la majorité ne fait pas présumer que l'enfant n'est plus à charge, l'obligation faite aux parents de contribuer à l'entretien et l'éducation des enfants ne cessant pas de plein droit à cette date.

Question 4

La Convention de La Haye du 2 octobre 1973, sur la loi applicable aux obligations alimentaires, ratifiée par la France, s'applique à toutes les obligations alimentaires découlant des relations de famille, de parenté, de mariage ou d'alliance. Elle donne compétence successivement :

- 1° à la loi interne de la résidence habituelle du créancier ;
- 2° à la loi nationale commune, lorsque le créancier ne peut obtenir d'aliment du débiteur en vertu de la première loi ;
- 3° à la loi interne de l'autorité saisie, lorsque la deuxième loi ne permet pas non plus au créancier d'obtenir d'aliments.

La loi désignée peut être écartée lorsqu'elle est manifestement contraire à l'ordre public.

Question 5

Les décisions en matière d'aliments envers les enfants sont rendues dans le cadre de procédures judiciaires.

Question 6

Les juridictions françaises sont compétentes pour connaître des litiges internationaux relatifs à la mise en œuvre de l'obligation alimentaire lorsque le défendeur ou le créancier demandeur demeure en France.

Les tribunaux français sont encore compétents quand bien même ni le défendeur ni le créancier demandeur ne demeuraient en France, dès lors que l'une des parties au procès est française.

Ce privilège ne peut toutefois être invoqué contre les défendeurs domiciliés sur le territoire d'un Etat contractant aux conventions de Bruxelles du 27 septembre 1968 et de Lugano du 16 septembre 1988.

Question 7

Le juge compétent, dans tous les cas, est le juge des affaires familiales, sauf en ce qui concerne la demande de subsides que peut former un enfant à l'encontre de celui qui a eu des relations avec sa mère pendant la période légale de conception, qui relève de la compétence du tribunal de grande instance.

Une différence essentielle existe entre l'obligation d'aliments et la contribution à l'entretien et l'éducation des enfants dont sont redevables les père et mère.

En effet, la loi du 3 janvier 1972 permet au juge de décharger le débiteur de tout ou partie de sa dette alimentaire quand le créancier aura lui-même manqué gravement à ses obligations envers lui.

Ce principe est expressément applicable au devoir de secours entre époux séparés de corps. Si aucun texte ne permet d'étendre ces dispositions à la situation d'un époux débiteur d'une contribution aux charges du mariage ou d'une pension alimentaire envers son ex-conjoint après un divorce pour rupture de la vie commune, la jurisprudence admet néanmoins la possibilité de dispenser le débiteur de ses obligations alimentaires s'il rapporte la preuve de circonstances particulières, généralement en rapport avec la responsabilité de son conjoint dans la séparation ou l'existence de manquements graves aux obligations et devoirs du mariage.

Question 8 et 9

Les aliments que sont susceptibles de percevoir les enfants sont de deux ordres, et il n'existe aucune barème d'application automatique pour en évaluer le montant.

- Les père et mère ont, à l'égard de leurs enfants une obligation d'entretien et d'éducation, qui est évaluée à proportion des ressources respectives de chacun d'eux et des besoins de l'enfant.

Ses besoins s'entendent alors de façon élargie. En effet, ils comprennent les dépenses nécessaires à la vie (nourriture, vêtements, logement...), conformément à toute obligation alimentaire de droit commun, mais couvrent également tous les frais qui s'attachent à son éducation et sa formation.

- Après l'obligation d'entretien et d'éducation qui pèse sur les père et mère, qui n'a, contrairement aux obligations alimentaires proprement dites, aucun caractère de réciprocité, succède l'obligation réciproque de droit commun entre parents et enfants, qui suppose la preuve d'un état de besoin de la part du demandeur.

Question 10

En ce qui concerne les aliments entre époux, telle la contribution aux charges du mariage, expression du devoir de secours résultant de leur union, il doit être tenu compte du niveau d'existence auquel l'époux créancier peut prétendre en raison des facultés de son conjoint. La demande ne suppose pas la preuve d'un état de besoin.

En revanche, à l'égard des autres membres de la famille, les principes habituels en matière d'aliments sont applicables : ils sont donc accordés « dans la limite du besoin de celui qui les réclame, et de la fortune de celui qui les doit ».

Question 11

La même loi que la loi applicable à la détermination d'un droit à aliment c'est-à-dire, en principe, la loi du créancier d'aliments ou la loi appliquée au divorce.

Question 12 et 13

L'indexation en matière d'aliments peut avoir une origine conventionnelle.

Elle peut également résulter d'une décision du juge. La loi du 03 janvier 1972 a, en effet, introduit une nouvelle disposition aux termes de laquelle « le juge peut, même d'office, et selon les circonstances de l'espèce, assortir la pension alimentaire d'une clause de variation permise par les lois en vigueur ».

Ce pouvoir concerne toutes les obligations alimentaires y compris la contribution aux charges du mariage, l'obligation d'entretien et d'éducation d'un enfant, la pension alimentaire entre époux séparés de corps et la pension alimentaire versée à l'époux qui n'a pas pris l'initiative de la procédure dans le cas d'un divorce pour rupture de la vie commune.

Les parties et le juge ont le libre choix de l'indice.

Question 14

L'obligation alimentaire est toujours révisable quel que soit la manière dont elle a été initialement fixée.

- Si le quantum a été fixé par décision de justice, celle-ci a autorité de la chose jugée. La modification peut, en conséquence, être demandée au vu d'éléments nouveaux.
- Si le quantum de l'obligation légale a été fixé par une convention entre le créancier et le débiteur, celle-ci peut toujours être révisée, soit par un nouvel accord des parties, soit par une décision de justice qui interviendra sur la demande de l'une des parties.

Les circonstances justifiant la majoration de l'obligation peuvent être l'augmentation des besoins du créancier, de ses charges, ou l'accroissement des ressources du débiteur à moins que les besoins du créancier soient déjà comblés.

Les circonstances justifiant la diminution, voire la suppression de l'obligation peuvent résulter notamment de la diminution des ressources du débiteur, d'une modification de sa situation de famille entraînant un alourdissement de ses charges ou de la diminution des besoins du créancier.

Question 15

Cela dépend de la loi applicable.

Question 16

En principe, l'obligation alimentaire à l'égard des enfants découle de l'établissement du lien de filiation à l'égard du ou des parents.

La loi française prévoit trois modes d'établissement de la paternité.

Si la reconnaissance volontaire du père en constitue le mode principal, ce lien peut également résulter de la possession d'état, le juge des tutelles dressant alors un acte de notoriété

constatant le lien de filiation. Enfin, la paternité peut être déclarée judiciairement, au terme d'une action en recherche de paternité.

Cependant, des subsides peuvent être alloués à l'enfant lorsque la filiation paternelle n'est pas établie. L'action est dirigée contre l'homme qui a eu des relations avec la mère pendant la période légale de conception et est fondée sur une simple présomption de paternité. Elle s'applique notamment dans le cas où le lien ne peut être juridiquement établi (filiation incestueuse) ou risque d'être traumatisant pour la mère ou l'enfant (viol) sans pour autant limitée à ces hypothèses.

Questions 17 et 18

L'action en recherche de paternité doit en principe être exercée dans les deux années suivant la naissance. Toutefois, si les parents ont vécu en concubinage durant la période légale de conception, l'action peut être exercée durant les deux ans suivant la cessation du concubinage. Si le père prétendu a participé à l'entretien ou à l'éducation de l'enfant en qualité de père, l'action peut également être exercée dans les deux années suivant la cessation de cette contribution.

L'enfant bénéficie également d'un droit d'agir dans les deux années qui suivent sa majorité.

L'action en recherche de paternité ne peut être intentée que s'il existe des présomptions ou indices graves. La preuve de la paternité peut ensuite être rapportée par tous moyens ; la Cour de cassation, par un arrêt en date du 28 mars 2000 a estimé que l'expertise biologique est, en matière de filiation, de droit, sauf s'il existe un motif légitime de ne pas y procéder.

Les frais d'expertises sont avancés par le demandeur et assumés par la partie perdante. L'aide juridictionnelle totale ou partielle peut être accordée aux parties selon leurs ressources, cette aide couvrant les frais d'expertise. Sont admises au bénéfice de l'aide juridictionnelle les personnes physiques de nationalité française et les ressortissants communautaires, ainsi que les personnes de nationalité étrangère résidant habituellement et régulièrement en France.

Question 20

Le champ d'application de l'aide juridictionnelle ne comporte pas en France d'exclusions : cette aide est accordée aux demandeurs et aux défendeurs, en matière gracieuse ou contentieuse devant toute juridiction. Elle peut être accordée pour tout ou partie de l'instance ainsi qu'en vue de parvenir à une transaction avant l'introduction de l'instance ; elle peut également être accordée pour obtenir l'exécution de la décision de justice ou de tout autre titre exécutoire.

En conséquence, l'aide juridictionnelle s'applique aux procédures judiciaires visant à obtenir une décision en matière d'obligation alimentaire et à la faire exécuter.

Deux cas sont distingués :

- celui du requérant, résidant en France avec les enfants et demandeur d'aliments au parent résidant à l'étranger : l'affaire est portée devant la juridiction du domicile du requérant qui peut obtenir l'aide juridictionnelle dans les conditions prévues en droit interne (cf. question 21) ;
- celui du requérant résidant à l'étranger avec les enfants et demandeur d'aliments au parent résidant en France : dans ce cas, l'aide juridictionnelle est accordée dans le respect des conventions.

Question 21

L'aide juridictionnelle est accordée par le bureau d'aide juridictionnelle établi auprès du tribunal de grande instance, sous plusieurs conditions de ressources, de nationalité, de résidence et de recevabilité.

1 – Conditions de ressources.

L'aide juridictionnelle est accordée si la moyenne des ressources de toute nature perçues au cours de l'année civile précédente, (à l'exclusion des allocations familiales et de certaines prestations sociales) ne dépasse pas un certain seuil fixé chaque année par la loi.

Par exemple, les demandes d'aide juridictionnelle déposées en 2002 sont examinées au vu des ressources perçues en 2001. Le plafond des ressources mensuelles est, pour une personne seule, de 802 € pour **l'aide juridictionnelle totale**, et de 1203€ pour **l'aide juridictionnelle partielle**. Dans les deux cas, une majoration de 91€ est appliquée pour chacune des personnes à la charge du demandeur, élevant ainsi le seuil des ressources.

Les personnes dont les ressources dépassent ces seuils peuvent être admises à **titre exceptionnel** à l'aide juridictionnelle si leur action apparaît particulièrement digne d'intérêt en raison de l'objet du litige ou du coût prévisible du procès. (art.6 de la loi de 1991)

La déclaration de ressources n'est pas demandée à la personne bénéficiaire de l'allocation du Fonds National de Solidarité ou du Revenu Minimum d'Insertion, ni à celle qui souhaite faire valoir un droit en matière de pensions militaires d'invalidité et de victimes de la guerre.

La déclaration de ressources fait l'objet d'une étude attentive de la part du bureau d'aide juridictionnelle qui peut, le cas échéant, effectuer des vérifications par examen de la cohérence entre les éléments déclarés par le demandeur et les justificatifs fournis et/ou ceux contenus dans le dossier judiciaire. Le bureau d'aide juridictionnelle peut également procéder par enquête auprès des services fiscaux. Ces vérifications ne sont pas systématiques, elles ne sont réalisées qu'en cas de suspicion de fausses déclarations ou d'incohérence.

2 – Condition de nationalité

L'aide juridictionnelle est accordée à la personne de nationalité française ou ressortissant de l'un des états membres de l'Union Européenne ou ressortissant étranger résidant habituellement en France et en situation régulière.

L'aide juridictionnelle est également accordée pour une affaire devant une juridiction française si, à l'étranger ne résidant pas en France, ressortissant d'un Etat lié à la France par un accord international ou bilatéral qui reconnaît à ses ressortissants le bénéfice de l'aide judiciaire.

3 – Condition de résidence

Hors les cas mentionnés ci-dessus, la résidence habituelle et régulière en France est de principe.

Toutefois, elle n'est pas obligatoire à titre exceptionnel dans le cas où la situation du demandeur apparaît particulièrement digne d'intérêt au regard de l'objet du litige ou des charges prévisibles du procès.

L'aide juridictionnelle est également accordée sans condition de résidence aux étrangers lorsqu'ils sont mineurs, témoins assistés, mis en examen, prévenus, accusés, condamnés ou parties civiles ou lorsqu'ils font l'objet d'une procédure relative aux conditions d'entrée et de séjour en France.

4 – Condition de recevabilité

L'aide juridictionnelle est accordée à la personne dont l'action n'apparaît pas manifestement irrecevable ou dénuée de fondement. Cette condition n'est pas applicable au défendeur à l'action, à la personne civilement responsable, au témoin assisté, à l'inculpé, au prévenu, à l'accusé, au condamné.

En matière de **cassation**, l'aide juridictionnelle est refusée au demandeur si aucun moyen de cassation sérieux ne peut être relevé.

Lorsque l'aide juridictionnelle a été refusée sur ce fondement et que cependant le juge a fait droit à l'action intentée par le demandeur, il est accordé à celui-ci le remboursement des frais, dépens et honoraires par lui exposés ou versés, à concurrence de l'aide juridictionnelle dont il aurait bénéficié compte tenu de ses ressources.

Question 22.- Les règles et procédures concernant l'aide juridique ou l'assistance judiciaire ou administrative sont-elles différentes pour les demandeurs d'aliments envers l'époux ou d'autres membres de la famille ?

Les règles et procédures régissant l'aide juridictionnelle sont les mêmes pour les demandeurs d'aliments envers l'époux ou d'autres membres de la famille.

Question 25

En cas de défaillance du débiteur d'aliments , le créancier saisit le juge qui fixe le montant de la créance alimentaire et en détermine les modalités de paiement .

Si le débiteur ne s'acquitte pas de la pension alimentaire mise à sa charge pour un enfant mineur, les organismes débiteurs de prestations familiales versent au créancier une avance sur pension qui emporte mandat à leur profit . Ils sont subrogés dans les droits du créancier et engagent les procédures de recouvrement qui peuvent , à cette occasion , être également mises en œuvre , avec l'accord du créancier , pour les pensions alimentaires qui lui sont dues à titre personnel (pension alimentaire ou rente due à titre de prestation compensatoire).

Question 26

En France , les frais occasionnés par le paiement de la pension sont à la charge du débiteur . Il n'existe aucun accord sur ce point .

Questions 27 et 28

Si le débiteur ne s'acquitte pas spontanément de sa dette, plusieurs voies d'exécution forcée sont ouvertes au créancier qui dispose d'un titre exécutoire :

- Le créancier pourra exercer les voies d'exécution de droit commun : saisie immobilière, saisie-vente de ses meubles corporels, saisie de droits incorporels, saisie-attribution des créances de son débiteur portant sur des sommes d'argent, saisie des rémunérations dues par l'employeur de celui-ci.
- La loi du 2 janvier 1973 relative au paiement direct de la pension alimentaire a institué au profit du créancier d'aliments une procédure simplifiée qui permet, sur intervention d'un huissier, d'obtenir le paiement de la pension directement par les tiers débiteurs de sommes liquides et exigibles envers son débiteur.
La mise en œuvre de cette procédure implique l'obligation pour le tiers de payer les échéances à venir mais s'applique également aux termes échus pendant les six derniers mois avant la notification de la demande.
- Les organismes débiteurs de prestations familiales se sont vus également reconnaître un rôle particulier dans le recouvrement des pensions alimentaires, dès lors que le créancier n'a pu obtenir le recouvrement par une autre voie d'exécution.
- Enfin, la loi du 11 juillet 1975 relative au recouvrement public des pensions alimentaires permet au créancier, qui n'a pu obtenir satisfaction par une voie d'exécution privée, de faire recouvrer sa pension alimentaire par le Trésor Public, grâce aux procédés de recouvrement particulièrement efficaces dont celui-ci dispose pour forcer le paiement des impôts.
La mise en œuvre de cette procédure permet au créancier d'obtenir outre le versement des échéances à venir, le paiement des termes échus à compter du sixième mois précédent la date de la demande.

Question 29

La nature et la tarification des frais bancaires varient en fonction des accords interbancaires .

Question 30

Non

Partie III – Questions concernant les éléments à inclure dans le nouvel instrument

Question 31

Deux difficultés essentielles se présentent :

- l'impossibilité dans certains pays d'obtenir la reconnaissance de la décision de justice fixant l'obligation alimentaire et de recouvrer **les arriérés des pensions** , lorsqu'une nouvelle décision est rendue dans l'Etat requis .
- le refus par certains pays d'appliquer la convention de New -York lorsque la demande de recouvrement concerne **une institution publique** qui a consenti à la créancière des avances sur la pension impayée .

Ces deux difficultés sont importantes puisque dans le 1^{er} cas, la décision de justice française est pour partie amputée d'une part (financièrement majeure) de son contenu. Dans le 2^{ème} cas, la subrogation de l'institution publique qui a fait des avances au créancier dans le souci de lui permettre de faire face à une situation souvent très difficile, n'est pas admise.

Question 32

En France, le créancier de la pension alimentaire est le parent qui assume la charge de l'enfant mineur ou de l'enfant majeur qui ne subvient pas à ses propres besoins. Il a seul qualité pour agir pour demander la reconnaissance et l'exécution de la décision fixant la pension alimentaire. Afin d'assurer le recouvrement des pensions dues pour l'enfant représenté par un organisme public, il conviendrait de préciser la loi applicable à la représentation du mineur devant les juridictions de l'Etat requis.

Question 33. Gardant à l'esprit que le nouvel instrument doit être « complet et fondé sur les meilleurs aspects des Conventions existantes », et que sa structure exacte n'a pas encore été déterminée, veuillez indiquer vos points de vue préliminaires sur les éléments clefs qui doivent y être pris en compte. A cette fin, il pourra vous être utile

d'utiliser la liste suivante et d'indiquer l'importance que vous attachez à chacun des points énumérés :

- a **dispositions relatives à la coopération administrative** ;
- b **dispositions pour la reconnaissance et l'exécution des décisions étrangères** ;
- c **principes de loi applicable** ;
- d **règles uniformes de compétence directe applicables pour déterminer et modifier la décision relative à des aliments** ;
- e **dispositions spécifiques d'aide qui doit être fournie à un requérant provenant d'une autre partie contractante** ;
- f **dispositions concernant l'aide et l'assistance judiciaires qui doivent être fournies à un requérant provenant d'une autre partie contractante** ;
- g **dispositions relatives à la coopération pour la recherche en paternité** ;
- h **dispositions concernant la coopération en matière de virement international de fonds au moindre coût** ;
- i **dispositions permettant aux parties contractantes d'éviter d'octroyer des services au requérant étranger lorsque ceux-ci ne sont pas disponibles sur une base réciproque** ;
- j **formules modèles** ;
- k **dispositions visant à assurer le respect des obligations en vertu de l'instrument** ;
- l **dispositions relatives aux institutions publiques qui poursuivent le remboursement des prestations fournies au créancier d'aliments** ;
- m **autres. Merci de bien vouloir préciser.**

- 34 a Au regard de la structure générale de ce nouvel instrument et en gardant à l'esprit que celle-ci devrait « combiner l'efficacité maximale avec la flexibilité nécessaire pour assurer une large ratification », quels éléments parmi ceux que vous avez mentionnés sous la question n° 33 devraient être introduits comme éléments « centraux », dans le sens où toutes les Parties contractantes devraient sans exception s'y soumettre ?**

Parmi les thèmes cités , plusieurs présentent un intérêt déterminant pour assurer l'efficacité d'un nouvel instrument :

a) une **coopération administrative active** devrait être initiée particulièrement entre les pays dont les échanges au titre de la convention sont les plus fréquents , afin de lever un certain nombre d'obstacles par une meilleure connaissance mutuelle et par la recherche de pratiques communes .

b) **des dispositions facilitant et accélérant la reconnaissance et l'exécution des décisions étrangères** sont nécessaires . Elles consisteraient à déterminer une liste limitative des pièces à produire et à définir l'étendue du contrôle du juge sur la décision .

c) **la détermination de la loi applicable**, notamment celle qui régit le mode de représentation en justice du mineur dans l'instance dans le pays requis .

d) **des règles uniformes de compétence directe applicable pour déterminer et modifier la décision relative aux aliments** sont indispensables afin d'éviter la pluralité d'instances et les actions dilatoires .

l) l'intervention des organismes publics pour le recouvrement des prestations fournies au créancier d'aliments doit être possible dans tous les cas . En effet, le versement au créancier de sommes représentant des avances sur les pensions impayées procèdent d'une politique de solidarité nationale . Ces prestations représentent un coût important pour la collectivité et n'ont pas vocation à être supportées définitivement par elle, dès lors que le débiteur a les moyens de s'acquitter de sa dette .

34 b – Quels sont, parmi ces éléments, ceux qui devraient être facultatifs, dans le sens où les Parties Contractantes devraient avoir la liberté de s'y soumettre ou non ?

h) des dispositions concernant la coopération en matière de virement international de fonds au moindre coût sont intéressantes . La France souhaite néanmoins qu'il soit admis que le recouvrement des créances alimentaires ne doit engendrer aucun frais pour le créancier . Les frais liés au paiement des créances alimentaires devraient être à la charge exclusive du débiteur .

f) des dispositions sur l'aide et l'assistance judiciaires spécifiques qui devraient être fournies à un requérant provenant d'une autre partie contractante sont en contradiction , dans des systèmes où l'admission au bénéfice de l'aide judiciaire est basé sur le plafonnement des ressources et la progressivité des barèmes , avec l'obligation d'assurer à tous un égal accès à la justice , les personnes résidant dans l'Etat requis ne bénéficiant pas des mêmes conditions. Les Etats devraient donc être libres de déterminer les règles concernant l'aide judiciaire .

34 c) Etes- vous en faveur d'un principe général par lequel , la reconnaissance d'une décision existante n'étant pas possible dans le pays où le débiteur réside , les autorités de ce pays devraient être obligées de fournir assistance au créancier pour obtenir une nouvelle décision ?

Non , pour les raisons évoquées ci-dessus . De plus , cela conduirait à énoncer une nouvelle règle de compétence directe . Il semble préférable pour éviter ce cas de figure de réduire les cas de non-reconnaissance comme cela a été fait dans le cadre du règlement communautaire n°44/2001 du 22 décembre 2000 concernant la compétence judiciaire , la reconnaissance et l'exécution des décisions en matière civile et commerciale .

PARTIE IV - Partenaires de négociation et divers

Question 36

Néant

Question 37

La France a consenti sur les trois derniers exercices à une augmentation de sa contribution au financement de la CODIP , ainsi la contribution versée au titre de l'année 2002/2003 est en hausse de 7% par rapport à 2001/2002 . Dans ces conditions et compte tenu de contraintes budgétaires , il ne paraît pas possible d'assurer un financement supplémentaire pour les frais de fonctionnement sus mentionnés.

Question 38

Le Ministère des Affaires Etrangères en sa qualité d'autorité centrale pour l'application de la convention de New -York , a élaboré et mis en ligne un site consacré au recouvrement des pensions alimentaires à l'étranger ¹. Le fonctionnement pratique de la convention y est détaillé et expliqué . Le droit de la famille et en particulier le droit des obligations alimentaires d'un certain nombre de pays est présenté sous forme de fiche de synthèse permettant de satisfaire la demande d'information du public . 48 300 consultations du site ont été enregistrées depuis la mise en service du site au mois de décembre 2001 . Une plaquette de présentation est diffusée dont un exemplaire est joint en annexe .

¹ www.france.diplomatie.gouv.fr/français/familles

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

Form of maintenance decision

- 1 A maintenance decision (a) during marriage and (b) on application for separation/divorce/nullification of marriage, etc. for a spouse and a child of the marriage is made under the Separation and Maintenance Orders Ordinance (“SMOO”, Chapter 16 of the Laws of Hong Kong)* and section 8 of the Matrimonial Proceedings and Property Ordinance (“MPPO”, Chapter 192) respectively. Section 3 of SMOO provides 8 grounds under which a spouse may apply for maintenance. A spouse and a child of the family may obtain maintenance pending suit under sections 3 and 5 of MPPO. Maintenance pending suit is provided by way of periodical payments from the time of presentation of the petition to the date of decree absolute. There is no express provision governing the provision of maintenance for family members other than the spouse and child.

On granting of a decree of judicial separation, the court is empowered to make financial provision and property adjustment to a party to a marriage and a child of the family.

Maintenance is not confined to periodical payments of money. Under section 5(1) of SMOO, the orders that the court may make include –

- (a) A party to a marriage to pay to the other party such lump sum or periodical payments, or both, as the court considers reasonable having regard to the means of both parties. A lump sum order may be made for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining such other party before the making of the order.
- (b) A party to a marriage to pay the other party such lump sum or periodical payments for the maintenance and education of a child of the marriage committed to such other party’s custody that the court considers reasonable having regard to the means of both parties. However, a lump sum order can only be made for the purpose of providing for the immediate and non-recurring needs of a child, or of enabling any liabilities or expenses reasonably incurred in maintaining the child before the making of the order, or both.

In making any of the above orders, the court shall have regard primarily to the best interests of the children.

There are various forms of maintenance payment. The orders that the

* The Laws of Hong Kong are available online at “www.justice.gov.hk/Home.htm”.

court may make under section 8 of MPPO include –

- (a) An order that the respondent shall make to the applicant such periodical payments and for such term as may be so specified in the order;
- (b) An order that the respondent shall secure to the applicant, to the satisfaction of the court, such periodical payments and for such term as may be so specified;
- (c) An order that the respondent shall pay to the applicant such lump sum as may be so specified;
- (d) An order that the respondent shall make to such person as may be specified in the order for the benefit of the child to whom the application relates, or to that child, such periodical payments and for such terms as may be so specified;
- (e) An order that the respondent shall secure to such person as may be so specified for the benefit of that child, or to that child, to the satisfaction of the court, such periodical payments and for such term as may be so specified;
- (f) An order that the respondent shall pay to such person as may be so specified for the benefit of that child, or to that child, such lump sum as may be so specified.

Property transfer and other orders are available to satisfy a maintenance obligation. Sections 4, 6 and 6A of MPPO provide that where a court grants a decree of divorce, it may make an order for –

- (a) periodical payments;
- (b) secured periodical payments;
- (c) lump sum;
- (d) transfer of property;
- (e) settlement of property;
- (f) variation of settlement of property; and
- (g) sale of property.

Eligibility

2 See reply to Question 1, paragraph 1.

3 Section 2 of MPPO defines who is a “child of the family”. A child of the family in relation to the parties to the marriage means –

- (a) a child of both those parties; and
- (b) any other child who has been treated by both those parties as a child of their family.

A “child”, in relation to one or both parties of the marriage, includes an illegitimate child or adopted child of one or both parties. Thus, a “child of the family” includes not only a biological child of the parties, legitimate or otherwise, it also includes an adopted child, a stepchild living with the

parties, or any child who has been treated as a child of the family.

- 4 SMOO provides that a “married person” may apply. Section 2 of SMOO states that a married person means a husband or a wife. A husband means “the husband or partner of a wife or married woman”. A wife and a married woman means the wife or partner of a man by –
- (a) a marriage celebrated or contracted in accordance with the Marriage Ordinance (Chapter 181);
 - (b) a modern marriage validated by the Marriage Reform Ordinance (“MRO”, Chapter 178);
 - (c) a customary marriage declared to be valid by MRO;
 - (d) a union of concubinage as defined in section 14 of the Legitimacy Ordinance (Chapter 184);
 - (e) a *kim tiu* marriage entered in accordance with Chinese law and custom applicable thereto in Hong Kong before 7 October 1971 under MRO; or
 - (f) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed.

There is no express provision governing the provision of maintenance for family members other than the spouse and child.

Procedures for the initial assessment of maintenance

- 5 Child support is determined through a judicial process.
- 6 The process and assessment criteria used in assessment of maintenance are the same, regardless of whether the applicant or respondent lives in Hong Kong or abroad. Section 3 of the Matrimonial Causes Ordinance (Chapter 179) provides that the court has jurisdiction to entertain a petition or application for divorce if –
- (a) either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application;
 - (b) either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or
 - (c) either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application.
- 7 There is no difference and the two processes can be joined. There is no express provision governing the provision of maintenance for family members other than the spouse and child.

Methods of calculating maintenance

- 8 Under section 7(2) of MPPO, the factors the court considers in a maintenance for child case include –
- (a) the financial needs of the child;
 - (b) the income, earning capacity (if any), property and other financial resources of the child;
 - (c) any physical or mental disability of the child;
 - (d) the standard of living enjoyed by the family before the breakdown of the marriage; and
 - (e) the manner in which he was being and in which the parties to the marriage expected him to be educated.
- 9 The process and assessment criteria used in assessment of maintenance are the same, regardless of whether the applicant or respondent lives in Hong Kong or abroad.
- 10 Under section 7(1) of MPPO, the factors the court considers in a maintenance case relating to parties of the marriage include –
- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
 - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.
- There is no express provision governing the provision of maintenance for family members other than the spouse and child.
- 11 Section 7(2) of MPPO is applicable to the assessment of maintenance for a child. See answer to Question 8. Section 7(1) of MPPO is applicable to the assessment of maintenance for a spouse. See answer to Question 10. There is no express provision governing the provision of maintenance for family members other than the spouse and child.

Reassessment/adjustment/modification of maintenance decisions or assessments

- 12 Maintenance payments are not subject to automatic reassessment unless it is specifically provided for in the maintenance order.
- 13 Maintenance payments are not subject to automatic reassessment unless it is specifically provided for in the maintenance order.
- 14 Where the court has made a maintenance order, it has the power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended. In exercising the powers, the court shall have regard to all circumstances of the case, including any change in any matter to which the court was required to have regard when making the order, where the party against whom that order was made has died, as well as the changed circumstances resulting from his/her death. The variation is done by the same authority that makes the original maintenance order – the court.
- 15 Where a foreign maintenance order is registered in Hong Kong, it can be varied by order of the District Court on application of the payer (resident debtor) or the payee (foreign creditor). Under section 10 of the Maintenance Orders (Reciprocal Enforcement) Ordinance (“MOREO”, Chapter 188), the District Court shall not vary a registered order otherwise than by a provision order unless –
- (a) both the payer and the payee under the registered order are for the time being residing in Hong Kong;
 - (b) the application is made by the payee under the registered order; or
 - (c) the variation consists of a reduction in the rate of the payments under registered order and is made solely on the ground that there has been a change in the financial circumstances of the payer since the registered order was made or, in the case of an order registered under section 8 of MOREO, since the registered order was confirmed, and the courts in the reciprocating country in which the maintenance order in question was made do not have power, according to the law in force in that country, to confirm provisional orders varying maintenance orders.

Establishing paternity

- 16 Prior to the enactment of the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance No.80 of 1997 (“Ordinance 80/97”), an illegitimate child could obtain maintenance from his natural father by seeking an affiliation order under the Affiliation Proceedings Ordinance (now repealed). The Ordinance provided that the mother of an illegitimate child might apply to the court for an affiliation order and if the respondent

was adjudicated to be the father, he could be ordered to pay maintenance.

Ordinance 80/97 has repealed the Affiliation Proceedings Ordinance. An illegitimate child can now seek a declaration of parentage under section 6 of the Parent and Child Ordinance (“PCO”, Chapter 429) and seek financial provision under the Guardianship of Minors Ordinance (“GMO”, Chapter 13). The range of orders under GMO has been enlarged to include lump sum payment, secured periodical payment, transfer of property and settlement of property orders.

Under section 6 of PCO, the child can apply to the court for a declaration. It is provided in section 13(1) that –

“In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction –

- (a) for the use of scientific tests showing whether a party to the proceedings is or is not the father or mother of that person; and
- (b) for the taking of bodily samples from that person or any party to the proceedings.”

The court may direct that scientific tests be used to determine parentage but it cannot compel a party to provide a bodily sample. Consent is required. A person who has attained the age of 16 is competent to give a valid consent, but in the case of a child under 16, a sample can be taken only if a person who has care and control of the child consents. Section 15 of PCO provides that where a person fails to comply with a court direction the court may draw such inferences as appear proper in the circumstances.

17 See answer to Question 16.

18 See answer to Question 16. Where the parties are husband and wife and child support is sought –

- (a) in proceedings for divorce;
- (b) in proceedings for nullity of marriage;
- (c) in proceedings for judicial separation; or
- (d) under section 8 of MPPO,

no establishment of paternity is required. The relevant factor is whether the child is a “child of the family” and not whether the respondent is the natural father of the child.

It is up to the court to decide, after considering the circumstances of the case, whether the costs involved should be borne by the applicant, respondent or the parties in equal shares. If the party who has to bear the costs receives legal aid for the relevant proceedings, such costs will be covered by legal aid. There is no distinction between resident and non-resident in these matters.

19 Maintenance orders granted overseas may be registered and enforced under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 319). The Ordinance provides that if the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in Hong Kong is substantially less favourable than that accorded by Hong Kong courts to judgments of that country, the local legislation may direct that no proceedings can be entertained for the recovery of any sum alleged to be payable under the judgments of that country.

Legal and administrative aid and assistance

20 Legal aid is available to both resident and non-resident claimant provided that the proceedings for child support are commenced in the District Court or Court of First Instance in Hong Kong.

21 To be eligible for legal aid, the claimant has to pass both the merits and means tests. The claimant may pass the means test if his financial resources do not exceed HK\$169,000 (section 5 of the Legal Aid Ordinance, (“LAO”, Chapter 91)). A successful applicant for legal aid may be required to contribute towards the costs of the proceedings out of his financial resources.

22 The same rules and procedures apply in the processing of legal aid applications except that of an application for legal aid on behalf of an infant claimant where the applicant is treated as the agent of the infant. There is no express provision governing the provision of maintenance for family members other than the spouse and child.

Legal costs and expenses

23 Court fees in Hong Kong are relatively low when compared to lawyers' fees. The amount of legal costs involved in each case varies according to the complexity of the case. Costs chargeable by lawyers are either taxed or agreed on hourly rate basis. Legal costs may be reduced if an early settlement is achieved through mediation or negotiations.

24 Save for the contribution required to be paid under LAO, a claimant in receipt of legal aid in respect of the case in question is not required to make any further payment to meet costs until and unless there is property recovered for him in the relevant proceedings. Under section 18A(5) of LAO, the Director of Legal Aid will not deduct legal costs from any maintenance recovered if such sum is for periodical payments not exceeding \$4,800 per month for a spouse or for periodical maintenance for a child.

Collection and transfer arrangements and enforcement of decisions

- 25 Payment and collection of maintenance are arranged by individuals.
- 26 Maintenance payments to be made or collected from abroad are regulated by section 17 of MOREO.
- 27 Maintenance orders are enforced through judicial process and different enforcement methods follow different procedures.
- 28 Judgment summons (“JS”) is the most commonly used method of enforcing a maintenance order. The general provisions on the issue of JS are set out in rules 87 and 88 of the Matrimonial Causes Rules (“MCR”, Chapter 179).

Other methods of enforcement include –

- ❖ Attachment of income – where the court makes an attachment of income order, it will order the payer’s income source(s) to periodically deduct a certain amount from his/her pay and forward it to the maintenance payee;
- ❖ Warrant of execution – this enables goods and chattels of the debtor to be seized and sold;
- ❖ Charging order – an order can be made to charge the debtor’s land or his/her interest in land with the outstanding sum; and
- ❖ Garnishee order – this enables the applicant to obtain payment of the sum owing to a payee directly from a third party who is indebted to her/his spouse (including money standing to the spouse’s credit in his/her bank account).

The Public Officers’ (Assignment of Emoluments) Ordinance (Chapter 363) enables public officers to assign part of their emoluments with the written permission of the Secretary for the Civil Service for purposes under section 2 of the Ordinance.

Assignment or transfer of provident fund maintained for the benefit of teachers employed by aided or subsidized schools under the Subsidized Schools Provident Fund Rules (Chapter 279D) and the Grant Schools Provident Fund Rules (Chapter 279C) is prohibited. There are no provisions in these Rules that permit the assignment/transfer of provident fund in settlement of claims in ancillary relief proceedings.

Tax refund intercepts, deductions from social security payments, and committal to prison as enforcement are not available in Hong Kong.

- 29 When the District Court receives maintenance payment in Hong Kong dollars under foreign orders registered in Hong Kong, it will convert the money into the equivalent foreign currency of the reciprocating country in

the form of a bank draft before sending the payment to the receiving authority. A fee is charged by most banks in Hong Kong for issue of a bank draft (Hongkong Bank charges HK\$50, for instance).

- 30 There is no foreign exchange control on transfer of payments to/from abroad.

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

- 31 Hong Kong's processes are court-based and we have no plans to change this practice.

- 32 See answer to Question 31.

- 33 All the items are of similar degree of importance.

- 34 a a, b, c, d, and j.
b e, f, g, h, i, k, and l.
c No.

- 35 Hong Kong has not entered into any bilateral or regional agreements with other countries on maintenance recovery.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

- 36 N/A.

- 37 N/A.

- 38 See Enclosure.

REPUBLIC OF CROATIA

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

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? In particular are they confined to periodic payment of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligations?**

Maintenance decisions in Croatia are made in the form of a court decision. Exceptions are cases involving child support in which an agreement may be reached in respect of support (amount or increased amount) between the parents of an underage child or between the parent and a full-age child. Such an agreement, according to the Family Act, is signed at a social welfare centre which in turn is responsible to make sure that the agreement is in the child's best interest.

Maintenance is ruled in monthly payments to be made in advance for every month from the day of submittal of the maintenance claim.

In case of non-compliance with court-ruled maintenance obligations, a distress procedure may be initiated to ensure collection of the outstanding amount or an agreement.

Under the Distress Act, maintenance money can be deducted on a compulsory basis from the salary or other income, chattels or real estate of the maintenance debtor.

Eligibility

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

According to the Family Act, a maintenance beneficiary can be a child, an adoptive child and an adoptive parent, a parent, a spouse, marital and extramarital, mother of an extramarital child, a minor stepchild, if unable to obtain maintenance from the parent, a stepmother or a stepfather (if the stepchild cannot obtain maintenance from the parent or if the parent dies and at the time of death the child lived with the stepfather or the stepmother).

- 1. What is your definition of "dependent" child for child support purposes?**

Under the Family Act, parents are obliged to support their underage child or full-age child who is a regular student. A full-age child who has finished school but unable to find a job has to be supported by his/her parents for a period of one year after completed education. Furthermore, parents are obliged to support their full-age child taken ill or mentally or physically disabled and thus rendered incapable of working, as long as such incapacity lasts.

- 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?**

Procedures for the initial assessment of maintenance

The Family Act defines which persons and under what conditions are eligible for maintenance.

Procedure for the assessment of maintenance is stipulated in the Family Act as *lex specialis* and the Court Procedure Act.

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

Child support and collection procedure is a judicial matter. The Family Act provides for an agreement between the parents and between a full-age child and his/her parent and this matter is dealt with by the social welfare centre (administrative process).

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

The process is different if the recognition of a foreign court decision or a maintenance agreement is required, because in such a case an extrajudicial process is conducted at the competent court. The procedure is similar in all other cases.

- 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?**

The process is conducted according to the same rules, and if, for example, a mother as the child's legal representative has requested maintenance for both the child and herself, it will normally be a combined procedure; if two applications are separately filed, it is possible under the Court Procedure Act, and subject to a court decision, to join the processes for reasons of economy and expeditiousness. For all joined processes a single court decision can be made. The difference is that for a child an agreement can be reached at the social welfare centre, whereas for other family members this possibility is not provided under the Family Act. Besides, a social welfare centre can initiate and conduct a process for enforcement of maintenance or adjusted maintenance.

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

There is no single formula. The Family Act defines in principle what should be determined in a court process and taken into account in assessing the amount of support. Thus a court will determine the total amount of funds required for support, with allowance being made for the applicant's income, property, ability to work, job prospects, health condition and other relevant circumstances. Taken into account for a supported child are age and educational needs. The Act also

provides for an increased maintenance if accompanied by improved living circumstances of a parent.

As for the respondent, the Act provides that in assessing maintenance all his/her income or improved earning capacities, as well as personal needs and legal support obligations be taken into account.

The parent, capable for work, is obliged to pay maintenance regardless of his income or employment status.

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

General criteria are stated in the foregoing answer and also apply in these cases.

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 are some differences in respect of a child, specified in the Act, mentioned under 8 above.

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

The Family Act is the applicable law in all cases.

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 who and with what frequency?

There is no provision to this effect. For reassessment or adjustment of maintenance decisions a new process must be initiated or a new agreement reached.

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?

There is no automatic adjustment. Please see 12 above.

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

Please see 8 and 11 above.

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

If a recognised foreign decision explicitly states that it varies in accordance with the cost of living index, such a decision will be enforceable.

Establishing paternity

16. Which is the law applicable to the determination of paternity in the context of child support proceedings?

The matter is regulated under the Family Act.

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

Paternity can be established by a personal admission given at legally authorized institutions or stated in the will or, in absence of such an admission, through a court procedure.

18. Please outline the legal procedures and the methods (including scientific methods) by which paternity may be established in the context of child support proceedings. Please indicate the costs that typically would be involved, who would bear the 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.

If not established by admission, paternity is established in a judiciary procedure. In determining paternity the court is using all legally permissible methods(statements by the parties concerned, medical methods including DNA etc). Child care and support are also addressed in a paternity decision.

The Family Act stipulates that an advance towards the costs of paternity or maternity determination procedures shall be paid from the court's funds. The Court Procedure Act stipulates that the party unable to cover such costs without detriment to the essential wellbeing of the party or his/her family shall be exempted from covering such costs.

The Court Procedure Act contains a special provision on the coverage of judiciary costs by the applicant, a foreign national, at the respondent's request to be made at the preliminary hearing at the latest, or if no such hearing is envisaged, at the first hearing before the court session. However, the respondent is not entitled to the recovery of judiciary costs if among other stated cases the dispute is about the existence or non-existence of marriage, cancellation of marriage or divorce, or about paternity or maternity (in all these disputes a decision is also made on child support).

19. May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (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.

A foreign decision may be refused only for reasons envisaged in the Law Conflict Act. It may happen only if the court, acting upon a complaint, finds that the person concerned could not have taken part in the procedure due to procedural irregularities, that a final court decision has already been passed on the same matter or that a foreign decision on the same matter has already been recognized.

Foreign court decisions concerning the status of a national affected by a decision are recognized in Croatia without reconsideration. However, if a competent Croatian authority believes that a foreign court decision concerns the status of a Croatian national, the recognition of such a decision is subject to reconsideration under the provisions of the Law Conflict Act in respect of: finality of the decision to be confirmed by a competent body, the respondent's ability to take part in the procedure preceding the passage of the decision, jurisdiction of the body, and whether or not it collides with the established principles of the Croatian state.

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;

A person who meets requirements described under 18 above and if wholly exempted from payment of judicial costs is entitled to: exemption from court duty fee and advance payment against the costs of witnesses, experts, investigation and court announcements, as well as real expenses of the appointed legal representative (free legal aid). In cases involving the support of a child or a full-age child incapable of working the social welfare centre may, acting on behalf of the child, institute and conduct a maintenance assessment or readjustment procedure, if the child is under the care of another person or an institution or if the parent with whom the child lives does not exercise this right for unjustified reasons.

- b) a claimant for child support who is resident abroad.

A foreign claimant for child support is entitled to free legal aid if this is requested under the Convention on Maintenance Obligations (New York, 1956) to which the Republic of Croatia is a party.

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

The Family Act specifies which persons are eligible for maintenance and under what conditions.

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

The Croatian law makes no distinction among persons when it comes to the exemption from paying actual costs incurred and fee due to the legal representative on account of property status, but the Family Act contains special provisions on the protection of the rights and interests of the child or an adult under guardianship in procedures involving maintenance claims – please see answers under 18 and 20 above.

23. What are the typical legal costs and expenses (including lawyer's 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?

These costs are related to expertise, e.g. medical paternity or maternity tests, means test, the costs of witnesses, court announcements, or of the appointed legal representative if the respondent's residence is unknown, etc. In respect of costs, the rules are the same for any of these processes.

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

There is no legal possibility for making such a decision.

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?

The Family Act contains special provisions on maintenance collection. The maintenance debtor gives his/her consent before the court, a notary public, a social welfare centre, his/her employer or other source of payment to have the determined maintenance paid directly to the maintenance beneficiary from his/her salary or other regular income, without a need for a special procedure. Under this law, the employer or other source of regular income are required to act at each payment in compliance with the maintenance decision delivered to them.

The Family Act contains special provisions on child support, whereby a social welfare centre can propose the method of support payment, and if the support debtor has not agreed to compulsory deductions, the social welfare centre will, within six months of the date of the respective court decision or the signed support agreement, check if support is being paid regularly and in whole and take measures required for the protection of the child's interests.

The way of child support collection is specified in the court decision (by the support beneficiary or his/her legal representative, payment to the account specified by the support beneficiary or his/her legal representative, etc.).

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

There are no special arrangements.

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

In either case the law provides for court collection procedure. In case of a child support decision or agreement, the Family Act provides for a special procedure as described under 25 above.

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;
- tax refund intercepts;
- garnishment from bank accounts or other sources;
- deductions from social security payments;
- forced sale of property;
- division of pension benefits; and
- committal to prison.

As already mentioned, child support decisions can be enforced on salary, pension benefits or other regular income (withholding up to 50% of salary or pension benefits), garnishment from bank accounts or other sources, as well as forced sale of property.

In case of non-compliance, the Criminal Law provides for special offences: “violation of family obligations” and “violation of support obligations”. Failure to honour child support duties is punishable by a fine or imprisonment up to three years. Under a suspended sentence the court may rule payment of outstanding support installments and regular future fulfillment of support obligations.

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

Banks are charging a certain fee for their services.

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.

The problem is the length of processes.

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 problem is the length of processes and in some cases the impossibility to enforce the decision because of unemployment status of the debtor.

32. 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;**
- b provisions for the recognition and enforcement of foreign decisions;**
- c applicable law principles;**
- d uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;**
- e provisions specifying the assistance to be provided to an applicant from another Contracting Party;**
- f provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;**
- g provisions concerning co-operation in the establishment of paternity;**
- h provisions concerning co-operation in the international transfer of funds at low cost;**
- i provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;**
- j standard forms;**
- k provisions aimed at securing compliance with obligations under the instrument;**
- l provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;**
- m others. Please specify.**

We approve of the above items. In addition to it, as there are States which are not parties to the Convention of 5 October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents, we feel that the new instrument should contain a provision abolishing the need to use legal documents to the effect that the documents duly issued or certified by a court or other competent authority of the sending State and furnished with a signature and official seal of that authority would not need re-certification for use in the receiving State. In other words, in order to simplify and shorten processes, such documents should have the same legal validity as the domestic public documents.

We also believe that elements should be added concerning the exemption from the costs of procedure, at least in providing security to the respondent.

Elements should be incorporated to ensure expeditiousness of processes.

33. 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 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,

We would single out the elements specified under a, b, c, d, e, f, g, h, k and m.

b which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or out of them, and

Optional elements should in our opinion be those under I, j and l.

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?

It would be desirable to make certain arrangements for the child to be supported in such a case as well.

34. In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within these arrangements you would wish to see replicated or reflected in the new global instrument.

As there are States which are not parties to the Convention of 5 October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents, we feel that the new instrument should contain a provision abolishing the need to legalize documents to the effect that the documents duly issued or certified by a court or other competent authority of the sending State and furnished with a signature and official seal of that authority would not need re-certification for use in the receiving State. In other words, in order to simplify and shorten

processes, such documents should have the same legal validity as the domestic public documents.

We also believe that elements should be added concerning the exemption from the costs of procedure, at least in providing security to the respondent.

PART IV: NEGOTIATING PARTNERS AND MISCELLANEOUS

35. Apart from the Member States of the Hague Conference and State 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?

These should certainly be all the State Parties to the Convention on the Rights of the Child or the States whose legal system conforms with the provisions of the Convention, even if they have not yet become State Parties to the New York Convention of 1956.

36. 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?

37. 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 publication.

The Ministry of Labour and Social Welfare has its website on which child protection regulations in the Croatian language can be found.

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.

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?

Yes. The competent court in the Republic of Croatia asks for such a decision.

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

Required in the original are decisions on which a claim is based, as well as the child's birth and citizenship certificates, evidence that a full-age child is a regular student, and the power of attorney.

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

The transmitting agency reviews the application and checks if required documents are attached. If some are missing, it informs the sending agency accordingly requesting the missing attachments, and forwards the whole file to a social welfare centre located in the area of the court competent for the respondent. The social welfare centre calls the respondent to its office to give and sign his/her statement concerning the applicant's request. If the respondent accepts the application without departing from its provisions, his/her signed consent to have the support instalments deducted from his/her salary or other regular income sources becomes legally binding. In that case the social welfare centre will immediately forward the affidavit to the respective payment body indicated therein along with the respective decision and its certified translation. If the respondent refuses to comply with his/her support obligation, or if his/her affidavit departs from the amount of support specified in the decision, the social welfare centre will forward the application with attached documents to the competent court and initiate a procedure for the recognition and enforcement of the decision. In that case a legal representative (lawyer) is appointed to act on behalf of the applicant in the judicial procedure.

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

In practice no similar problems have been encountered.

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

We are using only a standard form when forwarding an application to the social welfare centre.

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)?

8 Legal assistance:

- (a) Do you provide legal assistance to the claimant?**
- (b) What form does this take?**
- (c) Is it subject to any conditions or limitations?**
- (d) Are applications for spousal and child support treated differently?**

The claimant is granted a legal representative, a lawyer who can provide complete legal assistance. Such assistance can also be extended by central government bodies and at the social welfare centre. Applications for spousal and child support are treated similarly. (The transmitting agency has not yet received any application for spousal support based on the Convention).

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

So far we have not charged the costs to any requesting State or a claimant.

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

We ask for a certified translation into the Croatian language of the respective decisions and attached documents. If an application is received in the English language, the transmitting agency will prepare an official translation for further procedure, but the court, in case of a dispute, will demand a certified translation of all relevant documents.

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

Personnel in the transmitting agency engaged in dealing with such cases are using Croatian and English languages.

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

Under the Family Act, the social welfare centre is authorized to check if maintenance payments are regularly made, but this is not explicitly authorized to receive such payments on behalf of the creditor.

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

The best method would be if the maintenance debtor pays extra charges (postage or banking duty). The problem is that in practice the recovery of such costs is neither claimed nor ruled. A provision would be desirable which would bind the court to rule such obligation in cases involving child support.

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

The best method would be if the maintenance debtor pays extra charges (postage or banking duty). The problem is that in practice the recovery of such costs is neither claimed nor ruled. A provision would be desirable which would bind the court to rule such obligation in cases involving child support.

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

We are not aware of any such cases.

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

If the social welfare centre is unable to locate the whereabouts of the maintenance debtor or his/her employer, assistance is asked from the Ministry of the Interior.

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

Under the Family Act, no person able to work, even if a beneficiary of public assistance payment, can be exempted from child support obligations. However, if a support debtor fails to contribute towards child support longer than three months, and the social welfare centre finds that this may jeopardise child support, the social welfare centre, acting upon request of the other parent or at its own discretion, has to take measures to ensure provisional support funds until the support debtor resumes to honour his/her obligations. In that case the social welfare centre can claim back the funds from the support debtor.

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

In addition to the provisional measure described under 17 above, there are other measures to ensure support, defined in the Family Act, which the court may rule if without such measures the interests of the provider of provisional funds may be jeopardized or the enforcement of support made difficult. The Act makes a special reference to such a risk in cases involving support of an underage child or a full-age child unable to work.

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

In determining the facts concerning the extent of assets of maintenance debtor, the court has a power to request relevant data from any agency or source of income and to order a means test.

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

In either case the principal problem is the length of procedures.

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 are collecting statistics for the year 2002 and we expect to have such an analysis available by the end of March.

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

**INTERNATIONAL
ACADEMY OF
MATRIMONIAL
LAWYERS**



2 April 2003

**HAGUE CONVENTION ON INTERNATIONAL
RECOVERY OF CHILD SUPPORT**

**IAML AS OBSERVER- SPECIAL COMMISSION ON
MAINTENANCE OBLIGATIONS**

The International Academy of Matrimonial Lawyers ("the IAML" or "the Academy") is an organization of judges, barristers and trial lawyers who have dedicated their professional careers to helping families and individuals resolve challenging issues surrounding separation, divorce, custody of children, support of children and other family members, and the myriad related issues. The IAML currently has approximately 360 members in 27 countries. The Academy is uniquely suited to assist in the drafting of a new instrument for the international establishment and enforcement of child and family support and maintenance. It is excited to have the opportunity to participate in that process.

The members of the Academy are painfully aware of the devastating effect the failure to pay child or other family support can have on children and families. The Academy wholeheartedly supports the efforts of the Hague Conference in attempting to draft a new convention for the international enforcement of child and other family support which will improve on existing conventions by making the enforcement process more efficient, more speedy and more cost effective.

While an administrative rather than a judicial process for the establishment and enforcement of child and other family support may seem to be the ideal, the reality is that in a large number of cases the use of the judicial system is necessary. This can be seen quite readily from a review of the responses of the States to the Questionnaire from the Hague Conference Concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance. In a number of States support or maintenance may only be established through a judicial proceeding. Even in those cases where support may be established initially through an administrative proceeding, some States permit an appeal of the administrative determination through a judicial proceeding.

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Ideally, child and family support obligations should be enforceable even internationally in a speedy, low cost administrative proceeding. However, the reality is that even in those States where such a process is available, frequently it is not successful, or if it is, it is excessively time consuming.

Paternity of the child or children is frequently an issue in support and maintenance cases. Very often, if not most often, parentage issues must be resolved in a judicial rather than an administrative proceeding. Generally, if a parentage issue arises, it must be resolved before a support obligation maybe established or before it is enforced.

The Academy believes that child support and other forms of family maintenance obligations should be established and enforced through administrative proceedings which are speedy, efficient, and at little or no cost to the obligee. The Academy recognizes that in many cases that will not be possible. Accordingly, in any new Convention there must be detailed provisions for the coordinating of the efforts of those on the judicial side and of those on the administrative side, to have support and maintenance orders established and enforced as efficiently and cost effectively as possible.

Since the members of the IAML routinely work within the judicial system respecting support, maintenance and paternity issues, it is anticipated that by participating in the process of drafting of a new Convention, the Academy will be able to provide valuable, practical assistance in crafting a document which will, to the fullest extent possible, accomplish the desired objectives.

We very much appreciate the opportunity of being involved in this process.

Best wishes

Respectfully yours,

Charles C. Shainberg, Esq., President IAML

Frank L. McGuane, Jr, Esq. Observer IAML

INFORME ESPECIAL

*APORTES A UN NUEVO INSTRUMENTO GLOBAL PARA EL COBRO
INTERNACIONAL DE PENSIONES ALIMENTICIAS CON RESPECTO A LOS MENORES DE
EDAD Y OTRAS FORMAS DE MANUTENCIÓN DE LA FAMILIA.*

Introducción.

1.- El Buró permanente de la Conferencia de La Haya de Derecho Internacional Privado trabaja para la emisión de un nuevo instrumento global en materia de cobro internacional de pensiones alimenticias con respecto a los menores de edad y otras formas de manutención de la familia.

2.- Este instrumento será complementario a los Convenios de la Conferencia de La Haya en la materia. En especial los Convenios números: 8 de 24 de octubre de 1956 y Convenio 23 de 2 de octubre de 1973. Y el Convenio que en el ámbito de Naciones Unidas se emitiera el 20 de junio de 1956 denominado: Convenio de New York sobre obtención de alimentos en el extranjero.

3.- El Instituto Interamericano del Niño resalta que en el ámbito interamericano se emitió la **CONVENCIÓN INTERAMERICANA SOBRE OBLIGACIONES ALIMENTARIAS** de 15 de julio de 1989 en el marco de la Cuarta Conferencia especializada Interamericana sobre Derecho Internacional Privado, ratificada por 15 Estados miembros de la Organización de Estados Americanos y por ello en plena vigencia en el hemisferio.

4.- En este marco normativo internacional y teniendo presente la realidad jurídica interamericana, el Instituto Interamericano del Niño se permite facilitar los siguientes aportes al esfuerzo que lleva adelante el Buró Permanente de la Conferencia de La Haya de Derecho Internacional Privado.

Comentarios a la Nota Informativa y Cuestionario sobre un nuevo instrumento global para el cobro internacional de pensiones alimenticias con respecto a menores de edad y otras formas de manutención de la familia.

5.- El Instituto Interamericano del Niño recibió de la Secretaría General de la Conferencia de La Haya en Derecho Internacional Privado los Oficios No 19306(2)WD/WZ de 21 de junio del 2002 así como el Oficio No 20489(2)WD/AMT/WZ/LJM de 29 de octubre del 2002 respecto a la solicitud de pronunciamiento de parte del Instituto Interamericano del Niño sobre la Nota Informativa y el cuestionario en mención.

6.- Siendo el Instituto Interamericano del Niño un organismo intergubernamental, especializado en la materia en el ámbito de la Organización de los Estados Americanos (OEA) y dado que las interrogantes de dicho cuestionario están dirigidas a realidades jurídicas domésticas de los Av. 8 de Octubre 2904, Casilla de Correo 16212, Montevideo (11600) – Tel. (5982) 487 2150 Fax: (5982) 487 3242 E-Mail: iin@redfacil.com.uy – Web Site: www.iin.org.uy

Estados miembros y en esa condición se debe preparar una respuesta al mismo; El Instituto no se pronunció sobre el contenido del mismo. Facilitando sus programas y servicios para dar amplia difusión entre los Señores Representantes de los Estados miembros ante su Consejo Directivo respecto a la importancia de dar respuesta en tiempo y forma al mismo. Tal y como se dio a conocer a la Conferencia de La Haya en Oficio No 568/02 de 28 de noviembre de 2002.

Aportes del Instituto Interamericano del Niños a la emisión de un nuevo instrumento global en materia de cobro internacional de pensiones alimenticias con respecto a los menores de edad y otras formas de manutención de la familia.

7.- El Instituto Interamericano del Niño resalta que en la práctica y naturaleza propia del sistema interamericano existe un instrumento desde el año de 1989 en materia de alimentos, denominado: **CONVENCIÓN INTERAMERICANA SOBRE OBLIGACIONES ALIMENTARIAS**, antes descrito, y suscrito por los siguientes Estados miembros ¹:

Argentina.

Belice

Bolivia

Brasil

Colombia

Costa Rica

Ecuador

Guatemala

Haití

México

Panamá

Paraguay

Perú

Uruguay

Venezuela

8.- En contraste, tratándose de los Convenios de la Conferencia de La Haya sobre Derecho Internacional Privado en relación a los aspectos de obligaciones alimenticias de 1956 y 1973, no se reporta ² ningún Estado signatario de esa normativa y que a la vez sea miembro de la Organización de Estados Americanos (OEA).

9.- Relacionado al Convenio de New York de 20 de junio de 1956 sobre obtención de alimentos en el extranjero adoptado en el marco de la Conferencia de las Naciones Unidas convocada por el Consejo Económico y Social (ECOSOC) de esa Organización, mediante Resolución 572 (XIX) el 17 de mayo de 1955 los datos se muestran en el párrafo que sigue. La finalidad del instrumento es facilitar los trámites para hacer efectivo el derecho de alimentos, cuando demandante y demandado residan en diferentes países, estableciendo los procedimientos necesarios en orden a lograr el pago de esta obligación.

¹ Base de datos de Convenios Interamericanos de la Organización de los Estados Americanos de la Sub Secretaría Técnica de Asuntos Jurídicos. www.oea.org

² Home Page HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. www.hcch.net

10.- Los Estados signatarios de este instrumento, dentro de la esfera de la Organización de los Estados Americanos (OEA) son ³:

Argentina
Barbados
Bolivia
Brasil
Colombia
Cuba ⁴
Chile
República Dominicana
Ecuador
El Salvador
Guatemala
Haití
México
Surinam
Uruguay

11.- Con ello se determina que la práctica internacional existente en las Américas respecto a obligaciones alimenticias se refiere a la existencia de los siguientes instrumentos internacionales:

CONVENCIÓN INTERAMERICANA SOBRE OBLIGACIONES ALIMENTARIAS de 15 de julio de 1989 y,
EL CONVENIO DE NEW YORK DE 20 DE JUNIO DE 1956 SOBRE OBTENCIÓN DE ALIMENTOS EN EL EXTRANJERO adoptado en el marco de la Conferencia de las Naciones Unidas convocada por el Consejo Económico y Social (ECOSOC), mediante Resolución 572 (XIX) el 17 de mayo de 1955.

12.- Respecto a los principios que en el sistema Interamericano resaltan como Fundamentales según la Convención Interamericana sobre Obligaciones Alimentarias, los enumeramos:

- I. **Ambito de aplicación:** Desde el punto de vista material, el ámbito de aplicación presupone la existencia de vínculos consanguíneos entre el acreedor de alimentos y la persona deudora de tales. Por ello se necesita que exista una obligación alimentaria de uno a otro. Asimismo que ambas partes tengan su domicilio o residencia habitual en Estados diferentes y que por esta razón se motive el reclamo internacional y los mecanismos correspondientes.
- II. **Las partes.** Se aplicará a las obligaciones alimentarias respecto de menores de edad, por su calidad de tales y a las que se deriven de las relaciones matrimoniales entre cónyuges o quienes hayan sido tales.

³ Ministerio de Relaciones Exteriores, Comercio Internacional y Culto República de Argentina. Dirección General de Asuntos Jurídicos, Dirección de Asistencia Judicial Internacional. <http://www.menores.gov.ar/ingles/alimen.htm>

⁴ Cuba no es Estado miembro de la OEA.

- III. La competencia y cooperación procesal internacional.** Se hace énfasis en la cooperación entre Estados miembros de la OEA y la reciprocidad en estas medidas;
- IV. La habilitación para el reclamo.** Las decisiones adoptadas en aplicación de estas Convenciones no prejuzgan acerca de las relaciones de filiación y de familia entre el acreedor y el deudor de alimentos. No obstante, podrán servir de elemento probatorio en cuanto sea pertinente.
- V. Derecho aplicable:** Las obligaciones alimentarias, así como las calidades de acreedor y de deudor de alimentos, se regularán por aquel de los siguientes órdenes jurídicos que, a juicio de la autoridad competente, resultare más favorable al interés del acreedor: a. El ordenamiento jurídico del Estado del domicilio o de la residencia habitual del acreedor; b. El ordenamiento jurídico del Estado del domicilio o de la residencia habitual del deudor. Asimismo serán regidas por el derecho aplicable las siguientes materias: a. El monto del crédito alimentario y los plazos y condiciones para hacerlo efectivo; b. La determinación de quienes pueden ejercer la acción alimentaria en favor del acreedor, y c. Las demás condiciones requeridas para el ejercicio del derecho de alimentos.
- VI. Competencia de las autoridades para conocer este tipo de reclamos:** Serán competentes en la esfera internacional para conocer de las reclamaciones alimentarias, a opción del acreedor: a. El juez o autoridad del Estado del domicilio o de la residencia habitual del acreedor; b. El juez o autoridad del Estado del domicilio o de la residencia habitual del deudor, o c. El juez o autoridad del Estado con el cual el deudor tenga vínculos personales tales como: posesión de bienes, percepción de ingresos, u obtención de beneficios económicos. Se considerarán igualmente competentes las autoridades judiciales o administrativas de otros Estados a condición de que el demandado en el juicio, hubiera comparecido sin objetar la competencia.
- VII. Principio de intervención sobre los montos debidos en materia alimentaria.** Los alimentos deben ser proporcionales tanto a la necesidad del alimentario, como a la capacidad económica del alimentante. Si el juez o autoridad responsable del aseguramiento o de la ejecución de la sentencia adopta medidas provisionales, o dispone la ejecución por un monto inferior al solicitado, quedarán a salvo los derechos del acreedor.
- VIII. Cooperación Procesal Internacional.** Las sentencias extranjeras sobre obligaciones alimentarias tendrán eficacia extraterritorial en los Estados Parte si reúnen las siguientes condiciones: a. Que el juez o autoridad que dictó la sentencia haya tenido competencia en esfera internacional de conformidad con los Artículos 8 y 9 de esta Convención para conocer y juzgar el asunto; b. Que la sentencia y los documentos anexos que fueren necesarios según la presente Convención, estén debidamente traducidos al idioma oficial del Estado donde deban surtir efecto; c. Que la sentencia y los documentos anexos se presenten debidamente legalizados de acuerdo con la ley del Estado en donde deban surtir efecto, cuando sea necesario; d. Que la sentencia y los documentos anexos vengan revestidos de las formalidades externas necesarias para que sean considerados auténticos en el Estado de donde proceden; e. Que el demandado haya sido notificado o emplazado en debida forma legal de modo sustancialmente equivalente a la aceptada por la ley del Estado donde la sentencia deba surtir efecto; f. Que se haya asegurado la defensa de las partes, g. Que tengan el carácter de firme en el Estado en que fueron dictadas. En caso de que existiere apelación de la sentencia ésta no tendrá efecto suspensivo.
- IX. Documentación habilitante.** Los documentos de comprobación indispensables para solicitar el cumplimiento de las sentencias son los siguientes: a. Copia auténtica de la sentencia; b. Copia auténtica de las piezas necesarias para acreditar que se ha dado cumplimiento a los incisos e) y f) del artículo 11, y c (de esta Convención). Copia auténtica del auto que declare que la sentencia tiene el carácter de firme o que ha sido apelada.

X. Eliminación de costos procesales y beneficio de pobreza. Ningún tipo de caución será exigible al acreedor de alimentos por la circunstancia de poseer nacionalidad extranjera, o tener su domicilio o residencia habitual en otro Estado. El beneficio de pobreza declarado en favor del acreedor en el Estado Parte donde hubiere ejercido su reclamación, será reconocido en el Estado Parte donde se hiciere efectivo el reconocimiento o la ejecución. Los Estados Parte se comprometen a prestar asistencia judicial gratuita a las personas que gocen del beneficio de pobreza. Las autoridades jurisdiccionales de los Estados Parte en esta Convención ordenarán y ejecutarán, a solicitud fundada de parte o a través del agente diplomático o consular correspondiente, las medidas provisionales o de urgencia que tengan carácter territorial y cuya finalidad sea garantizar el resultado de una reclamación de alimentos pendiente o por instaurarse. Lo anterior se aplicará cualquiera que sea la jurisdicción internacionalmente competente, bastando para ello que el bien o los ingresos objeto de la medida se encuentren dentro del territorio donde se promueve la misma. El otorgamiento de medidas provisionales o cautelares no implicará el reconocimiento de la competencia en la esfera internacional del órgano jurisdiccional requirente, ni el compromiso de reconocer la validez o de proceder a la ejecución de la sentencia que se dictare.

XI. Medidas mínimas adoptadas por los Estados parte. Los Estados Parte procurarán suministrar asistencia alimentaria provisional en la medida de sus posibilidades a los menores de otro Estado que se encuentren abandonados en su territorio. Los Estados Parte se comprometen a facilitar la transferencia de fondos que procediere por aplicación de esta Convención. Las disposiciones de esta Convención no podrán ser interpretadas de modo que restrinjan los derechos que el acreedor de alimentos tenga conforme a la ley del foro. Podrá rehusarse el cumplimiento de sentencias extranjeras o la aplicación del derecho extranjero previstos en esta Convención cuando el Estado Parte del cumplimiento o de la aplicación, según sea el caso, lo considerare manifiestamente contrario a los principios fundamentales de su orden público.

13.- Respecto a la Convención de Naciones Unidas sobre obtención de alimentos en el extranjero de 20 de junio de 1956, la misma establece en 21 artículos un mecanismo de reclamo internacional de obligaciones alimentarias, designando organismos involucrados en el reclamo y estableciendo los principios de la cooperación internacional en la materia. No se exponen sus principios por conocerse ampliamente su contenido.

14. En base a lo expuesto por este medio, el Instituto Interamericano del Niño define sus Aportes a la emisión de un nuevo instrumento global en materia de cobro internacional de pensiones alimenticias con respecto a los menores de edad y otras formas de manutención de la familia, así:

15.- Con fundamento en la Nota Informativa y Cuestionario preparado por el Buró especial sobre obligaciones alimenticias de la Conferencia de La Haya en su apartado No 33, 34, 36, 38 del Cuestionario que consideramos pertinentes para el rol específico del IIN. Sobretodo en la enunciación de los elementos clave en el nuevo instrumento global, considerando que el mismo debe ser "amplio en su naturaleza, basándose en las mejores características de los Convenios existentes", nos referimos:

- a. Disposiciones relativas a la cooperación administrativa;
- b. Disposiciones para el reconocimiento y ejecución de decisiones extranjeras;
- c. Principios relativos a la ley aplicable;

- d. Reglas uniformes de jurisdicción directa aplicables a la determinación y modificación de las decisiones de otorgar pensiones alimenticias;
- e. Disposiciones que especifiquen la asistencia que se proporcionará a un solicitante de otra Parte contratante;
- f. Disposiciones que especifiquen la ayuda y asistencia legal que se proporcionará a un demandante de otra parte contratante;
- g. Disposiciones relativas a la cooperación en la determinación de la paternidad;
- h. Disposiciones relativas a la cooperación en la transferencia internacional de fondos a bajo costo;
- i. Disposiciones que permitan a las partes contratantes el negarse a proveer servicios a los solicitantes extranjeros cuando no exista reciprocidad con el respectivo país;
- j. Formularios estándar;
- k. Disposiciones dirigidas a asegurar el cumplimiento de las obligaciones contraídas bajo el instrumento;
- l. Disposiciones relativas a entidades públicas que solicitan el reembolso de los beneficios pagados a acreedores de pensiones alimenticias;

16.- Consideramos válidos y sustanciosos los elementos definidos en el acápite 33 antes transcritos. Y siendo así, brindamos nuestros modestos aportes como elementos clave en el nuevo instrumento a criterio del IIN:

- a. **Definiciones clave del nuevo instrumento.** El nuevo instrumento debería definir con toda claridad y a la luz de la normativa internacional relacionada, aspectos conceptuales como: Definición de obligaciones alimenticias, determinación de los supuestos para que se aplique el instrumento internacional, Sujetos objeto del instrumento, ejemplo: Personas menores de 18 años, personas que mantienen vínculos conganguineos o parentales y en qué grado de consanguinidad, cónyuges, ascendientes, descendientes, etc;
- b. **Definir un procedimiento expedito.** Un aporte claro de los instrumentos normativos con validez regional es el esfuerzo en la definición de un procedimiento claro y expedito. El nuevo instrumento debe valerse de ello para definir: Autoridades intervenientes, requisitos del reclamo, fundamentos mínimos que debe acompañar la solicitud y procedimiento a seguir. Aspectos de sustanciación del reclamo como: Pruebas de paternidad o filiación, validez de los instrumentos justificantes del reclamo, definición de las instancias intervenientes en la solicitud;
- c. **Establecimiento de formularios estándar;**
- d. **Definición de términos y plazos para resolver la solicitud;**
- e. **Garantías del debido proceso para la parte solicitante y también para la parte demandada;**
- f. **Garantías de ejecución de la medida.** En este apartado se incluiría entre otros aspectos, el declarar título ejecutivo la resolución de pagar alimentos para garantizar la ejecutividad de la medida, asegurarse en el instrumento de la inclusión de la cláusula que de pleno reconocimiento a la validez y ejecución de sentencias extranjeras en materia de obligaciones alimenticias;
- g. **Asistencia jurídica a las partes;**
- h. **Implantación de mecanismos financieros para la transferencia de recursos pecuniarios a bajo costo en esta materia;**
- i. **Facilitación de información financiera y laboral del demandado por las instancias administrativas y privadas para garantizar la ejecutoriedad de la petición;**

- j. Sugerencia de desarrollo de legislación nacional que facilite la aplicabilidad de solicitudes entre Estados en materia de obligaciones alimenticias;
- k. Medidas provisionales ante la petición de obligaciones alimentarias;
- l. Definir las reglas de solución de conflicto de leyes en el tiempo y espacio;
- m. El nuevo instrumento debe compatibilizarse con la legislación nacional vigente en la materia;

17.- El Instituto Interamericano del Niño se pone a la entera disposición de las autoridades de la Conferencia de La Haya en Derecho Internacional Privado, para hacer las consultas entre los Estados miembros de la Organización de Estados Americanos para estudiar y enriquecer los primeros ante proyectos del Nuevo Instrumento elaborado por la Conferencia.

Con las muestras de mi consideración,

Atentamente,

Licenciado Alejandro Bonasso
Director General
Instituto Interamericano del Niño
Montevideo, Uruguay.

Israel

Response to the Questionnaire Concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance

PART II

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

Introduction

In order to get a clearer understanding of the way in which maintenance obligations works in Israel, it is first necessary to understand a few salient aspects of family law in Israel.

Firstly, a distinction needs to be made between civil and religious law. There are certain family law matters, where the religious law is applied as opposed to the civil law. In these cases, the law of the respective religion a person practices, is the law that will be applied. In other words, if a person is Jewish, then Jewish law will be applied; if a person is a Muslim, then Islamic law will be applied, and so on. This is what hereinafter will be referred to as the ‘personal law’. If a person does not have a personal law, then civil law makes provisions for those circumstances such as in the Family Law Amendment (Maintenance) Act 1959 (hereinafter - the Maintenance Act). Another principle which needs to be understood is that of the court’s jurisdiction. The civil and religious courts have parallel jurisdiction in most family law matters, and the court in which the matter is heard, is dependant firstly on the parties’ choice and secondly the court before which the matter was first brought. If a matter calls for the personal law to be applied, it

will be applied even if the matter is heard in a civil court. It should be noted, however, that only a religious court can grant the actual decree of divorce, but any matters incidental to the divorce, such as custody and maintenance, can be heard by either a civil or religious court.

Form of maintenance decision

1. (a) Child support is always periodic.
(b) In terms of the law applicable to the majority of the population, a husband is only required to maintain his wife while they are still married and the duty to maintain the wife does not extend beyond divorce. Maintenance for both a spouse and other family members is also periodic.

Eligibility

2. Spouses and minor children are eligible for maintenance in terms of their personal law. If a specific personal law does not make provisions for the payment of child support, then the minor child is eligible for maintenance in terms of the Maintenance Act. This Act also makes provisions for the payment of maintenance to other family members, such as parents, grandparents and siblings, but only if the following conditions are fulfilled:
?? ability to pay maintenance after the maintenance debtor has supplied his own requirements and that of his spouse and minor children.
?? the particular relative is unable to supply his own requirements.
?? there is no family member of a closer degree of relation, who is liable to pay him maintenance.
3. A child is considered a minor until the age of 18. Case law, however, has created a presumption that from the age of 18 until the age of 21(which is usually the age at which a child completes his or her compulsory military service), a parent

still has an obligation to support a child, but only in an amount which is one third of what the child received until the age of 18.

4. The law pertaining to maintenance is contained in the Maintenance Act of 1959 but since, in terms of this Act, the law applying to maintenance of spouses and minor children is the personal law of a person, reference has to be made to the particular religious law, i.e. Jewish law, Islam etc... When, however, the personal law makes no provision for a parent to pay maintenance for their child, the Maintenance Act imposes a duty to pay maintenance.

Procedures for the initial assessment of maintenance

5. Child support is determined by a judicial process.
6. The moment an applicant or respondent falls within the scope of Israel's rules of jurisdiction, the process is exactly the same.
7. In principle there is no difference in the process of application. It should however be noted that in child support applications the maintenance creditor is the child himself and the child is represented in court by a parent or a guardian.

Methods of calculating maintenance

8. There are no regulations setting out a formula to be used in calculating maintenance. The court (both civil and religious) determines the amount of maintenance according to the personal law. The court, however, does take into account the needs of the creditor balanced against the ability of the debtor to make maintenance payments. Regardless of which personal law is applied, there is a procedural obligation on

both the maintenance creditor and debtor to detail a list of their income and assets.

9. There are no differences in the assessment criteria.
10. The law applicable is different but the method used is the same for spouse, child and other family member maintenance.

11. .The personal law is applied.

Reassessment/ adjustment/ modification of maintenance decisions or assessments

12. Application for reassessment can only be made when there has been a substantial change in circumstances.

13. When the court makes a maintenance order, it is usually linked to the Consumer Price Index.

14. .In respect of child maintenance, a variation in the order will usually be made, on application to the court in three different circumstances which are:

- 1 - a change of income of the maintenance debtor.
- 2 - a change of income of the maintenance creditor.
- 3 - a change in the child's needs.

Although this is determined by the personal law, there is little difference between the various religious laws. In respect of spouse maintenance there can be huge variations in maintenance made by the court especially in the Jewish religious courts, where if a spouse (usually the husband) refuses to give or receive a "get" (a Jewish decree of divorce which is only granted subject to the consent of both spouses) then the court can obligate that spouse to pay more maintenance.

It should be noted that in terms of the various personal laws applicable to the majority of Israel's population, spouse maintenance is only payable until a decree of divorce is given by the court and not beyond that.

15. The court does not have the jurisdiction to vary foreign judgements.

Establishing paternity

16. The personal law is applicable to the determination of paternity, when the question of paternity arises during maintenance proceedings (when the determination of paternity is the main cause of action, the rules of jurisdiction differ). There is a Supreme Court judgment which determined that when the personal law (religious law) does not recognize paternity, then 'civil paternity' is established by the court in relation to maintenance and the father will be obligated to pay maintenance.

17. If the matter of paternity is raised in the context of child proceedings, then it forms part of the proceedings. When submitting a claim for maintenance, there is a specific form which is attached to the statement of claim which includes an affidavit. In the statement of claim, a claim of paternity can be made.

18. There is a Supreme Court decision, that holds that a parent cannot be obligated to undergo a blood test to determine paternity. There is however, a further consideration which the court has to take into account, even when the father consents to undergo a paternity test, and that is that the child's status within Jewish law could be affected, if the paternity test indicates that a man is not really the father of the child. In such a case, the court will not allow a test to be conducted in order to preserve the best interests of the child.

Currently pending before the Supreme Court is a case which deals with the question of whether a parent can be obligated to undergo a DNA test which can be done using external samples, such as a hair or saliva sample and can be carried out without the need for an invasive procedure, such as drawing blood. There are no set rules as to payment of the costs of a test and this is determined by the court on a case by case basis.

The law applicable to non-residents is their personal law. If a couple does not have a personal law, then the law of the place of their joint residence is applied. If they do not have a joint residence, then the law of the place where the maintenance creditor resides is applied.

19. No, it will probably not affect the recognition of the foreign decision, although, even if the decision for the maintenance award is recognized, it does necessarily mean that paternity will be recognized for the purpose of any matter other than maintenance. This answer is not definitive, however, since there has been no case in point.

Legal and administrative aid and assistance

20. (a) Legal aid is provided to people who meet all the requirements in the form of legal consultation and representation, when necessary.

(b) There is no obligation to give a non-resident legal aid, but in terms of the New York Convention, if the non-resident is from a reciprocating country, he or she will be entitled to administrative assistance.

21. There are two eligibility requirements. The first is a financial means test which is fixed according to regulation. The second requirement is the prospect of success in the case.

22 The difference lies in the financial means test. When there is a request for legal aid for collection of maintenance for a minor,

the minor automatically qualifies for legal aid as usually minors have no income at all. The minor will qualify even if the parent would not qualify in terms of the financial means test.

Legal costs and expenses

23. The costs for a maintenance application vary from case to case depending on the nature of the case and the fees of the specific counsel chosen to handle the case.

24. Maintenance payments and costs are two separate issues, and costs are not deducted from maintenance payments. The general rule in litigation, though, is that the costs follow the cause and the court will usually order one of the parties to pay costs.

Collection and transfer arrangements and enforcement of decisions

25. Once a maintenance award is obtained, the maintenance creditor makes direct payments to the creditor.

26. There are no particular arrangements for payments to be made or collected from abroad.

27. The maintenance creditor has recourse to the Execution Office who can execute the maintenance judgment through various methods such as attachment of property of the debtor. If the creditor is unable to obtain any maintenance through the Execution Office, the creditor can receive the payments from the National Insurance Institute (NII) (Israel's social security system), in terms of the Maintenance (Assurance of Payment) Law, 1972 and the NII can then claim it back from the debtor. Only a person who is a resident of Israel and was also a resident at the time the maintenance award was made, or 24 months out of the 48 months prior to the time the award was made, can apply to the NII for monthly maintenance payments.

28. The following collection/enforcement methods are available:

- ?? wage withholding
- ?? garnishment from bank accounts
- ?? forced sale of property
- ?? committal to prison

29.

30. No

PART III

QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT

31. The shortcomings are often in the practical implementation, such as authorities not being able to find the maintenance debtor, or if they are able to find the debtor, they will not collect the maintenance, if the debtor is on social welfare. Furthermore, it is often not clear what the process and procedures of the Requested State are, that are necessary to follow in order to obtain or recover child support. There is usually a lack of clarity regarding the jurisdiction rules of the court of the Requested State along with the difficulty of not knowing the relevant source to turn to for clarification of those rules. Language barriers also present a problem, especially if the procedures of the Requested State are set out in that State's language.

32. The problems encountered when dealing with foreign judgments are not so much connected with the enforcement of the judgment itself, but rather the content of the judgment. Courts may be reluctant to enforce maintenance orders which become exorbitantly high when the sum in the original order is converted into Israeli currency. A further problem which may be encountered by a foreign applicant seeking to recover or collect maintenance in Israel is that they will not qualify for legal aid.

This problem arises when the debtor cannot be located. Usually, when a debtor cannot be located, a certain amount can be collected from the NII , but only if the creditor fulfills the criteria required by the NII, which are very low and usually foreign applicants do not qualify under these criteria and therefore cannot collect from the NII.

The shortcomings further lie in the practical implementation such as location of the debtor or a debtor having no assets or income from which to pay maintenance. A further problem is a difference in internal procedures which leads to difficulties in enforcing decisions in Israel such as when maintenance decisions are administrative and not judicial or when there are conflicting decisions from abroad.

33. (a) Administrative Co-operation:

Administrative co-operation is essential to the practical success of the new instrument. The new instrument should set out the minimum threshold of administrative assistance, that should be given to a maintenance creditor, seeking to have a maintenance order recognized, enforced or established. This should include providing details of the maintenance debtor, taking steps to track down the creditor, and providing all the necessary information regarding the procedures of the Requested State and, what exactly needs to be done by a Requesting State, in order for the request to be processed.

(b) Provisions for the recognition and enforcement of foreign decisions:

There is importance in including rules of recognition of foreign decisions, whereby decisions can be recognized without necessarily referring to rules of indirect jurisdiction. As long as there is certification by the requesting state, that a maintenance decision has been validly obtained in terms of the laws, and procedures of the state of origin. Once the validity of a decision has been established, the decision will be enforced and should

the debtor object to the enforcement, the burden will be upon him to institute proceedings and to prove his objection. In terms of the enforcement of the maintenance decision, the relevant authority should be required to collect only up to a certain amount.

The issue of lump sum maintenance and arrears, should be examined in order to decide whether there should be an obligation under the new instrument to enforce these.

(c) Applicable law principles:

We do not believe that it is necessary to include applicable law principles in the new instrument. Each state should enforce its own laws and procedures regarding maintenance. Applicable law clauses are liable to cause complications, lengthening the whole process of maintenance collection.

(d) Uniform direct rules of jurisdiction applying to the determination and modification of maintenance decisions:

We consider uniform direct rules of jurisdiction to be an important part of the new instrument, both in terms of modification of existing maintenance decisions and the establishment of maintenance orders.

One of the problems facing the courts, when having to enforce foreign maintenance orders, is that the amount of the maintenance payment often do not reflect the economic reality of the country, in other words, the amount of payment by the maintenance debtor required by the foreign decision is too high taking into account foreign exchange rates.

Our internal law does not allow for modification of foreign judgments and our courts, therefore are left with the choice of either not enforcing the judgment at all or enforcing it, knowing that it will be impossible for the debtor to meet the payments. We suggest a certain middle ground in the new instrument,

whereby modification of the judgement is made provision for on a limited basis, accompanied by direct rules of jurisdiction entitling a court to modify the original decision. The modification should be limited only to the amount of the maintenance payment and not the substantive part of the maintenance decision. Furthermore, the grounds for modification should also be limited to changes in the circumstances of the maintenance debtor, creditor (such as a change in income) and of the child, and modification to allow realistic adjustment of the amount according to the economic reality of the country in which the judgment is being enforced.

Direct rules of jurisdiction are also important for the establishment of decisions regarding maintenance. (perhaps a similar arrangement to the one which appears in the Convention on the Civil Aspects of International Child Abduction.)

(e) Provisions specifying the assistance to be provided to an applicant from another Contracting Party:

The provision of assistance by Requested States to a maintenance creditor is essential throughout the whole process. The assistance should be both administrative and legal. A suggestion that can be taken into account is the possibility of including in the new instrument a possibility of extending the assistance given in executing a recognized order to a certain amount only. In other words, if a maintenance decision was given for an amount of \$10 000 a month than a state will be seen as having complied with its obligation under the Convention if it collects only a certain percentage of that amount.

(f) Provisions concerning legal aid and assistance to be provided to an applicant from another contracting party:

The issue of legal aid is already covered by (e) above. Once a maintenance creditor has a decision that needs to be recognized and enforced, or needs to establish a maintenance decision, this

would fall within the scope of assistance that should be given in terms of the new instrument.

(g) Provisions concerning co-operation in the establishment of paternity:

The issue of paternity is a problematic one in terms of the Jewish religious law (see answer to question 18), and so we can only make general reference to the issue. On principle, we see no reason why there should not be co-operation in establishing paternity. The new instrument should however, include a provision that should paternity be established, it would be for the purposes of the specific maintenance only.

Co-operation in this matter should be administrative and not financial. A Requested state should not have to bear the financial burden of establishing paternity. Rather, this cost should be borne by the father and, should he refuse, then the court should be able to presume his paternity for the purposes of either enforcing or establishing a maintenance order.

(h) Provisions concerning co-operation in the international transfer of funds at low cost:

(i) Provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis:

We will deal with this issue together with securing compliance with obligations under the instrument and the reimbursement of public bodies who have paid benefits to a maintenance creditor (i.e. (k) and (l)).

We strongly believe that a Contracting State needs to assume responsibility under the instrument. A state should do everything in its power to ensure that all possible steps have been taken to

recognize and enforce or establish a maintenance order. This responsibility spans from ensuring that the necessary administrative co-operation is given, to doing what it can to try and track down the debtor. If a state does not do this, it should be responsible for its own respective public body making the maintenance payment (or at least a certain portion thereof). In addition, a public body that has made payment to a maintenance creditor should be entitled to reimbursement. Once again, the Requested State, once it has received the request from the public body of the Requesting State, should take all necessary steps to track down the debtor in order to enforce the maintenance decision in terms of which that public body has been paying the creditor maintenance.

(j) Standard Forms:

Standard forms are vitally important in order to ensure efficiency in processing requests. Provisions regarding standard form should be dealt with under the administrative co-operation provisions. Standard forms should be available in English or French, at least and should include information about the details of the maintenance decision, including any special circumstances that were taken into account in making the decision. The amount of the maintenance payments should be expressed as units of the payment as a percentage of the actual income of the debtor, and if the income is unknown, then according to some other standardized calculation.

34. (a) and (b): Except for applicable law principles, we regard all of the above elements as being important to the new instrument. The issues of co-operation in establishing paternity (g) and provisions concerning legal aid (f) should perhaps be optional.

(c)

**THE ANSWER BY THE JAPANESE GOVERNMENT
TO THE QUESTIONNAIRE CONCERNING A NEW GLOBAL INSTRUMENT
ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND
OTHER FORMS OF FAMILY MAINTENANCE**

PART I

We do not have supplementary answers to the questionnaire in 1999, except that the Supreme Court has recently decided on the applicable law to the incidental / preliminary question in general. For details, please see the answer to Question 16 of this questionnaire.

PART II

1. If no agreement is reached or possible on the extent and mode of maintenance, the Family Court shall determine such matters, taking into account the needs of the creditor, the resource of the debtor and all other circumstances (Article 879 of the Civil Code). The court has discretion in determining the form of decision, which includes periodic payment, lump sum, etc.
2. The lineal relatives by blood and brothers and sisters shall be under duty to furnish support each other (Article 877 of the Civil Code). Husband and wife shall aid each other and share the expenses of the married life with each other (Article 752 of the Civil Code). Under special circumstances, the court may impose a duty to support between relatives within the third degree (Article 877 of the Civil Code).
A spouse who has the custody of an 'immature' children (see infra, 3) is entitled to receive child support from the other spouse as the share of the expenses of marriage life (Article 760 of the Civil Code), and a parent not married is entitled to receive it from the other parent as the expenses of the care and custody of children (Articles 766, 749, 771 and 788 of the Civil Code).
3. A child may obtain support from his / her parents when he / she is in need (Article 877 of the Civil Code), and we have no clear definition of a 'dependent child.' It is considered, however, that parents are under heavier duty of support to an 'immature' child (i.e. a child who cannot maintain his / her economic life without the care and custody of parents) than to a 'mature' child.
4. The law of the habitual residence of the creditor shall apply. If he / she is unable to obtain support from the debtor under the said law, the law of their common nationality shall apply. If the creditor is unable to obtain support under either of the laws mentioned above, the law of Japan shall apply (Article 2 of the Law Relating to the Law Applicable to Maintenance

Obligations. This law has been enacted to implement the 1973 Hague Convention on the Applicable Law to Maintenance Obligations).

5. Child support is ultimately determined through judicial process.

Child support can be paid either a) by a parent to the child as the performance of maintenance obligation, or b) by a parent to the other as the payment of expenses for the care and custody of their child. Whatever the legal ground is, the amount can be determined by the agreement between the parties concerned. If no agreement is reached or possible, the Family Court shall determine the matter by the procedure provided by the Law for Determination of Family Affairs (Articles 766, 749, 771, 788f1 and 879 of the Civil Code and Paragraph 1, Article 9 of the Law for Determination of Family Affairs). The District Court may determine child support in the latter sense (i.e. the payment of expenses for the care and custody of the child) in conjunction with the declaration of divorce or annulment of marriage (Article 15 of the Law of Procedure in Actions Relating to Personal Status).

6. The question of international jurisdiction will be decided on the basis of case law where one of the parties lives abroad. Apart from that, the same process will apply regardless of the parties' residence.

7. The process is the same in that the mode and amount shall be ultimately determined by the Family Court pursuant to the Law for Determination of Family Affairs.

8-9. We don't have any formula, guidelines, or other criteria in making the assessment of child support. The child support award may be determined at the discretion of the Family Court mainly based on the best interest of child and the following considerations:

- a. gross and net income of the parents
- b. income taxes, health insurance payments etc. of the parents
- c. business expenses of the parents
- d. age of the child
- e. educational expenses for the child
- f. any other factors the court may deem relevant

10. The method of assessment is the same in that the Family Court has discretion in determining the amount of maintenance based on the totality of circumstances.

11. The law of the habitual residence of the creditor shall primarily governs. If he/she is unable to obtain support from the debtor under the said law, the law of their common nationality shall apply. If the creditor is unable to obtain support under either of the laws mentioned above, the law of Japan shall apply. Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account

in determining the extent of maintenance. (Articles 2 and 8 of the Law Relating to the Law Applicable to Maintenance Obligations. This law has been enacted to implement the 1973 Hague Convention on the Applicable Law to Maintenance Obligations.)

12. Maintenance payments are not subject to automatic reassessment.

13. Maintenance payments are not subject to automatic adjustment in accordance with an external marker.

14. Maintenance determined by conciliation or adjudication by the Family Court may be modified upward or downward ultimately by the Family Court on the ground of (a) the change of circumstances concerning the income of the parents and the educational expenses for the child, (b) the increase in expense by re-marriage, the birth of new child and so on, (c) any other factors the Family Court may consider. Judgements of the District Court on the approval of collateral claims in a divorce suit may also be changed in the same manner.

15. There have been some reported court cases in which a Family Court of Japan rendered a decision which in effect altered the preceding foreign judgement by applying the applicable law designated by Horei (Law Concerning the Applicable Law in General) in a situation where there had been substantial change of circumstances after the foreign judgement and the court found that it had international jurisdiction over the case. However, there is no established precedent with respect to the modification of foreign maintenance decisions as such.

16. According to the recent decision of the Supreme Court, the law applicable to a prerequisite issue indispensable for solving an issue of law (the present issue) should be determined by the private international law of the forum State. Hence, where Japan has become the forum State, the Japanese courts would apply the law designated by Horei (Law Concerning the Application of Law in General) which adopts the principle for easier formation of parent-child relationship by providing several applicable laws on the basis of nationalities of the parties concerned.^{f1} However, the question of whether or not the precedent applies in the context of maintenance proceedings is yet to be clarified, since the question should be examined with regard to the purpose of the Law Relating to the Applicable Law to Maintenance Obligations which implements the 1973 Hague Convention on the Applicable Law to Maintenance Obligations.

17. Except for adoption cases, one of the following legal requirements must be satisfied in order to establish paternity:

(a) the child was conceived by or born to a married woman. If this requirement is satisfied, the child is treated as the child of the woman's husband unless the court holds otherwise

(Article 772 of the Civil Code and case law).

(b) the child has been acknowledged by its father or has obtained a judgement of acknowledgement (Articles 779, 787 and 789 of the Civil Code).

18. In the normal course of events, the child who seeks to establish paternity in child support proceedings is required to bring a separate action relating to personal status, such as the one to negate the paternity of existing legal father, or the one against alleged father for acknowledgement, or both, to the District Court. Plaintiff is required to apply to the Family Court for conciliation before filing actions mentioned above (Articles 18 and 17 of the Law for Determination of Family Affairs).! With the consent of both parties and after conducting necessary factual investigation which may include the examination of scientific evidence, the court may make a determination corresponding to agreement (Article 23 of the Law for Determination of Family Affairs). The applicant shall bear the costs and expenses of these proceedings, but the court may impose the whole amount or a part thereof on respondent or others concerned under special circumstances (Article 7 of the Law for Determination of Family Affairs, Articles 26 and 28 of the Voluntary Matters Proceedings Law)!in) 1 . In the actions relating to personal status, the court determines paternity based on the result of the oral argument, evidence produced by the parties and, if any, facts and evidence gathered by the court. Scientific evidence may be examined in the procedure. The losing party in principle bears the costs and expenses of the proceedings (Article 61 of the Code of Civil Procedure).

The attorney fee for all these court procedures is not included in legal costs and expenses and each party shall pay it, but it could be covered by legal aid under certain conditions.

The same description applies to non-residents, except that non-residents cannot usually receive legal aid.

19. A foreign child support decision can be recognized and enforced under certain requirements. We cannot find a view that recognition / enforcement of the decision should be refused just because the decision entails a determination of paternity. If, for example, the recognition of a foreign decision which applied a foreign law or method of establishing paternity brings about a situation incompatible with public order and good moral, the court will refuse to recognize and enforce the decision (See Article 118 of the Code of Civil Procedure).

20.

- Administrative assistance: For resident claimants, local governments at the prefectural level offer special consultation services by specialists such as lawyers. No assistance is available for non-resident claimants.
- Legal aid: Legal aid includes the free legal consultation service by an attorney and the assistance of an attorney in court proceedings. The Legal Aid Association pays the attorney

fee on behalf of the person aided. Non-residents cannot usually receive legal aid.

21.

- Administrative assistance: The requirement for the assistance is that the applicant is the parent in a single-parent household.
- Legal aid: The requirements of legal aid are as follows:
 - (a) the applicant should be indigent,
 - (b) the case should have reasonable chance of winning,
 - (c) the case should conform to the purpose of legal aid.

22. The rules and procedures are not different where the applicant is a spouse or other family member.

23. The legal costs and expenses of the determination proceedings by the Family Court includes:

(a) the costs and expenses which accrue before the determination such as application fee, the expenses for the examination of evidence and the expenses of service of documents. For example, the applicant shall pay \900 application fee for maintenance proceedings in the Family Court, and \1,350 fee for an appeal to the higher court (Article 3 of the Law Relating to the Costs and Expenses of Civil Litigation, etc.).

(b) the expense of notifying the decision by certified mail.

The principle is that the applicant shall bear the costs and expenses mentioned above, but under special circumstances the court may impose the whole amount or a part thereof on the respondent or others concerned (Article 7 of the Law for Determination of Family Affairs, Articles 26 and 28 of the Voluntary Matters Proceedings Law).

Under the current system, attorney fee is not included in legal costs and expenses and each party shall pay it.

24. Application fee should be paid on the application. We have no system which is designed specifically for the collection of other costs and expenses of judicial proceedings from maintenance payments.

25. Maintenance payments are to be made by the method on which the debtor and the creditor have agreed. As to the payment which has been determined either by conciliation in or adjudication of the Family Court, the Court has the power to recommend (Articles 15-5 and 25-2 of the Law for Determination of Family Affairs) or order to pay the amount (Articles 15-6 and 25-2 of the Law for Determination! of Family Affairs cf1). In the latter case, the Family Court may impose civil monetary sanction on the non-obedient debtor in order to ensure the payment.

The system described above applies regardless of whether the creditor is child or other family

members.

26. No special arrangements are available where the payment is to be made or collected from abroad.

27. The enforcement proceedings of the maintenance decisions do not differ from the enforcement proceedings based on a monetary claim in general. For example, the creditor can seize a monetary claim by court order for attachment of property, and can exact this directly. Moreover, the creditor can seize real estate by court order for the initiation of auction, and can receive a liquidation from the price which the court realized.

28. Available methods: seizure of a wages claim, seizure of a tax refund claim, seizure of the fund of bank accounts or other sources, or forced sale of property. These methods are available only through enforcement proceedings mentioned supra, 27.

Basically unavailable methods: wage withholding (not based on an attachment order mentioned supra, 27), deductions from social security payments and division of pension benefits.

Unavailable method: committal to prison.

29. Certain amount of fee is charged for remittance to / from a foreign bank. The rate may vary from bank to bank.

30. Various methods of international transfer are available, but there is no regulation over the banking fee. No arrangement has been developed to facilitate the transfer of maintenance payments.

PART III and IV

31-36. We have not ratified either the New York Convention or the Hague Conventions of 1956 and 1973 on Recognition and Enforcement of Maintenance Obligations and we need more information about the operation of the Conventions in order to answer these questions in detail. However, we believe that the new instrument should be drafted in such a manner as to accommodate the diverse legal systems among Parties and have flexibility to enable each Party to operate the instrument within the existing system.

37. We are not prepared to make a contribution to the fund at this moment.

38. N/A

Répons du Luxembourg
Questionnaire concernant un nouvel instrument mondial sur le
recouvrement international des aliments envers les enfants et d'autres
membres de la famille

Partie II

1. Les décisions relatives à des aliments se limitent en principe à la condamnation à des paiements périodiques. Dans la mesure où le secours alimentaire est à allouer en fonction du critère de l'insuffisance des moyens de subsistance personnels du créancier d'aliments, lequel critère est donc essentiellement variable, il n'est guère concevable qu'une décision de justice alloue, à titre d'aliments, une pension capitalisée. Une seule exception est prévue par la loi, s'agissant de l'obligation alimentaire entre conjoints: la succession de l'époux prédécédé doit des aliments au conjoint survivant s'il est dans le besoin. Ces aliments peuvent être prélevés en capital sur la succession.

A signaler une jurisprudence récente de la Cour d'appel, intervenue dans le cadre de la liquidation d'un régime matrimonial après divorce: le fait pour l'un des conjoints de continuer à rembourser de ses revenus de travail un prêt hypothécaire sur l'ancien domicile conjugal, dans lequel continue à résider après le prononcé du divorce l'autre conjoint, ne constitue pas l'exécution d'une obligation alimentaire.

2. Peuvent bénéficier d'une décision relative à des aliments toutes les personnes qui, d'après la loi, peuvent se prévaloir d'une créance alimentaire. Les obligations alimentaires instituées par la loi sont réciproques, c'est-à-dire que le créancier d'aliments peut aussi être débiteur d'aliments.

Une telle obligation alimentaire existe

- en ligne directe entre les enfants, leurs père et mère ou autres ascendants;
- entre certains alliés (beaux-parents, gendres et belles-filles), sous réserve de certaines limitations légales ;
- entre conjoints.

Un projet de loi relatif aux effets légaux de certains partenariats, actuellement engagé dans la procédure législative, prévoit, à titre exceptionnel, il est vrai, la possibilité pour un partenaire de demander à l'autre des aliments, à la fin du partenariat.

3. La notion d'enfant à charge est une notion qui en principe n'a d'incidence que sur l'obligation d'entretien mise à charge des père et mère par l'article 203 du code civil, obligation qui peut s'étendre au-delà de la majorité civile de l'enfant, en cas de poursuite d'études justifiées, pour infirmité ou pour un autre motif. Pour l'obligation alimentaire proprement dite il est tenu compte du besoin de celui qui réclame des aliments et de la fortune de celui qui les doit.

4. Après la ratification de la Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires, le régime découlant de celle-ci constitue dorénavant le droit commun des conflits de lois en matière d'obligations alimentaires découlant de relations de famille, de parenté, de mariage ou d'alliance, y compris les obligations alimentaires à l'égard d'enfants nés hors mariage.

Il en résulte par exemple que les obligations alimentaires entre époux, dans le cadre d'un divorce, sont régies par la loi applicable au divorce, qui au Luxembourg, est soit la loi nationale des époux lorsqu'elle leur est commune, soit la loi de leur domicile effectif commun, lorsqu'ils sont de nationalité différente, soit la loi du for lorsque les époux de nationalité différente n'ont pas de domicile effectif commun. Les procédures subséquentes en révision sont également en principe régies par la loi appliquée à la dissolution du mariage.

5. Les décisions en matière d'aliments sont rendues dans le cadre de procédures judiciaires.

6. Il n'y a pas lieu de distinguer, pour ce qui est de la procédure, suivant que le demandeur ou le défendeur est domicilié à l'étranger.

7. La différence réside au niveau de la juridiction compétente pour statuer sur une demande en matière d'aliments : en principe le juge de paix connaît de toutes demandes en pension alimentaire, à l'exception de celles se rattachant à une instance en divorce ou séparation de corps. Au cours d'une instance en divorce, compétence pour décider des mesures provisoires relatives aux aliments (tant pour un époux que pour les enfants) est reconnue au président du tribunal d'arrondissement statuant en référé. Le tribunal d'arrondissement ayant à statuer sur la demande en divorce est également compétent pour statuer sur les mesures accessoires au divorce, et imposer à ce titre à l'une des parties l'obligation de verser à l'autre une pension alimentaire ; il peut au même titre fixer la pension alimentaire pour les enfants (étant précisé toutefois que dans le cadre d'une instance en divorce, tant dans le cadre des mesures provisoires que dans le cadre des mesures accessoires au divorce, l'obligation mise à charge des père et mère découle en réalité de leur obligation d'entretien et d'éducation des enfants).

8. Il n'existe pas au Luxembourg de barème pour la fixation des aliments.

Sur base de la jurisprudence en matière d'aliments redus aux enfants par les père et mère on peut dégager une tendance consistant à allouer pour chaque enfant environ 10% du revenu net du débiteur d'aliments (revenu net = revenu brut duquel il y a lieu de déduire l'impôt sur le revenu retenu à la source et les charges sociales). Cette jurisprudence ne semble toutefois pouvoir être généralisée ni à toutes les hypothèses où des enfants sont demandeurs d'aliments (une progression linéaire semble nécessairement devoir se heurter à des limites) ni aux hypothèses où d'autres personnes sont demandeurs d'aliments.

Les aliments doivent essentiellement répondre aux besoins du créancier et être proportionnés aux facultés de la partie tenue à l'obligation.

9. Les critères d'évaluation restent les mêmes, sans qu'il y ait lieu de distinguer suivant que le demandeur ou le défendeur vit à l'étranger. On appliquera donc toujours le critère du besoin du demandeur et le critère des facultés du défendeur, quitte à ce qu'il soit, suivant les cas, tenu compte des niveaux de vie à l'étranger dans l'appréciation des besoins et des facultés contributives.

10. Il n'y a pas de différence quant au principe même de la fixation des aliments.

11. Il y a lieu de renvoyer à la réponse au point 4. La loi applicable telle que désignée par la Convention de La Haye du 2 octobre 1973 (et qui constitue donc le droit commun

luxembourgeois des conflits de lois en matière d'obligations alimentaires) régit aussi le mode d'établissement du montant de la pension alimentaire. Il y a toutefois lieu de préciser que quelle que soit la teneur de la loi applicable, le montant de la prestation alimentaire doit toujours être établi en fonction des besoins du créancier et des ressources du débiteur.

12. Les pensions alimentaires sont essentiellement variables. Il n'y a cependant pas de réévaluation automatique, celle-ci ne pouvant intervenir que sur demande.

13. En règle générale, les pensions alimentaires font l'objet d'une adaptation automatique aux variations du coût de la vie. Les décisions judiciaires prévoient que la pension alimentaire sera adaptée automatiquement et sans mise en demeure préalable conformément aux dispositions de la loi portant généralisation de l'échelle mobile des salaires et traitements. Cette loi prévoit une adaptation des salaires et traitements suivant l'évolution de l'indice pondéré des prix à la consommation.

14. Dans la mesure où les aliments doivent répondre aux besoins du créancier d'aliments et être proportionnés aux facultés du débiteur d'aliments, toute modification significative de la situation de l'un ou de l'autre est susceptible de se traduire, sur demande, par une modification des montants alloués.

Les demandes en modification sont de la compétence du juge de paix, sous réserve des demandes de modification se rattachant à une instance en divorce ou séparation de corps (voir réponse point 7.)

15. La question de savoir si un débiteur d'aliments, résident luxembourgeois, peut solliciter devant les juridictions luxembourgeoises la modification de la fixation des aliments intervenue à l'étranger, ne s'est pas encore posée. Dans les affaires de recouvrement d'aliments reçues par le Parquet général en tant qu'institution intermédiaire les modifications des décisions originaires ont toujours été sollicitées devant les juridictions de l'Etat dans lequel il avait été statué sur la demande initiale (dans toutes ces affaires les créanciers d'aliments continuaient à avoir leur résidence habituelle dans l'Etat où était intervenue la fixation initiale des aliments).

A signaler un problème particulier, ayant trait aux décisions judiciaires étrangères fixent la pension alimentaire à une quote-part du salaire et des autres revenus du débiteur d'aliments : la créance d'aliments ne présente dans pareil cas pas le caractère de liquidité requis pour se prêter à une exécution forcée. Une évaluation de la créance d'aliments par le juge sera alors nécessaire, et cette évaluation s'effectuera au regard des circonstances factuelles telles qu'elles existent au moment de l'évaluation. L'évaluation pourrait dès lors aboutir en fait (et en valeur) à une modification de la décision originale.

Les points 16., 17., 18. et 19. ne me semblent pas devoir comporter de plus amples développements :

- d'une part, il n'existe pas de jurisprudence luxembourgeoise, rendue sous l'empire des dispositions de la Convention de New York, sur les questions soulevées. Le Parquet général, que ce soit en tant qu'autorité expéditrice ou en tant qu'institution intermédiaire, n'a pas connaissance de ce que dans le cadre d'une procédure judiciaire de recouvrement d'aliments, des problèmes relatifs à la détermination de la paternité se soient posés.

- d'autre part, le rôle de l'autorité centrale comme autorité expéditrice ou comme institution intermédiaire au titre de la Convention de New York n'est pas conçu comme incluant un rôle actif de sa part pour compte d'une partie relativement à une question d'état, surtout si l'on envisageait l'action alimentaire comme l'accessoire d'une action d'état.
- enfin, et surtout, il risque de se poser un problème de compétence : en principe le juge de paix connaît de toutes demandes en pension alimentaire (voir réponse point 7.). Si l'article 14 du Nouveau Code de procédure civile dispose que le juge de paix connaît de toutes exceptions et de tous moyens de défense qui ne soulèvent pas une question relevant de la compétence exclusive du tribunal d'arrondissement ou d'une autre juridiction, l'article 342-2 du Code civil dispose précisément que le tribunal d'arrondissement, statuant en matière civile, est seul compétent pour connaître des actions relatives à la filiation. En tout état de cause la détermination de la paternité dans le cadre d'une procédure en matière d'aliments revêtira dès lors le caractère d'une question préjudicielle.

Il y aurait peut-être lieu, s'agissant du point 19., de renvoyer à la jurisprudence luxembourgeoise rendue à propos d'actions purement alimentaires : en approuvant la Convention conclue à La Haye le 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants, le législateur luxembourgeois a manifesté son intention de ne pas ou de ne plus considérer comme contraire à l'ordre public luxembourgeois une loi étrangère qui permet d'actionner un père naturel en payement d'aliments sans qu'en même temps une filiation naturelle soit judiciairement constatée.

Pour le surplus, il est difficile en l'état actuel de se prononcer sur la question de savoir si dans le cadre d'un nouvel instrument international, il y a lieu de régler à la fois les rapports d'ordre alimentaire et les questions de filiation entre le débiteur et le créancier, mais il s'agit dévaluer cela avec prudence.

20. Le demandeur résident (il y a lieu d'interpréter le terme « résident » comme synonyme de « autorisé à s'établir au pays») a la possibilité de solliciter l'assistance judiciaire.

Pour pouvoir bénéficier de l'assistance judiciaire, il faut justifier d'une insuffisance de ressources. Il est renvoyé au point 21. ci-dessous pour le détail des conditions tenant à l'insuffisance des ressources.

Le demandeur résident peut également obtenir l'avance des pensions alimentaires par le Fonds national de Solidarité. Le créancier d'aliments doit à ces fins adresser une demande au président du Fonds et satisfaire aux conditions suivantes :

- avoir son domicile légal dans le pays et y résider depuis cinq ans (la condition de résidence est remplie si le représentant légal du créancier d'aliments a sa résidence depuis cinq ans au pays) ;
- disposer d'une décision judiciaire, fixant les aliments, exécutoire au Luxembourg ;
- avoir échoué dans le recouvrement total ou partiel de la pension poursuivie par une voie d'exécution de droit privé effectivement exercée ;
- se trouver dans une situation économique difficile.

Il est fait abstraction de la condition tenant à l'exercice infructueux d'une voie d'exécution de droit privé, si le recours aux voies d'exécution paraît de toute façon voué à l'échec ou si le débiteur réside à l'étranger.

Le demandeur non résident (mais se trouvant sur le territoire d'une Partie contractante à la Convention de New York du 20 juin 1956) a la possibilité de s'adresser à l'institution intermédiaire luxembourgeoise, pour le recouvrement des aliments. Aucune autre condition d'éligibilité, hormis la résidence sur le territoire d'une Partie contractante, n'est dans ce cas exigée.

Le demandeur non résident peut aussi poursuivre lui-même le recouvrement des aliments, en sollicitant l'assistance judiciaire. Il est éligible à l'assistance judiciaire (mis à part la condition tenant à l'insuffisance des ressources) s'il est ressortissant d'un Etat membre de l'Union européenne ou ressortissant étranger assimilé aux ressortissants luxembourgeois en matière d'assistance judiciaire par l'effet d'un traité international.

Il y aurait lieu d'ajouter que le demandeur, qu'il soit résident ou non résident, n'est éligible à l'assistance judiciaire que s'il s'agit d'une personne physique.

21. L'insuffisance des ressources s'apprécie par rapport au revenu brut intégral et à la fortune du requérant ainsi que des personnes qui vivent avec lui en communauté domestique. Sont ainsi considérées comme personnes dont les ressources sont insuffisantes les personnes bénéficiant du revenu minimum garanti dans les limites des montants fixés par la législation afférente ainsi que les personnes qui vivent en communauté domestique d'un tel bénéficiaire et dont les revenus et la fortune ont été pris en considération pour la détermination du revenu minimum garanti.

Le revenu minimum mensuel garanti est fixé à

- a) 155,55 EUR pour une personne seule ou pour la première personne de la communauté domestique
- b) 233,32 EUR pour une communauté domestique composée de deux adultes
- c) pour chaque adulte supplémentaire vivant dans la communauté domestique, le montant sous b) est augmenté de 44,50 EUR
- d) pour chaque enfant ayant droit à des allocations familiales qui vit dans la communauté domestique le montant sous a) ou b) est augmenté de 14,15 EUR.

Les montants prévus correspondent au nombre cent de l'indice pondéré du coût de la vie au 1^{er} janvier 1948. Actuellement l'indice pondéré du coût de la vie est de 642,09, de sorte que les montants sous a), b), c) et d) se chiffrent respectivement à 998,77, 1498,12, 285,73 et 90,85 EUR.

Les ressources des personnes vivant en communauté domestique avec le requérant ne sont pas prises en considération, si la procédure oppose entre eux les conjoints ou les personnes vivant habituellement au même foyer, ou s'il existe entre eux, eu égard à l'objet du litige, une divergence d'intérêts rendant nécessaire une appréciation distincte des ressources.

Le bénéfice de l'assistance judiciaire peut également être reconnu à des personnes qui en seraient exclues au regard de la détermination des ressources, si des raisons sérieuses, tenant à la situation sociale, familiale ou matérielle du requérant justifient cette admission.

22. Pour bénéficier de l'assistance judiciaire, le requérant doit compléter un questionnaire disponible auprès du Service central d'assistance social (service constitué au Parquet général), et l'adresser au Bâtonnier de l'Ordre des avocats territorialement compétent. Doivent y figurer les indications suivantes :

- nom, prénoms, profession, date et lieu de naissance, domicile, état civil, nationalité du requérant et le cas échéant de l'autre partie en litige ;
- nature du litige et exposé sommaire des faits ou, en cas de demande de consultation juridique, la nature du problème juridique ;
- renseignements sur la situation de famille du requérant, comportant l'indication des nom, prénoms, âge et profession du conjoint et des enfants ainsi que d'autres personnes vivant dans un foyer commun ;
- situation de fortune :
 - ?? si le requérant bénéficie du revenu minimum garanti, il lui suffit de joindre un certificat justificatif émanant de l'autorité administrative compétente (en l'occurrence le Fonds national de solidarité)
 - ?? dans les autres cas, les éléments suivants sont à indiquer, avec pièces justificatives à l'appui :
 - a) fortune immobilière et mobilière
 - b) loyer
 - c) dettes contractées et modalités de remboursement
 - d) revenus nets provenant d'une activité salariée pour les trois mois précédent la demande
- indication des noms et adresses de l'avocat et des officiers publics ou ministériels qui prêtent leur concours au requérant ou qu'il entend choisir pour prêter leur concours ;
- déclaration que le requérant n'est pas en droit d'obtenir d'un tiers le remboursement des frais à couvrir par l'assistance judiciaire ;
- le cas échéant, indication de tous renseignements et production de toutes pièces justificatives de nature à établir un cas de rigueur susceptible de relever le requérant d'une exclusion du bénéfice de l'assistance judiciaire.

Si le requérant est dans l'impossibilité de fournir les pièces nécessaires, le Bâtonnier peut demander au Service central d'assistance sociale la production de tous documents de nature à justifier que l'intéressé satisfait aux conditions exigées pour bénéficier de l'assistance judiciaire (il doit être entendu que ce recours au Service d'assistance sociale ne se conçoit guère que pour la production de pièces disponibles auprès d'autorités ou d'organismes indigènes).

Il appartient au Bâtonnier de l'Ordre des avocats de décider de l'admission au bénéfice de l'assistance judiciaire. Contre les décisions de refus d'admission, un recours (appel) est ouvert auprès du Conseil disciplinaire et administratif de l'Ordre des avocats, qui statue en dernier ressort. Ce recours doit être introduit sous forme de lettre recommandée à l'adresse du Conseil disciplinaire et administratif, dans un délai de dix jours de la notification de la décision de Bâtonnier.

22. Les règles et procédures concernant l'assistance judiciaire sont les mêmes pour toutes les demandes d'aliments.

23. Les honoraires d'avocats et les frais occasionnés par l'intervention d'officiers ministériels (huissiers de justice) au niveau de l'exécution sont susceptibles d'entraîner les

frais les plus importants. Les honoraires d'avocats sont en principe librement fixés, l'avocat prenant en compte les différents éléments du dossier, tels l'importance de l'affaire, le degré de difficulté, le résultat obtenu et la situation de fortune du client. Les actes d'huissier sont rémunérés soit selon un tarif fixe, soit par vacation, étant précisé que ce ne sont en principe que les actes qui ne sont pas nominativement tarifés qui sont payés par vacation.

Dans le cadre de l'assistance judiciaire l'avocat qui prête son concours au bénéficiaire de l'assistance judiciaire reçoit une indemnité qui est calculée en raison du nombre d'heures prestées, sur base d'un taux horaire correspondant au taux d'une vacation horaire d'un expert judiciaire. Pour les avocats à la Cour, ce taux est multiplié par 1,5.

24. Dans le cadre d'une demande en recouvrement d'aliments sur base de la Convention de New York du 20 juin 1956, l'institution intermédiaire luxembourgeoise se refuse de mettre sur un pied d'égalité avec les aliments proprement dits les frais de justice et les autres dépenses que la fixation judiciaire des aliments a occasionnés. Si une demande formée sur base de ladite Convention donne lieu à une procédure de recouvrement judiciaire, ces frais de justice et ces autres dépenses ne seront dès lors pas compris dans le montant à recouvrer.

25. Quel que soit le débiteur d'aliments, le paiement et le recouvrement s'effectuent

- soit par l'exécution volontaire du débiteur d'aliments
- soit par l'exécution forcée poursuivie contre le débiteur d'aliments (avec la possibilité offerte au créancier d'aliments d'obtenir l'avance des aliments par le Fonds national de Solidarité, voir ci-dessus réponse au point 20.).

26. Pas d'accords particuliers.

27. Le créancier d'aliments doit exercer les voies d'exécution de droit privé (sous réserve de la possibilité d'obtenir l'avance des aliments par le Fonds national de Solidarité, voir réponse au point 20.).

28. Sur la liste figurant au point 28, la saisie sur les rémunérations du travail ainsi que les pensions et rentes est couramment pratiquée pour obtenir l'exécution de décisions relatives à des aliments. La saisie-arrêt entre les mains d'un tiers des sommes et effets appartenant au débiteur d'aliments est une autre possibilité offerte au créancier d'aliments.

Autres méthodes d'exécution : la saisie exécution, la saisie immobilière.

29. Pour les transferts en euros opérés depuis le Luxembourg vers l'étranger, il y a lieu de distinguer :

- jusqu'à un montant de 9.000 EUR des frais bancaires entre 4 EUR (pour la Belgique) et 9 EUR (pour les autres pays) sont dus. Le cas échéant il convient d'y ajouter une commission pour traitement manuel.
- au-delà de 9.000 EUR des frais bancaires de l'ordre de 0,175% sont prélevés, avec un minimum de 7 EUR et un maximum de 250 EUR.

Pour les transferts effectués en une devise autre que l'euro, s'y ajoute le cas échéant une commission de change (si le transfert est effectué depuis un compte libellé en euros).

Pour les paiements entrant au Luxembourg, des frais bancaires de l'ordre de 0,175% sont prélevés (avec un minimum de 7 EUR et un maximum de 40 EUR), quelle que soit la devise dans laquelle le transfert est opéré. Pour les paiements entrant au Luxembourg depuis la Belgique, il n'y a pas de frais bancaires qui sont mis en charge.

Pour tous les transferts il y a lieu de remarquer que l'imputation s'effectue d'après les directives du donneur d'ordre : celui-ci peut donc prendre à sa charge tous les frais, à la sortie comme à l'entrée.

30. Pas d'observation.

31. Au niveau de la coopération administrative :

- il faudrait se mettre d'accord sur les formalités à accomplir (à signaler que certaines institutions intermédiaires au titre de la Convention de New York, lorsqu'elles sont saisies par l'autorité expéditrice d'une demande de recouvrement d'aliments, réclament, outre la procuration prévue à l'article 3.3 de la Convention de New York, une lettre manuscrite du créancier d'aliments sollicitant l'application des dispositions de la Convention de New York. A quoi bon ?)
- il faudrait se mettre d'accord sur les pièces à produire : est-il nécessaire de produire toujours un certificat de non appel, d'une décision de première instance, assortie de l'exécution provisoire, ou un certificat de non cassation d'une décision d'appel ? La décision en question peut remonter déjà à plusieurs années, et émaner d'une juridiction étrangère (compte tenu de la libre circulation des personnes à l'intérieur de l'UE) et il sera alors difficile au créancier d'aliments de se procurer lesdits certificats. Par ailleurs il arrive souvent que le débiteur d'aliments s'est pour le moins partiellement acquitté des obligations alimentaires mises à sa charge par la décision judiciaire ? N'incomberait-il pas alors plutôt au débiteur d'aliments, s'il conteste le caractère exécutoire d'une telle décision, d'établir pour quelle raison la décision serait dépourvue de caractère exécutoire ?
Parmi les pièces à produire devrait figurer en tout état de cause une pièce (copie d'une pièce d'identité, d'un acte d'état civil, etc.) renseignant exactement les nom, prénoms, date et lieu de naissance du débiteur d'aliments, afin de faciliter au besoin la localisation du débiteur.
- l'information du créancier d'aliments (par le biais de l'autorité expéditrice) sur les démarches entreprises devrait être beaucoup plus systématique, plus régulière et plus adéquate : des formules du genre « le dossier a été transmis à l'autorité compétente » (quelle autorité ?) pour que celle-ci entreprenne des démarches (quelles démarches ?) laissent le créancier d'aliments sur sa faim.

Au niveau de l'assistance judiciaire :

Les créanciers d'aliments devraient être informés dès le début par l'institution intermédiaire à laquelle une demande de recouvrement est adressée des plafonds de revenus (et le cas échéant des plafonds de fortune mobilière ou immobilière) au-delà desquels l'assistance judiciaire leur sera de toute façon refusée, plutôt que de leur faire remplir des formulaires et de leur imposer la production de multiples pièces. D'une manière plus générale, ne serait-il pas possible d'admettre de droit les créanciers d'aliments au bénéfice de l'assistance judiciaire ou de l'aide juridique, dès lors que les aliments ne sont en principe alloués qu'en cas d'insuffisance des moyens de subsistance personnels ?

Au niveau des voies et moyens pour assurer le recouvrement des aliments.

Si le créancier d'aliments n'est pas à même de produire un titre exécutoire (il dispose par exemple d'une convention sous seing privé), l'institution intermédiaire requise devrait exercer une action aux fins de procurer au créancier d'aliments un titre exécutoire.

Un nouvel instrument de droit international devrait contenir des dispositions relatives à la reconnaissance et à l'exécution des décisions de justice étrangères, pour pallier ainsi aux inconvénients résultant du fait que certains Etats n'admettent pas la complémentarité de la Convention de New York et, par exemple, de la Convention de la Haye concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires.

32. Le Luxembourg ne voit pas directement en quoi un nouvel instrument international pourrait améliorer le fonctionnement interne du recouvrement d'aliments en faveur d'un créancier d'aliments qui réside à l'étranger (compte tenu par ailleurs du fait que les autorités luxembourgeoises ont toujours considéré la Convention de La Haye concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires comme complémentaire de la Convention de New York, de sorte que l'institution intermédiaire luxembourgeoise n'a pas de problèmes de satisfaire à l'article 6, paragraphe 1 de la Convention de New York en ce que cette disposition charge l'institution intermédiaire de faire exécuter tout jugement, ordonnance ou autre acte judiciaire).

32. Sur la liste figurant au point 33., les points a), b), e), f), j), et k) seraient à traiter prioritairement.

Pour les points c) et d) : position réservée.

Pour le point g) : dépasse le cadre d'une convention sur le recouvrement d'aliments. L'autorité centrale (ministère public) aurait par ailleurs des difficultés à se voir confier en ce domaine un rôle de coopération active, eu égard au fait qu'elle risque de se retrouver dans une position délicate, alors que dans les affaires ayant trait à l'état des personnes, le ministère public est certes partie jointe, mais n'intervient pas activement pour compte d'une des parties.

Les points h) et i) ne semblent pas prioritaires.

Le point l) soulève la question de ce qu'il y a lieu d'entendre par « créancier d'aliments ». A priori, les institutions publiques étrangères devraient disposer de moyens suffisants pour faire valoir leurs droits par leurs propres moyens.

34. Il a été, du moins en partie, répondu sous le point 33. Les éléments de la liste, considérés comme devant être traités prioritairement, devraient aussi être introduits comme éléments centraux.

S'agissant du point 33, c), il se recoupe avec l'observation formulée ci-dessus au point 31. (voies et moyens pour assurer le recouvrement).

35. Pas d'observation.

36. Pas d'observation.

37. Ceci est une question qui relève de manière générale de la politique et des principes budgétaires inhérents à la Conférence
38. Pour l'instant l'autorité centrale (Parquet Général) n'a pas de site Internet.



Direction des Affaires Civiles

NATURE DE LA DECISION RELATIVE A DES ALIMENTS

1- Quelle forme une décision relative à des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille peut -elle prendre ? L'une ou l'autre se limite-t-elle notamment à un paiement périodique ? existe-t-il des circonstances dans lesquelles un versement unique, un transfert de propriété ou une ordonnance similaire peuvent tendre à assurer les obligations alimentaires.

1- Toute décision relative à des aliments envers les enfants, l'époux ou d'autres membres de la famille est une décision de nature judiciaire. En général les décisions rendues en la matière consistent dans des paiements périodiques, à l'exception de celle octroyée à l'épouse en cas de divorce. L'obligation alimentaire a pour source : le mariage, la parenté et l'engagement. La pension alimentaire est accordée par jugement à compter de la date à laquelle le mari a cessé de pourvoir aux charges d'entretien qui lui incombent .L'épouse est redevable de sa pension alimentaire en cas de divorce ou répudiation pour sa retraite de continence à savoir son logement, sa nourriture son habillement et tout ce qui est habituellement considéré comme indispensable.

ELIGIBILITE

2- Dans votre pays qui est en droit de bénéficier d'une décision relative à des aliments ? (par ex. : l'enfant, l'époux, un autre parents · etc.)

2- Sont en droit de bénéficier d'une décision relative à la pension alimentaire :

- Les enfants à charge.
- l'épouse.
- En faveur des parents s'ils sont nécessiteux.

- Pour tout tiers envers lequel il s'est obligé à lui verser une pension alimentaire.
- 3- *Quelle est votre définition d'un enfant « à charge » dans le contexte des aliments envers les enfants ?*
- 3- Les enfants à charge sont :
- les enfants en bas âge ou incapables de se procurer des ressources.
 - ce droit subsiste pour la fille jusqu'au mariage et pour le garçon jusqu'à sa majorité mais si ce dernier poursuit ses études, ce droit subsiste jusqu'à ce que ces dernières prennent fin.
 - les enfants sous le régime de la kafala.
- 4- *Quelle est la loi applicable pour déterminer l'éligibilité (a) des enfants (b) l'époux ou d'autres membres de la famille à se voir octroyer des aliments ?*
- 4- Le code de statut personnel et des successions du 22 novembre 1957.

PROCEDURE D'EVALUATION INITIALE DES ALIMENTS

- 5- *Les décisions en matière d'aliments envers les enfants sont-elles rendues dans le cadre de procédure administrative ou judiciaire ?*
- 5 - Procédure judiciaire.
- 6- *Si le Demandeur ou le défendeur vit à l'étranger, la procédure est-elle différente ? dans l'affirmative, merci de bien vouloir préciser.*
- 6 - Non.
- 7- *La procédure relative à une demande en matière d'aliments envers l'époux ou d'autres membres de la famille diffère-t-elle de celle envers les enfants ? dans l'affirmative, merci de bien vouloir annexer les deux procédures .*
- 7- Non.

METHODES DE CALCUL DES ALIMENTS

- 8- L'estimation des aliments envers les enfants est-elle basée sur une formule, des lignes directrices ou d'autres critères ? Merci de bien vouloir préciser les principaux éléments déterminant une évaluation.
- 8- Non, pouvoir discrétionnaire du juge.
- 9- Lorsque (a) le demandeur ou (b) le défendeur vit à l'étranger, les critères d'évaluation employés sont-ils différents ?
- 9- Non, mais il est tenu compte de la moyenne des ressources de l'époux.
- 10- La méthodes de calcul des aliments envers l'époux ou d'autres membres de la famille diffère-t-elle de celle envers les enfants ?
- 10- Non.

11- quelle est la loi applicable à l'évaluation des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille ?

11- Pouvoir discrétionnaire du juge, qui prend en considération la moyenne des ressources de l'époux, le niveau de vie, le charges de scolarisation et les besoins.

REEVALUATION/ AJUSTEMENT / MODIFICATION DES DECISIONS OU DES EVALUATIONS RELATIVES AUX ALIMENTS.

- 12- Le montant et la fréquence des versements de la pension alimentaire envers les enfants ou l'époux et d'autres membres de la famille font-ils l'objet d'une réévaluation automatique, et dans l'affirmative, par qui et avec quelle fréquence ?
- 12- Toute réévaluation de la pension alimentaire allouée dans le sens d'une majoration ou d'une diminution ne sera admise avant l'écoulement du délai d'un an à compter de la date d'octroi de cette pension.
- 13- Ces versements font-ils l'objet d'une réévaluation automatique en fonction de critères objectifs comme l'index du coût de la vie, et dans l'affirmative, quels en sont les mécanismes et la périodicité ?
- 13-Oui, mais il n'y a pas de critères pré-définis, tout relève du pouvoir discrétionnaire du juge.

~~4-~~ Dans quelle circonstances la décision en matière d'aliments envers les enfants ou l'époux et d'autres membres de la famille ou l'évaluation de ces aliments peut-elle être revue/ modifiée à la hausse ou la baisse ? Cela se fait-il par la même autorité ayant rendu la décision initiale ?

14- La réévaluation se fait par autorité judiciaire et pas forcément par celle ayant rendu la décision initiale.

15- Dans quelles circonstances une décision ou une évaluation étrangère peut-elle être revue / modifiée par la demande d'un débiteur résident ?.

15- Il y a deux cas :

- toute décision émanant d'une autorité judiciaire étrangère peut être révisée par la même autorité à condition qu'elle soit revêtue au Maroc de la formule exécutoire .
- si les règles de compétence le permettent la décision peut être révisée au Maroc sur la base d'une procédure judiciaire.

DETERMINATION DE LA PATERNITE

16- Quelle est la loi applicable à la détermination de la paternité dans le cadre des procédures en matière d'aliments envers les enfants ?.

16- La loi marocaine.

17- Veuillez résumer les exigences administratives et judiciaires relatives à la détermination de la paternité dans le cadre des procédures en matière d'aliments envers les enfants ?

17-C'est la loi qui a déterminé les personnes ayant droit à une pension alimentaire, elle est due :

- le père envers ses enfants ;
- l'époux envers son épouse ;
- le fils envers ses parents s'ils sont nécessiteux ;
- envers tout tiers avec qui on s'est obligé.

Et pour déterminer ces relations on se base soit sur l'acte de mariage, soit sur l'acte de kafala soit sur l'acte de filiation.

18- Veuillez préciser les procédures judiciaires et les méthodes (y compris les procédés scientifiques) par lesquelles la paternité peut être établie dans le cadre des procédures en matière d'aliments envers les enfants. Veuillez indiquer également : les coûts généralement induits ; qui devrait les assumer ; si ces coûts peuvent être couverts par une aide judiciaire ; et, si une distinction est faite sur cette question entre les résidents et les non-résidents ?.

18- La paternité est établie par l'acte de mariage ou par aveu de paternité, et la demande de pension alimentaire est exonérée des taxes judiciaires.

19- La reconnaissance et l'exécution d'une décision étrangère relative à des aliments envers les enfants peuvent-elles être refusées (a) si une recherche en paternité est un élément nécessaire ou (b) si une loi ou une méthode employée pour cette recherche est différente de celle utilisée dans votre pays ? dans l'affirmative, veuillez en expliquer les raisons.

19- La reconnaissance et l'exécution d'une décision judiciaire étrangère est subordonnée à ce qu'elle soit revêtue de la formule exécutoire et que cette décision ne soit pas contraire à l'ordre public national et que les voies de défense aient été strictement respectées ainsi que les moyens de preuve du pays dont émane la décision.

AIDE JURIDIQUE ET ASSISTANCE JUDICIAIRE ET ADMINISTRATIVE

20- Quels types d'assistance (y compris l'assistance administrative, l'aide juridique et l'assistance judiciaire) sont disponibles dans votre pays pour :

- a- un résident requérant des aliments envers des enfants
- b- un requérant d'aliments envers des enfants résidant à l'étranger.

20- Il faut faire la distinction entre les taxes judiciaires et l'assistance judiciaire :

- les demandes de pension alimentaire sont toutes exonérées des taxes judiciaires.
- Pour ce qui est de l'assistance judiciaire (avocats, experts, interprètes) pour bénéficier de leurs services dans le cadre de l'assistance le requérant devra prouver son indigence dans le cas où il n'appartient pas à l'un des Etats adhérents à la convention de New York, sinon elle est automatiquement accordée.

21- Veuillez spécifier les principales conditions d'éligibilité, y compris tous les tests relatifs au moyens (financiers), pour les différentes formes d'assistance disponibles.

21- Pour être éligible de l'assistance judiciaire il faut présenter un certificat d'indigence et un certificat de non imposition.

22- *Les règles et procédures concernant l'aide juridique ou l'assistance judiciaire ou administrative sont-elles différentes pour les demandes d'aliments envers l'époux ou d'autres membres de la famille ?*

22- Non.

FRAIS DE JUSTICE ET AUTRES DEPENSES

23- *Quels types de frais de justice et autres dépenses (y compris les honoraires d'avocats et les frais de tribunaux) entraînent une demande pour les aliments envers les enfants ou l'époux et d'autres membres de la famille ? pouvez-vous indiquer comment ces frais et ces dépenses varieront depuis la demande initiale jusqu'aux diverses procédures d'appel ou de révision.*

23- Toute demande de pension alimentaire est exonérée des taxes judiciaires, sauf celles relatives aux frais des huissiers de justice, et les honoraires des avocats, mais on peut toujours bénéficier de l'assistance judiciaire.

24- *Est-il possible de recouvrer les frais de justice et autres dépenses à travers les versements d'une pension alimentaire ?*

24- Dans le cadre de l'exécution , le demandeur peut exiger du défendeur une indemnisation pour ses frais engagés lors de la procédure sauf les honoraires de l'avocat.

ACCORDS RELATIFS AU RECOUVREMENT ET TRANSFERT ET EXECUTIONS DES DECISIONS.

25- *Comment le paiement et le recouvrement des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille sont-ils organisés dans votre pays ?*

25- Ils sont organisés soit par exécution amiable, exécution forcée par le biais des voies répressives, saisie exécutoire, saisie arrêt, par prélèvement à la source et recours aux procédures pénales.

26- *Quels accords particuliers, le cas échéant, sont appliqués lorsque les paiements sont effectués ou recouvrés depuis l'étranger ?*

26- Soit par consentement mutuel, ou convention bilatérale, ou selon la convention de New York par délégation judiciaire.

27- *Quelles sont les procédures en vigueur pour faire exécuter des décisions relatives à des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille ?*

27- - Exécution volontaire ;

- Exécution forcée : saisie exécutoire par vente des effets : mobiliers, immobiliers, saisie exécutoire, saisie arrêt, recours aux procédures pénales (abandon de famille).

28- *Veuillez adresser des méthodes disponibles pour l'exécution de décisions relatives à des aliments envers (a) les enfants (b) l'époux ou d'autres membres de la famille ? Veuillez indiquer les méthodes d'exécution/ de prélèvement qui, parmi celles listées ci-dessous et en plus de celles-ci, sont disponibles dans votre pays :*

- *saisie sur salaire ;*
- *prélèvement sur remboursement d'impôt ;*
- *saisie arrêt de comptes bancaires ou d'autres sources ;*
- *déduction sur versement de sécurité sociale ;*
- *vente publique ;*
- *partage des revenus de pension ; et incarcération*

28-- Exécution volontaire ;

- Exécution forcée : saisie exécutoire par vente des effets : mobiliers, immobiliers, saisie exécutoire, saisie arrêt, recours aux procédures pénales (abandon de famille).

29- *Quels sont les frais bancaires types engagés dans le transfert et les paiements des aliments de / vers votre pays ?*

29- Selon les clauses des conventions signées avec d'autres pays, sinon selon les pratiques bancaires en cours (commissions bancaires).

30- *Des accords sont -ils mis en place dans votre pays, par les secteur public ou privé, afin de faciliter les virements au moindre coût de / vers l'étrangers ?*

QUESTIONS CONCERNANT LES ELEMENTS A INCLURE DANS LE NOUVEL INSTRUMENT

- 31- Veuillez énumérer toutes les lacunes du processus actuel, pour l'obtention ou le recouvrement à l'étranger, par des personnes résidant dans votre ressort, d'aliments envers les enfants ou d'autres membres de la famille, auxquelles on pourrait remédier ou qui pourraient être améliorées dans le nouvel instrument.
- 31- Lenteur de la procédure, insolvabilité du débiteur, transactions qui ne satisfait pas la créancière.
- 32- Veuillez énumérer toutes les lacunes du processus actuel, en vertu duquel un requérant étranger cherche à obtenir ou à recouvrir, auprès d'une personne résidant dans votre ressort, des aliments envers les enfants ou d'autres membres de la famille, auxquelles on pourrait remédier ou qui pourraient être améliorés dans le nouvel instrument.
- 32- Problème de localisation du débiteur pour manque d'information, insolvabilité du débiteur, problème de reconnaissance des décisions étrangères.
- 33- Gardant à l'esprit que le nouvel instrument doit être « complet et fondé sur les meilleurs aspects des Conventions existantes », et que sa structure exacte n'a pas encore été déterminée, veuillez indiquer vos points de vue préliminaires sur les éléments clefs qui doivent y être pris en compte. A cette fin, il pourra vous être utile d'utiliser la liste suivante et d'indiquer l'importance que vous attachez à chacun des points énumérés.
- a- Dispositions relatives à la coopération administrative ;
 - b- Dispositions pour la reconnaissance et l'exécution des décisions étrangères ;
 - c- Principes de loi applicable ;
 - d- Règles uniformes de compétence directe applicables pour déterminer et modifier la décision relative à des aliments ;
 - e- Dispositions spécifiques d'aide qui doit être fournie à un requérant provenant d'une autre partie contractante.
 - f- Dispositions concernant l'aide et l'assistance juridique qui doivent être fournies à un requérant provenant d'une autre partie contractante ;
 - g- Dispositions relatives à la coopération pour la recherche en paternité ;
 - h- Dispositions concernant la coopération en matière de virement international de fonds au moindre coût ;
 - i- Dispositions permettant aux parties contractantes d'éviter d'octroyer des services au requérant étranger lorsque ceux-ci ne sont pas disponibles sur une base réciproque ;
 - j- Formules modèles ;

- k- Dispositions visant à assurer le respect des obligations en vertu de l'instrument ;
 l- Dispositions relatives aux institutions publiques qui poursuivent le remboursement de prestations fournies au créancier d'aliments ;
 m- Autres. Merci de bien vouloir préciser.
 33- a- oui ;
 b- oui ;
 c- oui ;
 d- oui ;
 e- oui ;
 f- oui ;
 g- non ;
 h- oui ;
 i- oui ;
 j- oui ;
 k- oui ;
 l- oui ;

34- Au regard de la structure générale de ce nouvel instrument et en gardant à l'esprit que celle-ci devrait « combiner l'efficacité maximale avec la flexibilité nécessaire pour assurer une large ratification ».

- a- quels éléments parmi ceux que vous avez mentionnés sous la question n° 33 devraient être introduits comme éléments « centraux », dans le sens où toutes les parties contractantes devraient sans exception s'y soumettre ;
 b- quels sont, parmi ces éléments, ceux qui devraient être facultatifs, dans le sens où les parties contractantes devraient avoir la liberté de s'y soumettre ou non ; et
 c- êtes-vous en faveur d'un principe général par lequel, la reconnaissance d'une décision existante n'étant pas possible dans le pays où le débiteur réside, les autorités de ce pays devraient être obligées de fournir assistance au créancier pour obtenir une nouvelle décision ?

34 c- oui.

35- Pour les Etats ayant conclu des accords bilatéraux, veuillez indiquer les éléments de ces accords que vous souhaiteriez voir repris dans ce nouvel instrument ?

PARTENAIRES DE NEGOTIATION ET DIVERS.

36- Hormis les Etats membres de la Conférence de la Haye et les Etats parties à la Convention de New York de 1956 (une liste complète est fournie en Annexe II)

quel(s) autres Etats souhaiteriez-vous inviter à prendre parts aux négociations du nouvel instrument ?

36- Etats arabes.

37- Seriez-vous disposés à contribuer à un fonds permettant (a) aux Etats moins bien nantis de prendre parts aux négociations (b) de produire en espagnol les principaux documents et d'assurer une interprétation simultanée en espagnol en session plénière ?

37- Non

38- Disposez-vous d'un site Internet ou de brochures qui fournissent des informations sur les systèmes de pensions alimentaires et d'autres formes d'aliments envers d'autres membres de la famille dans votre pays ? dans l'affirmative, veuillez nous transmettre les détails ou une copie de toute publication.

38- Oui.

**NOTE D'INFORMATION ET QUESTIONNAIRE CONCERNANT
UN NOUVEL INSTRUMENT MONDIAL SUR LE RECOUVREMENT INTERNATIONAL
DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE**

établi par William Duncan
Secrétaire général adjoint

* * *

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

drawn up by William Duncan
Deputy Secretary General

*Document préliminaire No 1 de juin 2002
à l'intention de la Commission spéciale sur les Obligations Alimentaires*

*Preliminary Document No 1 of June 2002
for the attention of the Special Commission on Maintenance Obligations*

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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**

I BACKGROUND

The Special Commission on Maintenance Obligations of the Hague Conference on Private International Law of April 1999 met "to examine the operation of the Hague Conventions on maintenance obligations and the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance and to examine the desirability of revising those Hague Conventions, and the inclusion in a new instrument of judicial and administrative co-operation".¹

On the question of reform of the system, the Special Commission reached the following unanimous recommendation:

"The Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance,

- having examined the practical operation of these Conventions and having taken into account other regional and bilateral instruments and arrangements,*
- recognising the need to modernise and improve the international system for the recovery of maintenance for children and other dependent persons,*
- recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument.*

The new instrument should:

- contain as an essential element provisions relating to administrative co-operation,*
- be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations,*
- take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology,*
- be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification.*

The work should be carried out in co-operation with other relevant international organisations, in particular the United Nations.

The Hague Conference, while accomplishing this task, should continue to assist in promoting the effective operation of the existing Conventions and the ratification of the New York Convention and the two Hague Conventions of 1973.

¹ Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999, drawn up by the Permanent Bureau in December 1999, paragraph 1 (<http://www.hcch.net/e/workprog/maint.html>).

The Special Commission recalls and emphasises the importance of the practical recommendations contained in the General Conclusions of the Special Commission of November 1995, which were drawn up by the Permanent Bureau (General Affairs, Prel. Doc. No 10, May 1996).²

Following this recommendation, the Special Commission on General Affairs of May 2000 concluded that there should be included with priority on the Conference's agenda "the drawing up of a new comprehensive convention on maintenance obligations, which would improve the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation. Non-Member States of the Hague Conference, in particular signatory States of the New York Convention of 1956, should be invited to participate in the future work."²

Commission I on General Affairs and Policy of the Nineteenth Diplomatic Session of the Hague Conference on Private International Law, which met from 22-24 April 2002, reaffirmed the conclusion of the Special Commission on General Affairs and Policy of May 2000 and added that "every effort should be made to ensure that the processes involved are inclusive, including by the provision if possible of Spanish translation of key documents and facilities for Spanish interpretation at plenary meetings".³

II PLAN OF ACTION

The Permanent Bureau is currently carrying out research and consultations to prepare the ground for negotiations within the Hague Conference on the new global instrument on maintenance obligations. A report will be prepared by the Permanent Bureau to provide Member and other States with background information on developments at the national and international level, and to identify some of the issues which are likely to be the subject of debate when negotiations over the new instrument begin. It is planned that this report should be available to States before the end of 2002, and that a first Special Commission to begin the negotiations should be convened in the first part of the year 2003.

III THE QUESTIONNAIRE

In order to gather relevant information, as well as to test opinion in a preliminary way on the principal elements that might be included in the new instrument, the Permanent Bureau has devised a questionnaire which is set out below. The questionnaire is being sent out to all Member States of the Hague Conference, to States Parties to the New York Convention of 1956 and to relevant international governmental and non-governmental organisations. The questionnaire will also be posted on the Hague Conference website at: <http://www.hcch.net>.

The questionnaire falls into four parts which concern, first, practice under the existing international instruments, second, practice under national systems, third, the elements to be included in the new instrument, and fourth, negotiating partners.

The project to establish a new instrument on maintenance obligations has the potential to benefit hundreds of thousands of persons, children and adults, in many States around the world, and to contribute to the reduction of welfare / social security dependency. The questionnaire is an important element in establishing firm foundations on which to build the new instrument. The States and organisations to whom the questionnaire is addressed

² Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference, Prel. Doc. No 10 of June 2000, page 17, paragraph 9 (<http://www.hcch.net/e/workprog/genaff.html>).

³ Working Document No 4 from Commission I, distributed on 24 April 2002.

are kindly asked to provide their responses to the Permanent Bureau, if possible, **by the end of September 2002.**

PART I PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS

The questionnaire on maintenance obligations, which was sent out in advance of the Special Commission of April 1999 has already provided much information on practice under the existing international instruments. Parts I to IV of that questionnaire are attached to this document as Annex I.

States and organisations which responded to the questionnaire in 1999 are requested only to supply supplementary responses to Parts I to IV of that questionnaire, covering any relevant developments since April 1999.⁴

States and organisations which were not able to respond in 1999 are asked to provide full responses.

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

An Annex reproducing the laws herein cited has been included at the end of the questionnaire. Extracts from the following laws have been inserted:

1. Children and Young Persons (Care Orders) Act
2. Civil Code
3. Code of Organisation and Civil Procedure
4. Conditions of Employment and Regulations Act
5. Criminal Code
6. Maintenance Orders (Reciprocal Enforcement) Act
7. Malta Armed Forces Act
8. Marriages Act
9. Social Security Act

If you would like to view the entire text of the Acts/Code above mentioned you could access these laws on the Maltese government's web site. The electronic address is the following:

<http://www.justice.gov.mt>

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? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Maintenance is defined in Section 19 (1) (Civil Code) (Chapter 16 of the Laws of Malta) as follows:

'Maintenance shall include food, clothing, health and habitation.'

This definition does not distinguish between maintenance due to a child and that due to a spouse or other family member. However, subsection (2) of the same section goes on to specify that with regard to children maintenance is to include the expenses necessary for health and education.

A maintenance order may establish that the obligation of maintenance is to be fulfilled by periodic payments of money. Indeed, Section (2) of the Maintenance Orders (Reciprocal Enforcement) Act describes a maintenance order in paragraph (a) as follows:

'an order ...which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain'

⁴ See extracts from responses to the Questionnaire on Maintenance Obligations, Prel. Doc. No 3 for the attention of the Special Commission of April 1999 (<http://www.hcch.net/e/workprog/maint.html>).

The Civil Code takes a wider approach and provides for other methods of supplying maintenance.

Section 23 of the Civil Code (Chapter 16 of the Laws of Malta) mentions the possibility of maintenance being made in kind. Indeed subsection (1) of this section stipulates that a person bound to supply maintenance may not without a just cause, be compelled to pay a maintenance allowance if s/he offers to take and maintain into his own house the person entitled to maintenance. Moreover subsection (2) states that where maintenance is to be furnished out of the house of the person liable to provide such maintenance, he may, provided he shows a good cause, supply such maintenance in kind instead of paying an allowance in money.

Once again the law in Section 23 does not distinguish between maintenance supplied to a child and that supplied to a spouse or any other family member. It may consequently be interpreted that Section 23 applies to both children and spouses or other family members in respect of whom maintenance is due.

Section 54 of the Civil Code (Chapter 16 of the Laws of Malta) provides for the obligation for maintenance in cases of personal separation. Subsection (3) states that on separation being pronounced, the court may, if it deems it appropriate, order the spouse liable to supply maintenance to pay to the other spouse, in lieu of the whole or part of such maintenance, a lump sum, which the court deems sufficient in order to make the spouse who is to receive maintenance financially independent or less dependent of the spouse from whom maintenance is forthcoming. Subsection (5) of the same section states that the lump sum referred to in subsection (3) may be made by equal or unequal instalments spread over a reasonable period of time. Moreover, the court may direct that in lieu of the payment of a lump sum of money (as mentioned in subsection (3)) the spouse liable thereto shall assign to the other spouse property in ownership or in usufruct, use or habitation (as per Section 54 (6)).

The provision of maintenance as provided for in Section 54 (6) does not seem applicable only in respect of a spouse. In *Emma Borg v L-Avukat Dr. John Mizzi et noe* (5 October 1998) the Court of Appeal held that the immovable property belonging to the male spouse was to be assigned to his spouse in order to set off the maintenance obligation due to both his spouse and their children. The court explicitly claimed that in this decision Section 54 (6) was applied. It follows that Section 54 (6) applies in fulfilment of a maintenance obligation both in respect of a child and a spouse.

Eligibility

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

The persons so eligible have been pointed out in the following list. Relevant supporting provisions of the law indicating the eligibility criteria have been cited after each person mentioned as entitled to benefit from a maintenance order.

(a) A spouse

? Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the

home as the interest of the family requires, to maintain each other and ... (Section 3 Civil Code)

- ? *In regard to maintenance, the spouse shall have a prior right over the parents or other ascendants. (Section 5 (1) Civil Code)*
- ? *Notwithstanding any other provision, the spouse who was responsible for the nullity of marriage, is bound to pay maintenance to the other spouse in good faith for a period of five years, which duty shall cease if the party in good faith marries during such period. (Section 20(5) of the Marriage Act)*

(b) A Child

? *Maintenance imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage... (Section 3B Civil Code)*

- ? *Where both children and spouse claim maintenance, they shall be in a position of equality. (Section 5(2) Civil Code)*
- ? *Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code. (Section 7(1) Civil Code)*

? *Section 57 (Civil Code) caters for maintenance and the care and custody of children in the context of personal separation. Section 57(1) reads as follows:*

Whosoever may be the person to whom the children are entrusted, the father and mother shall maintain their right to watch over their maintenance and education, and shall still be bound to contribute thereto, according to law.

? *The Children and Young Persons (Care Orders) Act enables the Minister responsible for social welfare to take a child or young person (i.e. a person under the age of sixteen years) under his hand so as to take such child or young person into his care. This occurs if upon representations made to the said Minister in writing by the Director of the Department responsible for social welfare and after giving the parents and the guardian, if any, of the child or young person an opportunity to express their views, and after hearing any other person he may deem likely to assist him, the Minister is satisfied that the child or young person as the case may be, is in need of care, protection or control (as per Section 4(1) of the Act herementioned).*

Section 10 of the same Act addresses the issue of provision of accommodation and maintenance of a child or young person deemed to be in need of care, protection or control. In fact, subject to the provisions of the Act, the Minister shall discharge his duty either by accommodating and maintaining him in a residential home, hostel or similar institution provided by the Minister for the reception of children or young persons in his care or by boarding him out with a fit person, whether a relative or not, or with a private institution willing to undertake the care of him on such terms as to payment by the Minister or other terms as the Minister may, in agreement with such person or private institution, determine by regulation.

(c) A Parent

? *The children are bound to maintain their parents or other ascendants, who are indigent. (Section 8 Civil Code)*

? *It shall not be lawful for either of the spouses to claim maintenance from the children or other descendants or from the ascendants if such maintenance can be obtained from the other spouse. (Section 5(3) Civil Code)*

- ? *In default of the parents, or where the parents do not possess sufficient means, the liability for the maintenance and education of the children devolves on the other ascendants. (Section 7(2) Civil Code)*

 - (c) **Brothers/Sisters**
 ? *The liability for maintenance shall extend to brothers and sisters, of the full or half-blood, only in default of other persons liable for maintenance. (Section 15(1) Civil Code)*
 ? *The persons mentioned in Article 12 [Civil Code] shall, in all cases, have a prior claim over brothers and sisters, except in cases of great urgency, regard being had to health, age, or other circumstances. (Section 15(3) Civil Code)*

 - (d) **Ascendants/Descendants**
 ? *In regard to children and other descendants, it shall also include the expenses necessary for health and education. (Section 19(2))*
 ? *A person who cannot implement his obligation to supply maintenance otherwise than by taking the claimant into his house, shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant. (Section 20(4) Civil Code)*
- 3 What is your definition of a "dependent" child for child support purposes?
We have no express definition. The word 'children' in Section 3B of the Civil Code applies to any child whatever his or her status.
- 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?
The Civil Code outlines who is eligible to obtain maintenance. For further details please refer to question 2 above.
- Procedures for the initial assessment of maintenance*
- 4 Is child support determined through an administrative or a judicial process?
Section 32(2) of the Code of Organisation and Civil Procedure states that the Civil Court, First Hall shall take cognizance of all causes of a civil and commercial nature, including those causes which have been assigned or cognizable by the Civil Court, First Hall and in regard to which it has not been otherwise provided for in this Code or in any other law.
- It follows that once there is a claim for maintenance it is the Civil Court, First Hall which will decide if maintenance and the amount thereof is to be given to the claimant. No distinction is made as to whether the claimant is a child or not.**
- However, the proviso to Section 470(1) of the Code of Organisation and Civil Procedure is also noteworthy in this respect. It provides that in an application for leave to sue for personal separation or at a subsequent date but prior to the commencement of litigation before the court of contentious jurisdiction, a demand may be made for determining the amount of an allowance for maintenance during the pendency of the proceedings before the court of voluntary jurisdiction and the court of contentious jurisdiction and for the issue of a decree ordering the payment of such allowance.**
- 6 Is the process different where either the applicant or the respondent live abroad? If so, please give details.
Applicants are not treated in a different manner because of their residence.

- 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?
The process is not different.

The two processes can be joined. There are various court judgements where the court has decided upon the issue of maintenance obligations in respect of both a spouse and children. Such is the case of the following judgements: A v B (Civil Court, First Hall 16 March 1990); Jane Camilleri, f'isimha proprij u bhala kuratrici 'ad litem' ta' bintha minuri Clairita nominata b'digriet tat-3 ta' Gunju, 1987 v Carmelo Camilleri (Civil Court, First Hall, 7 November 1990); Victoria Camilleri f'isimha u bhala kuratrici ad litem ta' uliedha minuri Omar u Daniel v Mahmood Faraj Abdul Kareem (Court of Appeal 2 November 1994); A v B (Court of Appeal, December 1997).

Methods of calculating maintenance

- 8 Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.
Section 20 of the Civil Code delineates the criteria, which determine the amount of maintenance. Maintenance is to be due in proportion to the want of the person claiming it and the means of the person liable thereto. When one is to examine whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art or trade. Moreover, in estimating the means of the claimant regard shall also be had to the value of any movable or immovable property possessed by him. In estimating the means of the person liable to provide maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other person, and to the fruits of any movable or immovable property. If the person liable to pay maintenance cannot implement this obligation other than by taking the claimant into his house, then for the purposes of the said Section 20 that person shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant.
- 9 Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?
- 10 Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?
The law does not make any express provision for a different mode of assessment of maintenance in respect of different claimants. It is important to stress however that as specified by Section 19(2) Civil Code, that maintenance in respect of children and other descendants is to include the expenses necessary for health and education.
- 11 Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?
The Civil Code. For further details please consult the answer to question 8 above.

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?

No. If one of the interested parties feels that a maintenance order needs to be revised then such party has to file an application with the First Hall, Civil Court in order to request that such an order be amended.

- 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?

The Civil Court may take cognisance of the cost of living index in its computation of the amount of maintenance. In the case *Cachia utrinque* (Civil Court, First Hall, 2 June 1980) the Court took into consideration the rate of inflation when determining maintenance.

There are instances where the Civil Court has delivered rulings whereby the amount payable in maintenance had to be revised within a stipulated period of time so decided by the court on the basis of the cost of living index. Such was the case in *A v B* (25 May 1993) before the Civil Court, First Hall. There was an appeal from this decision and the Court of Appeal decided that the maintenance obligation was not to subsist and consequently the revision of the maintenance amount was not ruled upon by the Court of Appeal.

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

Section 21 of the Civil Code caters for the situation whereby the person supplying maintenance becomes unable to continue to do so. If such a person becomes unable to fulfil his obligation in whole or in part, he may demand that he be released from his obligation, or that the amount of maintenance be reduced. Application is made to the Civil Court, First Hall through which the person supplying maintenance invokes Section 21 and makes his demand to that effect.

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

Section 10 of the Maintenance Orders (Reciprocal Enforcement) Act makes provision for modification in the ambit of maintenance. Under this Act a Maltese court has the power to vary or revoke the order as if it had been made by the Maltese court and shall have the power to vary/revoke a registered order by provisional order.

Order is interpreted by the said Act as including any decree or other decision, including an interlocutory decree. Provisional order means (according to the context) either an order made by a court in Malta which is provisional only and has no effect unless and until confirmed, with or without alteration, by a competent court in a reciprocating country, or an order made by a court in a reciprocating country which is provisional only and has no effect unless and until confirmed, with or without, alteration, by the competent Maltese court. Registration order is interpreted as a maintenance order which is for the time being registered, or deemed to be registered, in the competent Maltese court under the Maintenance Orders Act.

However, should take into account that subsection (2) of Section 10 restricts the instances when a registered order may be varied. It lays down instances where a registered order may not vary other than by a provisional order. Moreover subsection (3) of the same Section states that the competent Maltese court shall not revoke a registered order except by

a provisional order unless both the debtor and the creditor under the registered order are for the time being residing in Malta.

The whole text of Section 10 has been reproduced in the Annex for your perusal.

Establishing paternity

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

Civil law is applicable to the determination of paternity. Title II in the Civil Code is entitled 'Of Filiation' and provides, inter alia, for the determination of paternity.

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

To initiate legal procedures to establish paternity one may file a writ of summons with the First Hall, Civil Court.

- 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.

According to Section 67 (Civil Code) a child conceived in wedlock is held to be the child of the mother's husband. Therefore the legal presumption is that in wedlock the male spouse is the father of the born child. There is also a legal presumption concerning conception during wedlock. In fact Section 68 (Civil Code) states that a child not born before one hundred and eighty days from the celebration of marriage, nor after three hundred days from the dissolution or annulment of the marriage, shall be deemed to have been conceived in wedlock.

Notwithstanding the legal presumptions provided for in Sections 67 and 68 (the male spouse may still repudiate a child conceived in wedlock if any one occurrence demanded by law in Section 70 (Civil Code) ensues and is proved by such spouse. Hence a husband can repudiate a child conceived in wedlock if he proves any of the following:

- (a) that during the time from the three hundredth day to the one-hundredth-and eightieth day before the birth of the child, he was in the physical impossibility of cohabiting with his wife on account of his being away from her, or some other accident; or
- (b) that during the said time he was de facto or legally separated from his wife, provided that he may not repudiate the child if there has been, during that time, a reunion, even if temporary between him and his wife; or
- (c) that during the said time he was afflicted by impotency, even if such impotency was only an impotency to generate; or
- (d) that during the said time the wife had committed adultery or that she had concealed the pregnancy and the birth of the child, and further produces evidence of any other fact (which may also be genetic and scientific tests and data) that tends to exclude such paternity

With reference to genetic and scientific tests Section 70(3) (Civil Code) goes on to say that the court may in an action of disavowal invite all or any of the parties including the child whose filiation is in dispute to submit to

the tests necessary to establish the genetic proof that may be relevant to the case. In this context, the court shall be entitled to draw such inferences as may be justified by the refusal to submit to such tests. Where the child whose filiation is in dispute is a minor, the court itself shall determine whether the child shall submit to the tests.

Within the context of filiation of illegitimate children, when there is a judicial demand for a declarator of paternity or maternity which may be contested by any party interested, the court may without prejudice to any evidence that may be produced by the parties according to law, invite the parties to submit to examinations necessary to establish a genetic proof. If any of the parties involved refuses to submit to such tests, the court, may draw any inferences as may be justified due to such refusal. (Section 100A (Civil Code))

DNA Paternity Testings were carried out in judgement proceedings concerning the establishment of paternity. By way of example one can mention *George Bugeja v Rita Catania et* (Civil Court, First Hall, 24 January 1995) and *A v B* (Civil Court, First Hall 27 November 1998) wherein paternity tests were conducted.

Section 93 (Civil Code) is pertinent to the core subject of this questionnaire – maintenance obligations. This provision relates to duty of the father towards the illegitimate child. The father is bound to maintain and educate, according to his means, the illegitimate child whom he has acknowledged, and, even afterwards, to supply maintenance to such child, in case of need, provided such child has no husband or wife or descendants in a position to supply maintenance. Moreover, the father is under a like liability in regard to the legitimate descendants of the predeceased illegitimate son or daughter, if their surviving parent or their legitimate ascendants are unable to provide for them. Additionally, one should note that the provisions of the latter section are still applicable when the person has not acknowledged a child but whose paternity has been declared by a judgement of the court (Section 94 (Civil Code)).

The costs of litigation are rather low. The DNA tests may, however, be quite expensive. There is no distinction between residents and non-residents for legal aid. The same criteria apply. As to DNA costs, as the law stands, it is unlikely that these can be recovered.

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (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.

There is no legal provision or any case law about this point.

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

? Legal Aid

The benefit of legal aid may be demanded through an application made to the Civil Court, First Hall. Such request may also be made orally to the Advocate for Legal Aid.

? Social Assistance

Section 30 of the Social Security Act (Chapter 318 Laws of Malta) regulates various kinds of social benefits related to unemployment. Where a person is unemployed, the latter person can claim assistance in favour of a relative of his. Thus an unemployed father can claim assistance for the maintenance of a child of his. However, Section 30(11) gives the Director the right to take proceedings before the competent Civil Court against such relative being the spouse, father, mother, sons or daughters as the case may be, of any person in respect of whom Social Assistance is claimed or received to compel them to refund any such assistance that is paid to or on behalf of such person and the court shall order the refund up to such sum which the person to whom Social Assistance is paid would have received had he claimed maintenance from such relatives in accordance with the Civil Code.

- b a claimant for child support who is resident abroad.

If the claimant fulfils the criteria of Section 912 of Chapter 12 of the Laws of Malta, he may qualify for legal aid. (for further details *vide question 21*)

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

? Legal Aid

Section 912 (Code of Organisation and Civil Procedure) lists down the conditions required by law for the eligibility of a person to benefit from legal aid. To be admissible for the benefit of legal aid the applicant must confirm on oath:

- (a) **that he believes that he has reasonable grounds for taking or defending, continuing or being a party to proceedings; and**
- (b) **that excluding the subject-matter of the proceedings, he does not possess property of any sort, the net value whereof amounts to, or exceeds, three thousand liri, or such other sum as the Minister responsible for justice may from time to time establish by an order in the Gazette (everyday household items that are considered reasonably necessary for the use by applicant and his family are not to be included in the said computation of three thousand liri) and that his yearly income is not more than the national minimum wage established for persons of eighteen years or over, or such other sum as the Minister responsible for justice may from time to time by order in the Gazette establish.**

The law lays down two provisos to the latter subsection (b):

- (i) **in calculating the said net asset value, no account shall be taken of the principal residence of applicant or of any other property, immovable or movable, which forms the subject matter of court proceedings, even though such other property is not the subject matter of the proceedings in which legal aid is being applied for; and**
- (ii) **in calculating the income, the period of computation shall be the twelve months' period prior to the demand for the benefit of legal aid**

The conditions laid down in Section 912(Code of Organisation and Civil Procedure) cited above shall not apply to the granting of legal aid to any person for bringing an action for the correction or cancellation of any registration, or for the registration of any act of birth, marriage or death, provided that where any such action herementioned is disallowed the court shall deprive of such benefit the person admitted to proceed with the benefit of legal aid. In this case, unless such person demonstrates a good cause to the contrary, the court shall order him to pay all costs of the suit.

A party shall not be admitted to proceed with the benefit of legal aid if any of the following situations arise:

- (a) **where in the same cause and by the same court a demand made by such party for admission to the juratory caution or any other benefit whatsoever has been disallowed for want of a *probabilis causa litigandi* on the part of the applicant in respect of the action which he intends to prosecute; or**
- (b) **where in regard to the same action, such party has already been by the same court refused admission to proceed with the benefit of legal aid for want of a *probabilis causa litigandi***

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?

?Legal Aid

The rules regulating legal aid do not specifically cater for particular proceedings which may be brought before the courts of law in Malta. Hence, there are no different modes of procedure followed in the case of maintenance applications for a spouse or other family member. The articles regulating the benefit for legal aid apply generally to all cases which are brought before the courts mentioned in Sections 3 and 4 (Code of Organisation and Civil Procedure), namely the superior and inferior courts of 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?

Schedule A, Tariff A of the Code of Organisation and Civil Procedure regulates the fees payable in respect of particular trial causes. Paragraph 1(a) is of particular importance since it provides that in actions for inter alia, maintenance, filiation and paternity, all the fees provided in Tariff A shall be rebated by 50% subject to one particular exception.

The filing of any petition, application, writ of summons or other act of procedure containing a claim which initiates a contentious procedure in a Court of First Instance and requiring the decision of a Judge or Magistrate as well as for any statement of defence, answer or other act of procedure in reply thereto and intended to contest, whether totally or partially, the claim made costs Lm 50. The latter fee is to include the filing of all other acts of procedure and court services required following the initiation of the cause through the said act up to and including final judgement but excluding any fees due for the notification of acts and fees due to referees or experts appointed by the Court or any fees which the Court may be required to pay to third parties.

For the filing of any petition, application, writ of summons or other legal act initiating a contentious procedure in a Court of Appeal and requiring the decision of a Judge as well as for any statement of defence, answer or other act of procedure in reply thereto and intended to contest, whether totally or partially, the appeal, the fee is of Lm 75.

Paragraph 3 of the same Tariff A lists other fees which shall be due. However, Section 3(4) provides that in actions for, inter alia, personal separation, annulment, maintenance, filiation and paternity, the fees stated in paragraph 3 shall not apply but there shall be levied a one time fee of Lm 50.

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

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?

The Code of Organisation and Civil Procedure has effective enforcement procedures to ensure that court decrees are complied with. (vide question 27). Payment may be effected by deducting the amount of money decided on by the court from the salary or wage if the respondent is employed. Payment is also effected by means of cheques sent on a regular basis.

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

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

The general rule laid down in Section 256(1) (Code of Organisation and Civil Procedure) is that a judgement which does not contain any suspensive condition and which condemns a debtor to pay a liquidated sum, or to deliver up or surrender a specific thing, or to perform or fulfil any specific act or obligation whatsoever, may be enforced after two days from the day of its delivery. However Section 255 (Code of Organisation and Civil Procedure) provides that judgements ordering the supply of maintenance may be enforced after the lapse of twenty-four hours from their delivery.

Section 266 (Code of Organisation and Civil Procedure) provides that a judgement which does not constitute a res judicata shall not be enforceable unless, on the demand of the interested party, such judgement has been declared by the court to be provisionally enforceable. Such provisional enforcement has to be demanded by means of an application. Notwithstanding the rules purported in Section 266, any judgement ordering the supply of maintenance is always provisionally enforceable, even if the decision delivered by the court of first instance is being appealed by one of the parties.

The law does not distinguish between the enforcement of a maintenance decision in respect of a spouse and that in respect of a child. Thus the provisions relating to the enforcement of judgements are applicable to both.

For the purposes of Maltese law a judgement is an executive title. Executive titles can be enforced through the following:

(a) Warrant of seizure

The purpose of this warrant is to seize certain movable property belonging to the debtor which is then brought under the jurisdiction of the court and eventually sold through a judicial sale by auction.

(b) Judicial sale by auction of movable or immovable property or of rights annexed to immovable property

The Judicial sale by auction of movables must be preceded by a warrant of seizure as in para (a) above. The sale of immovable property on the other hand is preceded by an application, where the creditor has to show he has an executive title and request the sale of an immovable indicated in the same application.

(c) Executive garnishee order

The effect of this order is to seize money in the hands of third parties involved. A garnishee order particular to maintenance is the garnishee of wages, salaries or allowances of the persons liable to pay maintenance.

(d) warrant of ejection or eviction from immovable property

(e) warrant *in factum*

Any of the warrants or orders mentioned above is issued by the court on the demand of the party suing out execution. This demand must be made by application to the competent court.

- 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

The Conditions of Employment (Regulation) (Chapter 135 Laws of Malta) generally prohibits the attachment or assignment of the wages payable by an employer to an employee. However, Section 21(3) of the same Regulation provides that the above mentioned prohibition does not apply where the assignment or attachment is intended to ensure the payment of maintenance due to, inter alia, the wife or to a minor child.

Similarly, Section 381(1) (Code of Organisation and Civil Procedure) states that a garnishee order cannot be issued upon any salary, or wages (including bonus, allowances, overtime and other emoluments); or upon any benefit, pension, allowance or assistance mentioned in the Social Security Act or other allowance of any person pensioned by the Government; or upon any bequest expressly made for the purpose of maintenance, if the debtor has no other means of subsistence and the debt itself is not due in respect of maintenance. Notwithstanding the above, subsection (3) of the same section provides that in causes for maintenance, the court may, either in the judgement or in a subsequent decree upon an application to that effect by the creditor suing for maintenance, where the creditor is the spouse or a minor or an incapacitated child, or an ascendant of the debtor, order that a specified portion of the salary, allowance or bequest as mentioned above be paid directly to the creditor. The service of such an order on the person liable to pay maintenance shall have the same effect as a garnishee order. The person so served is to pay directly to the

creditor the portion of the salary, allowance or bequest specified in the said order.

Section 382 states that salaries or wages of up to Lm 300 per month are not subject to being seized. A creditor can only attach, from an employee, any sum beyond the Lm 300. The latter is however subject to an exception in that it Section 382 does not apply to a spouse or minor seeking maintenance.

The Malta Armed Forces Act (Chapter 220 Laws of Malta) also makes provision for wage withholding. Section 149(1) of the said Act reads as follows:

Where by virtue of a judgement, decree or order which is enforceable in Malta an order has been made against any person...for the payment of any periodical or other sum specified therein for or in respect of-

(a) the maintenance of his wife, child or ascendant; or

(b) any costs incurred in any proceedings relating to any such order by or on behalf of the person in whose favour the order has been made and the defendant is an officer or man of the regular force, then...the Commander or any officer authorised by him may order such sum to be deducted from the pay of the defendant and appropriated in or towards satisfaction of the payment due under the order of the court as the Commander or officer thinks fit.

Additionally, the following Section of the same Act states that where the Commander or officer authorised by him is satisfied that an officer or man of the regular forces is neglecting, without reasonable cause, to maintain his wife or any child of his under the age of 18, then the Commander or officer so authorised may order such sum to be deducted from his pay and appropriated towards the maintenance of his wife and child as the Commander or officer deems fit.

Tax refund intercepts

Garnishment from bank accounts or other sources

This can be made through a garnishee order. Consequently, the bank or any other source where the debtor has money or funds will not yield the same money or funds to the debtor. Following this, the creditor has the possibility of filing a judicial act in court against the garnishee (the bank or other source) by which the court orders such bank or source to deposit money in court. Once the money is so deposited, the creditor needs to file another application requesting the court to be able to withdraw the money so deposited.

Deductions from social security payments

Please refer to Wage Withholding part, 2nd para.

Forced sale of property

This can happen through a judicial sale by auction of movable or immovable property belonging to the debtor.

Division of pension benefits

Please refer to Wage Withholding part, 2nd para.

Comittal to prison

It is to be stated that under the Criminal Code a person who fails to provide maintenance for the spouse or child shall be liable to a contravention. The punishment awarded in respect of a contravention is however different from that awarded to a crime. The punishments that may be awarded for a contravention are either a detention or a fine (ammenda) or a reprimand or

admonition. Additionally, Section 53 (Criminal Code) stipulates that where a person sentenced for a contravention shall within three months from the date of the expiration or remission of the punishment, commit another contravention, he may be sentenced to detention for a term not exceeding two months or to a fine (multa) or to imprisonment for a term not exceeding one month.

**Section 338 (Criminal Code) relates to contraventions affecting public order
Every person is guilty of a contravention against public order, who:-**

- (y) being a parent or a spouse, leaves his children or spouse in want, whether in consequence of his or her disorderly living or indolence;
- (z) when so order by a court or so bound by contract fails to give to his or her spouse the sum fixed by that court or laid down in the contract as maintenance for the spouse and, or, the children, within fifteen days from the day on which, according to such order or contract, such sum should be paid

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

One of the banks in Malta was contacted so as to enquire what banking costs are involved in the given situation in question 29. It transpired that the commission charged by the bank in the case of a beneficiary payment is a maximum of Lm 15. However, from this enquiry it also resulted that other banking costs may be involved in that the bank abroad (from where the maintenance payment originates) may also charge a fee, the amount of which is at the discretion of the foreign bank.

- 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?

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.

- 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.

- 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;
- b provisions for the recognition and enforcement of foreign decisions;
- c applicable law principles;
- d uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;
- e provisions specifying the assistance to be provided to an applicant from another Contracting Party;
- f provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;
- g provisions concerning co-operation in the establishment of paternity;

- h* provisions concerning co-operation in the international transfer of funds at low cost;
 - i* provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;
 - j* standard forms;
 - k* provisions aimed at securing compliance with obligations under the instrument;
 - l* provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;
 - 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* 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* 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?
- 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.

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?
- 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?
- 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.

The site of the Ministry of Social Policy gives details about support offered to families and children. Two sites are particularly relevant to this questionnaire. These can be found on the following electronic addresses:

- 1 Family services**
http://www.appogg.gov.mt/services/services_family.htm
- 2 Children and family team**
http://www.appogg.gov.mt/services/services_family.htm

These two sites have been saved in two files which are being sent to you together with the questionnaire.

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?
- 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?
- 3 What documentation do you require from a transmitting agency? Which documents are required in the original?
- 4 What are your standard procedures following receipt of documentation from a transmitting agency?
- 5 Are there any issues that have arisen concerning the categories of persons eligible to apply as "in need" and "dependent"?
- 6 Do you make use of standard forms, whether acting as a receiving or transmitting agency? (If so, could you please supply copies).
- 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)?
- 8 Legal assistance:
 - (a) Do you provide legal assistance to the claimant?
 - (b) What form does this take?
 - (c) Is it subject to any conditions or limitations?
 - (d) Are applications for spousal and child support treated differently?
- 9 What costs incurred by your authorities, when acting as the receiving agency, are charged to the requesting State (or the claimant)?
- 10 What are your requirements with regard to the translation of documents submitted by the transmitting agency?
- 11 Which languages do personnel in your authority (a) use, and (b) accept?

- 12 Does your authority accept any responsibility with regard to the transfer / receipt of maintenance payments on behalf of the creditor?
- 13 What rules / procedures apply with regard to the conversion of maintenance payments into the currency of the creditor's State?
- 14 What methods of transferring funds are least costly for the maintenance creditor?
- 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?
- 16 What powers or procedures are available to your authority to locate the whereabouts or place of work of a maintenance debtor / respondent?
- 17 What is your policy in respect of a maintenance debtor / respondent whose entire income consists of public assistance payments?
- 18 Does your authority have power to take or apply for any provisional or protective measures?
- 19 What powers or procedures are available to your authority to determine the extent of assets of a maintenance debtor / respondent?
- 20 What are the principal problems, which you experience in dealing with cases (a) as a transmitting agency, and (b) as a receiving agency?
- 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.
- 22 Are there any States with whom you experience chronic difficulties in relation to the operation of the Convention?

Section B – Questions addressed to non-Party States

- 1 Are there particular reasons why your State has not ratified the New York Convention?
- 2 Are there any modifications / improvements to the New York Convention, which would make ratification by your State a more attractive proposition?
- 3 In relation to the negotiation of any bilateral or other arrangements to which your State is, or is to become Party, which of the issues raised in Section A have been of significance? Are there other issues not raised in Section A, which have been significant?

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

Section A – Questions addressed to States Party to one or both Conventions

- 1 Does a limitation period operate in respect of an action for the enforcement of a maintenance obligation? Which law governs any such limitation period?
- 2 Does a limitation period operate in respect of the execution of a writ for the recovery of maintenance? Which law governs any such limitation period?
- 3 Do your procedures for enforcement permit the debtor to claim inability to pay?
- 4 Do your procedures allow for the possibility of modifying the content of a decision registered in application of the 1973 Convention?
- 5 Is the debtor entitled to bring modification proceedings in respect of the foreign decision? If so, on what jurisdictional basis and on what grounds?

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?
- 2 Are there any modifications / improvements to the Hague Conventions which would make ratification / accession a more attractive proposition for your State?

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

Section A – Questions addressed to States Party to one or both Conventions

- 1 Which law is applied by your courts to incidental / preliminary questions (e.g., as to the paternity of a child) arising in the course of maintenance proceedings within the scope of the Hague Conventions?
- 2 In a decision of 21 February 1997 (*Nederlandse Jurisprudentie* 1998, No 416), the Netherlands Supreme Court ruled that Article 8 of the Hague Convention of 1973, in the light of its history and that of the Convention as a whole, was not incompatible with the admission of a choice by divorced spouses of the governing law, the law chosen being that of the country of their common habitual residence for a long period and of the forum. (Dutch law, chosen by the parties, was applied rather than Iranian Law which governed the divorce.)

Is this decision consistent with the manner in which Article 8 has been interpreted by your courts? If not, do you think that an amendment of Article 8 would be desirable to allow expressly for a choice of law by the spouses?

- 3 Do your courts interpret the Hague Convention of 1973 as applying to maintenance obligations of one spouse in respect of children of the other spouse to whom she / he is in *loco parentis*?
- 4 Have any particular difficulties arisen in applying / interpreting either the 1956 or the 1973 Conventions?

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?
- 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?
- 3 Are spouses (or any other category of persons) free under your system to choose the law which will govern their maintenance obligations?

ANNEX II

***List of Non-Member States of the
Hague Conference on Private International Law
which are Parties to the New York Convention of 20 June 1956
on the Recovery of Maintenance Abroad***

States Parties

Algeria
Barbados
Burkina Faso
Cape Verde
Central African Republic
Colombia
Ecuador
Guatemala
Haïti
Niger
Pakistan
Philippines
Holy See
Tunisia

ANNEX

CHILDREN AND YOUNG PERSONS (CARE ORDERS) ACT

4. (1) If, on representations made to him in writing by the Director of the Department responsible for social welfare and after giving the parents and the guardian, if any, of the child or young person an opportunity to express their views, and after hearing any other person he may deem likely to assist him, the Minister is satisfied that that child or young person is in need of care, protection or control, it shall be the duty of the Minister by an order in writing under his hand to take such child or young person into his care.
(2) A copy of any order made by the Minister under sub-article (1) shall forthwith be sent by registered letter to the person exercising paternal authority over the child or young person, or to his guardian, if any, who shall be asked to state to the Director of the Department responsible for social welfare within twenty-one days from the date of receipt of the said letter, whether he objects to the said order.
(3) If the person to whom the registered letter is sent under sub-article (2) shall, within the time therein prescribed, signify, even verbally, his objection to the order, the Director of the Department responsible for social welfare shall, not later than seven days from the date on which he shall have become aware of the objection, refer the case to the Juvenile Court in such manner as shall be prescribed by regulations made under article 13.
(4) Where a case is referred to the Juvenile Court under subarticle (3), the said court shall, in such manner and within such time as shall be prescribed by regulations made under article 13, review the whole case and decide whether the child or young person is in need of care, protection or control and shall accordingly confirm or revoke the order made under sub-article (1).
(5) An order made under sub-article (1) shall, unless it has ceased to have effect earlier, cease to have effect on the date on which the child or young person in respect of whom the order is made attains the age of eighteen years.

CIVIL CODE

- 3. Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.
- 3B.** Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.
- 5. (1) In regard to maintenance, the spouse shall have a prior right over the parents or other ascendants.
 (2) Where both children and spouse claim maintenance, they shall be in a position of equality.
 (3) It shall not be lawful for either of the spouses to claim maintenance from the children or other descendants or from the ascendants if such maintenance can be obtained from the other
- 7. (1) Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.
 (2) In default of the parents, or where the parents do not possess sufficient means, the liability for the maintenance and education of the children devolves on the other ascendants.
- 8. The children are bound to maintain their parents or other ascendants, who are indigent.
- 15.** (1) The liability for maintenance shall extend to brothers and sisters, of the full or half-blood, only in default of other persons liable for maintenance.
 (2) In any such case the liability of brothers and sisters shall be joint and several.
 (3) The persons mentioned in article 12 shall, in all cases, have a prior claim over brothers and sisters, except in cases of great urgency, regard being had to health, age, or other circumstances.
- 19.** (1) Maintenance shall include food, clothing, health and habitation.
 (2) In regard to children and other descendants, it shall also include the expenses necessary for health and education.
- 20.** (1) Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.
 (2) In examining whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade.
 (2) In examining whether the claimant can otherwise provide

for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade.

(3) In estimating the means of the person bound to supply maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other person, and to the fruits of any movable or immovable property.

(4) A person who cannot implement his obligation to supply maintenance otherwise than by taking the claimant into his house, shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant.

(5) In estimating the means of the person claiming maintenance regard shall also be had to the value of any movable or immovable property possessed by him.

- 21.** (1) Where the person supplying maintenance becomes unable to continue to supply such maintenance, in whole or in part, he may demand that he be released from his obligation, or that the amount of maintenance be reduced, as the case may be.
 (2) The same shall apply where the indigence of the person receiving maintenance shall cease, wholly or in part.

- 23.** (1) The person bound to supply maintenance may not, without just cause, be compelled to pay a maintenance allowance if he offers to take and maintain into his own house the person entitled to maintenance.
 (2) Where maintenance is to be furnished out of the house of the person liable thereto, he may, on good cause being shown, supply such maintenance in kind instead of paying an allowance in money.

- 32.** Besides the ground referred to in article 27, parents or other ascendants may refuse maintenance to children or other descendants on any of the grounds on which an ascendant may disinherit a descendant.

- 54.** (1) The spouse against whom the separation is pronounced shall not, as a result of such separation, be relieved from the obligation of supplying maintenance to the other spouse, where, according to the provisions of Sub-title I of this Title, such maintenance is due.
 (2) The amount of such maintenance shall be determined having regard to the means of the spouse bound to supply maintenance and the needs of the other spouse, taking into account also all other circumstances of the spouses.
 (3) Notwithstanding any other provision of this Code, on separation being pronounced, the court may if it deems it appropriate in the circumstances, order the spouse liable to supply maintenance to pay to the other spouse, in lieu of the whole or part of such maintenance, a lump sum, which the court deems sufficient in order to make the spouse to whom maintenance is due financially

independent or less dependent of the other spouse, as the case may be.

(4) For the purposes of sub-article (3) of this article, the court shall, among the circumstances, consider the possibility of the person to whom maintenance is due, of receiving training or retraining in a profession, art, trade or other activity or to commence or continue an activity which generates an income, and order the lump sum for that purpose.

(5) The court may direct, according to circumstances, that the payment of a lump sum referred to in the previous sub-articles of this article, be made by equal or unequal instalments spread over a reasonable period of time.

(6) The court may also direct that in lieu of all or part of the lump sum referred to in sub-article (3) of this article, the spouse liable thereto shall assign to the other spouse property in ownership or in usufruct, use or habitation.

(7) Where there is a supervening change in the means of the spouse liable to supply maintenance or the needs of the other spouse, the court may, on the demand of either spouse, order that such maintenance be varied or stopped as the case may be. Where however, a lump sum or an assignment of property has been paid or made in total satisfaction of the obligation of a spouse to supply maintenance to the other spouse, all liability of the former to supply maintenance to the latter shall cease. Where instead, the lump sum or assignment of property has been paid or made only in partial satisfaction of the said obligation, the court shall, when ordering such lump sum payment or assignment of property, determine at the same time the portion of the maintenance satisfied thereby and any supervening change shall in that case be only in respect of the part not so satisfied and in the same proportion thereto.

57. (1) Whosoever may be the person to whom the children are entrusted, the father and mother shall maintain their right to watch over their maintenance and education, and shall still be bound to contribute thereto, according to law.

(2) It shall be in the discretion of the court, according to circumstances, to fix the time, place, and manner in which the father or mother shall have access to the children.

(3) It shall be lawful for the court entirely to forbid such access if it may be detrimental to the welfare of the children.

67. A child conceived in wedlock is held to be the child of the mother's husband.

68. A child born not before one hundred and eighty days from the celebration of the marriage, nor after three hundred days from the dissolution or annulment of the marriage, shall be deemed to have been conceived in wedlock.

70. (1) The husband can repudiate a child conceived in wedlock -

(a) if he proves that during the time from the three hundredth day to the one-hundred-and-eightieth day before the birth of the child, he was in the physical impossibility of cohabiting with his wife on account of his being away from her, or some other accident; or
 (b) if he proves that during the said time he was *de facto* or legally separated from his wife:
 Provided that he may not repudiate the child if there has been, during that time, a reunion, even if temporary between him and his wife; or
 (c) if he proves that during the said time he was afflicted by impotency, even if such impotency was only an impotency to generate; or
 (d) if he proves that during the said time the wife had committed adultery or that she had concealed the pregnancy and the birth of the child, and further produces evidence of any other fact (which may also be genetic and scientific tests and data) that tends to exclude such paternity.

(2) The declaration alone of the mother to the effect that the husband is not the father of the child shall not be sufficient to exclude the paternity of the husband.

(3) The court may in an action of disavowal invite all or any of the parties including the child whose filiation is in dispute to submit to the tests necessary to establish the genetic proof that may be relevant to the case. The court shall be entitled to draw such inferences as may be justified by the refusal to submit to such tests. Where the child whose filiation is in dispute is a minor, the court itself shall determine whether the child shall submit to the tests.

93. (1) The father is bound to maintain and educate, according to his means, the illegitimate child whom he has acknowledged, and, even afterwards, to supply maintenance to such child, in case of need, provided such child has no husband or wife or descendants in a position to supply such maintenance.

(2) The father is under a like liability in regard to the legitimate descendants of the predeceased illegitimate son or daughter, if their surviving parent or their legitimate ascendants are unable to provide for them.

94. The provisions of article 93 shall apply to a person who has not acknowledged a child but whose paternity has been declared by a judgment of the court.

CODE OF ORGANISATION AND CIVIL PROCEDURE

- 255.** The following may be enforced after the lapse of twentyfour hours from delivery:
- (a) any judgment on any collateral issue or any interlocutory decree, provided the time for enforcement is not stated in the judgment or decree itself;
 - (b) any judgment rescinding a warrant of impediment of departure of any ship, or rescinding any warrant of seizure or any garnishee order relating to ships or merchandise;
 - (c) any judgment ordering the supply of maintenance.
- 256.** (1) Any other definitive judgment which does not contain any suspensive condition, and which condemns a debtor to pay a liquidated sum, or to deliver up or surrender a specific thing, or to perform or fulfil any specific act or obligation whatsoever, may be enforced after two days from the day of its delivery.
- (2) The enforcement of any other executive title may only take place after the lapse of at least two days from the service of an intimation for payment made by means of a judicial act.
- 266.** (1) Except in the cases mentioned in article 267, a judgment which does not constitute a *res judicata* shall not be enforceable unless, on the demand of the interested party, such judgment has been declared by the court to be provisionally enforceable.
- (2) Such demand shall be made by means of an application which shall be served on the opposite party who shall be entitled to file an answer thereto within two working days.
- (3) The court of first instance shall, after summarily hearing the parties, dispose of the application as soon as may be after the filing thereof:
- Provided that -
- (a) if the application is filed before the delivery of the judgment, the court of first instance shall dispose of the application as soon as may be after such judgment is delivered; and
 - (b) if, on appeal from the judgment of the court of first instance, the lodging of the record of the proceedings before the appellate court takes place prior to the disposal of the application by the court of the first instance, such application shall be dealt with and disposed of by the appellate court, and, in any such case, if the answer to the application has not been filed prior to such lodging, it shall be filed in the appellate court.
- (4) Where the court of first instance has declared a judgment to be provisionally enforceable, the appellate court may, at any time before delivering judgment, on the application of the interested

party, confirm, vary or revoke the decision.

(5) The provisions of sub-article (2) shall apply to any application filed under the last foregoing sub-article.

(6) Where a demand for a declaration under sub-article (1) is not made to the court of first instance, such demand may be made to the appellate court at any time prior to the delivery of the judgment on appeal.

SCHEDULE A

(Articles 75, 179, 666, 967 and 1004)

TARIFFS REFERRED TO IN THE CODE OF ORGANIZATION AND CIVIL PROCEDURE

TARIFF A

Fees payable in respect of the trial of causes in the Registries of the Superior Courts of Justice and the Courts of Magistrates in Malta and Gozo excluding the Court of Voluntary Jurisdiction

1 (a) In actions for personal separation, annulment, maintenance, filiation, paternity, child abduction or custody, relating to the civil status of a person, relating to human rights or relating to general elections and in actions of spoliation or concerning personal injury, claims for the payment of wages or claims for unjust dismissal from employment, all the fees provided for in this Tariff, with the exception of the tariff stated in paragraph 3 shall be rebated by 50%;
 (b) No fees shall be due for any act filed by a curator *ex officio* acting in that capacity.

2 (1) For the filing of any petition, application, writ of summons or other act of procedure containing a claim which initiates a contentious procedure in a Court of First Instance and requiring the decision of a Judge or Magistrate as well as for any statement of defence, answer or other act of procedure in reply thereto and intended to contest, whether totally or partially, the claim made Lm 50

Provided that the above fee shall include the filing of all other acts of procedure and court services (including but not limited to filing of warrants for the examination of witnesses, the examination itself, recording fees, transcriptions and copies, the services of judicial assistants, the transmission of the records of causes, taxed bill of costs and copies of the judgement) required following the initiation of the cause through the said act up to and including final judgement but excluding any fees due for the notification of acts and fees due to referees or experts appointed by the Court or any fees which the Court may be required to pay to third parties.

(2) For the filing of any petition, application, writ of summons or other legal act initiating a contentious

procedure in a Court of Appeal and requiring the decision of a Judge as well as for any statement of defence, answer or other act of procedure in reply thereto and intended to contest, whether totally or partially, the appeal Lm 75

Provided that no fee shall be payable under this paragraph for any appeal filed in terms of any other law which already provides a fee to be paid for such an appeal:

Provided further that the above fees shall include the filing of all other acts of procedure and court services (including but not limited to the filing of warrants for the examination of witnesses, the examination itself, recording fees, transcriptions and copies, the services of judicial assistants, the transmission of the records of causes, taxed bill of costs and copies of the judgement) required following the initiation of the appeal through the said act up to and including final judgement but excluding any fees due for the notification of acts and any fees due to referees or experts appointed by the Court or any fees which the Court may be required to pay to third parties.

(3) No fee shall be levied under this paragraph for the filing of any note of admission of a claim provided that the claim is admitted in full and unconditionally before any contestation thereon.

(4) No fee shall be levied on any counter-claim contained in any act of procedure mentioned in subparagraphs (1) or (2) of this paragraph.

3 (1) In addition to the fees stated in paragraph 2, on the filing any petition, application, writ of summons or other act of procedure containing a claim which initiates a contentious procedure in a Court of First Instance and requiring the decision of a Judge or Magistrate and when the registry fee is assessable on a determinate value or on a value which may be determined according to law or from the act itself, the following fees shall also be due:

(a) up to Lm 3000, per Lm 100 or part thereof Lm 3.50

(b) in respect of any value in excess of Lm 3,000 up to Lm 5,000, per Lm 100 or part thereof Lm 2.50

(c) in respect of any value in excess of Lm 5,000 up to Lm 10,000, per Lm 100 or part thereof Lm 2.25

(d) in respect of any value in excess of Lm 10,000 up to Lm 50,000, per Lm 100 or part thereof Lm 1.50

(e) in respect of any value in excess of Lm 50,000 up to Lm 100,000, per Lm 100 or part thereof Lm 1.00

(f) in respect of any value in excess of Lm 100,000, per Lm 100 or part thereof Lm 0.75

Provided that the fees established in sub-paragraphs (a) to (f) of this paragraph shall be inclusive of any declaration, which may be necessary, and of any decree given in a cause up to final judgement.

- (2) (a) In addition to the fees stated in paragraph 1, on the filing of a statement of defence, answer or other act of procedure filed in reply to a claim and intended to contest, whether totally or partially, a claim made in a Court of First Instance, the fees stated in subparagraph (1) of this paragraph shall also be due but shall be rebated by 50%
- (b) The amount to be paid in accordance with subparagraph (a) of this paragraph is to be paid not later than the day preceding the day of the first court sitting in the case, and in the event that such payment is not effected, such act of procedure shall be deemed not to have been done.
- (c) In computing such amount, the Registrar shall, together with the notified act concerning which the act is done, inform such person of the amount to be paid and by which date.
- (d) In the case of special summary proceedings or proceedings in the Court of Magistrates or any other proceedings where the act of procedure is filed in the Court and not in the registry, the fees due shall be paid not later than the day preceding the day of the sitting following the filing of the act, and if such payment is not effected, such act of procedure shall be deemed not to have been done.
- (e) The provisions of subparagraph (c) shall not apply in the eventualities provided for in subparagraph (d).
- (3) Any counter-claim contained in any act of procedure stated in sub-paragraphs (1) or (2) of this paragraph shall be treated as if it is a new claim and the fees set out in sub-paragraphs (1) and (2) of this paragraph shall be levied on the counter claim and the reply thereto.
- (4) In actions for personal separation, annulment, maintenance, filiation, paternity, child abduction or custody, relating to the civil status of a person, relating to human rights or relating to general elections and in actions of spoliation or concerning personal injury, claims for the payment of wages or claims for unjust dismissal from employment, causes of spoliation requesting that works be carried out under the supervision of the Court, the fees stated in this paragraph shall not apply but there shall be levied a one time fee of Lm 50
- (5) The fees established in sub-paragraph (1) of this paragraph shall be raised by one-third on appeal, but no fee shall be due in terms of subparagraph (2) of this paragraph.
- (6) No fee shall be payable under this paragraph for any appeal filed in terms of any other law which already provides a fee to be paid for such an appeal.
- (7) In the case of appeals filed in terms of any other law for which no fee is established in terms of that law, the

fees established in terms of this paragraph shall not be due but there shall be levied a one time fee of Lm 50
 4 (1) When the value of a claim is uncertain or indeterminate and the fees stated in paragraph 3 cannot be applied, the value of the claim shall be assessed in accordance with the following rules:

(a) In actions brought by the Government or by any Authority or Public Corporation where the claim is for the recovery of a penalty which has both a minimum and a maximum fixed by law, the value to be assessed shall be the maximum amount of the penalty fixed by law.

(b) In actions concerning the partition of property whether *in t e r v i v o s o r c a u s a m o r t i s* and independently of whether the actual partition is requested or not, and in actions concerning succession, the claimant may, together with his claim, submit a list of the property the partition of which is being requested or which is involved in the succession together with a declaration, signed and attested to on oath by a perit in the case of immovables and by a competent valuer in the case of movables, certifying the valuation of such property, and the value shall be assessed on the total sum shown on such valuation:

Provided that in no case shall the fee taxed be less than Lm 250

(c) In actions concerning the payment of annuities, allowances and the like the fee taxed shall be Lm 250

(d) In actions relating to the ranking of creditors, bankruptcy proceedings or any other adjudication upon competing claims the claimant shall together with his claim submit a valuation by a certified accountant of the assets and liabilities being the subject of the claim and the value to be assessed shall be the higher sum between the assets and liabilities:

Provided that in no case shall the fee taxed be less than Lm 250

(e) In causes concerning the validity of a redemption or the implementation of a promise of sale or transfer, whether of movables or immovables, the value to be assessed shall be the value of the property redeemed or which was promised to be sold or transferred and for this purpose the claimant shall, together with his claim, submit the promise of sale or transfer, if existent, or, if not existent, a declaration, signed and attested to on oath by a perit in the case of immovables and by a competent valuer in the case of movables, certifying the value of such property:

Provided that in no case shall the fee taxed be less than Lm 250

(f) In causes where the claim is for the Court to declare the existence of a right of the claimant against any other person which right may reasonably be inferred to be followed by a liquidation of the amount due, even if such liquidation is not requested in the claim, the claimant shall be obliged together with his claim to submit a sworn declaration stating the

11 (1) The Registrar shall cause a taxed bill of costs to be kept in the file of each cause and shall immediately enter therein all payments made to the Registrar and all payments due to the advocates and legal procurators of the parties and the parties, their advocates and legal procurators shall have the right to a copy thereof at any time.

(2) Within one month of the delivery of the definitive judgement, the Registrar shall cause a final taxed bill of costs to be drawn up and a copy thereof shall be sent to the parties and their advocates and legal procurators.

12 With respect to causes which have been presented prior to the coming into force of this Tariff the Registrar shall, on the conclusion of that cause or on the compromise or discontinuance thereof, tax the fees due on the basis of this Tariff deducting therefrom any sums paid to date and any difference in favour of the Registrar shall be due by the party established in this Tariff:

Provided that this paragraph shall not apply to any cause -

(i) which, on the day of the coming into force of this Tariff, is put off for judgement;

(ii) which, following the coming into force of this Tariff but not later than the 30th June 2001, is unconditionally compromised or unconditionally discontinued:

Provided further that any agreement registered in the records of the cause stating that the parties have agreed to discontinue the cause and refer it to the binding decision of the Malta Arbitration Centre shall, for the purpose of this paragraph, be treated as an unconditional compromise or discontinuance.

Provided further that any person acting as mandatory of another person in a cause shall, if he renounces his mandate not later than the 31st October, 2000, be liable for fees calculated in accordance with this Tariff as in force on the 30th September, 2000.

CONDITIONS OF EMPLOYMENT AND REGULATIONS ACT

21. (1) Wages payable by an employer to an employee may not be assigned.
- (2) Wages payable by an employer to an employee may not be attached save according to the provisions of sections 381, 382 and 849 of the Code of Organization and Civil Procedure.
- (3) The provisions of subsections (1) and (2) of this section shall not apply where the assignment or attachment is intended to ensure the payment of maintenance due to the wife, or to a minor child or to an incapacitated child or to an ascendant of the employee.

CRIMINAL CODE

- 53.** Where a person sentenced for a contravention shall, within three months from the date of the expiration or remission of the punishment, commit another contravention, he may be sentenced to detention for a term not exceeding two months, or to a fine (*multa*), or to imprisonment for a term not exceeding one month.
- 338.** Every person is guilty of a contravention against public order, who –
- (a) without permission, cuts any grass in or about any fortification;
 - (b) throws any building material or rubbish in any ditch or in the vicinity of any fortification;
 - (c) not being one of the persons referred to in article 62, in case of a tumult or other calamity, or in the case of any flagrant offence or of a hue and cry, refuses, without reasonable excuse, to give help, or refuses, when so required, to give information thereof, or gives false information or particulars, to any person entrusted with a public service in the actual exercise of his duties;
 - (d) allows any insane person under his custody, whether furious or otherwise, to go about at large;
 - (e) not being one of the persons referred to in article 62, is present at any attempt against the life or property of any person and fails to give information thereof to the Executive Police;
 - (f) without permission keeps a public school;
 - (g) refuses to give, or untruthfully gives to any public officer or any other person entrusted with a public service in the actual exercise of his duties, his name, surname, address and other part thereof
 - (h) *Repealed by: X.1998.52.*
 - (i) not possessing property of any kind, and having no other means of subsistence, fails to show that he has habitually endeavoured to engage in or exercise some art, trade or other occupation;
 - (j) without being duly licensed, opens or keeps any place for public divine worship;
 - (k) refuses to receive at the established value, any money lawfully current;
 - (l) taking advantage of the credulity of others, for the purpose of gain, pretends to be a diviner, fortune-teller or an interpreter of dreams;
 - (m) at night time, disturbs the repose of the inhabitants by rowdiness or bawling, or in any other manner;
 - (n) in any public place, wears any mask, or disguises himself, except at the time and in the manner allowed

- by law;
- (o) without permission, or against the prohibition of the respective authorities, wears any civil, naval, military or air force uniform, or any ecclesiastical habits or vestments;
 - (p) leaves exposed in any street, open space, field, or other public place, any ladder, iron bar, weapon, or other

MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT

2. (1) In this Act, unless the context otherwise requires -
 "affiliation order" means an order (however described) adjudging, finding or declaring a person to be the father of a child, whether or not it also provides for the maintenance of the child;
 "certificate of arrears", in relation to a maintenance order, means a certificate certifying that the sum specified in the certificate is to the best of the information or belief of the officer giving the certificate the amount of the arrears due under the order at the date of the certificate or, as the case may be, that to the best of his information or belief there are no arrears due thereunder at that date;
 "certified copy", in relation to an order of a court, means a copy of the order certified by the registrar or other proper officer of the court to be a true copy;
 "competent Maltese court" means the Civil Court, First Hall;
 "court" includes any tribunal or person having power to make, confirm, enforce, vary or revoke a maintenance order;
 "creditor", in relation to a maintenance order, means the person entitled to the payments for which the order provides;
 "debtor", in relation to a maintenance order, means the person liable to make payments under the order;
 "maintenance order" means an order (however described) of any of the following description, that is to say -
 (a) an order (including an affiliation order or order consequent upon an affiliation order) which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain; and
 (b) an affiliation order or order consequent upon an affiliation order, being an order which provides for the payment by a person adjudged, found or declared to be a child's father of expenses incidental to the child's birth or, where the child has died, of his funeral expenses,
 and, in the case of a maintenance order which has been varied, means that order as varied;
 "Malta" has the same meaning as is assigned to it by section 124 of the Constitution of Malta;
 "Minister" means the Minister responsible for justice;
 "order" includes any decree or other decision, including an interlocutory decree;
 "Ordinance" means the Maintenance Orders (Facilities for Enforcement) Ordinance;
 "provisional order" means (according to the context) -
 (a) an order made by a court in Malta which is provisional only and has no effect unless and until confirmed, with or without alteration, by a competent court in a

reciprocating country; or

(b) an order made by a court in a reciprocating country which is provisional only and has no effect unless and until confirmed, with or without alteration, by the competent Maltese court;

"reciprocating country" has the meaning assigned to it by section 3 of this Act;

"registered order" means a maintenance order which is for the time being registered, or deemed to be registered, in the competent Maltese court under this Act;

"Registrar" means the Registrar of Courts of Malta;

"the responsible authority", in relation to a reciprocating country means any person who in that country has functions similar to those of the Minister under this Act;

(2) For the purposes of this Act an order shall be taken to be a maintenance order so far (but only so far) as it relates to periodical payment of sums of money as mentioned in paragraph (a) of the definition of "maintenance order" in subsection (1) of this section or to the person adjudged, found or declared to be a child's father of any such expenses as are mentioned in paragraph (b) of that definition.

(3) Any reference in this Act to the payment of money for the maintenance of a child shall be construed as including a reference to the payment of money for the child's education.

10. (1) Subject to the provisions of this section, the competent Maltese court -

(a) shall have the like power, on an application made by the debtor or creditor under a registered order to vary or revoke the order as if it had been made by the competent Maltese court and as if that court had had jurisdiction to make it; and

(b) shall have the power to vary or revoke a registered order by a provisional order.

(2) The competent Maltese court shall not vary a registered order otherwise than by a provisional order unless -

(a) both the debtor and the creditor under the registered order are for the time being residing in Malta; or

(b) the application is made by the creditor under the registered order; or

(c) the variation consists of a reduction in the rate of the payments under the registered order and is made solely on the ground that there has been a change in the financial circumstances of the debtor since the registered order was made or, in the case of an order registered under section 8 of this Act, since the registered order was confirmed, and the courts in the reciprocating country in which the maintenance order in question was made do not have the power, according to the law in force in that country, to confirm provisional orders varying maintenance orders.

(3) The competent Maltese court shall not revoke a registered order except by a provisional order unless both the debtor and the creditor under the registered order are for the time being residing in Malta.

(4) On an application for the revocation of a registered order the competent Maltese court shall, unless both the debtor and the creditor under the registered order are for the time being residing in Malta, apply the law applied by the reciprocating country in which the registered order was made; but where by virtue of this subsection the competent Maltese court is required to apply that law, that court may make a provisional order if it has reason to believe that the ground on which the application is made is a ground on which the order could be revoked according to the law applied by the reciprocating country, notwithstanding that it has not been established that it is such a ground.

(5) Where the competent Maltese court makes a provisional order varying or revoking a registered order the court shall send to the court in the reciprocating country which made the registered order a certified copy of the provisional order together with a document, duly authenticated, setting out or summarising the evidence given in the proceedings.

(6) Where a certified copy of a provisional order made by a court in a reciprocating country, being an order varying a registered order, together with a document, duly authenticated, setting out or summarising the evidence given in the proceedings in which the provisional order was made, is received by the competent Maltese court, that court may confirm the order either without alteration or with such alterations as it thinks reasonable or refuse to confirm the order.

(7) For the purpose of determining whether a provisional order

should be confirmed under subsection (6) of this section the court shall proceed as if an application for the variation of the registered order has been made to it, and for this purpose a copy of the order shall be served on the debtor under the order together with an intimation that unless he makes appearance at the hearing, or otherwise enters a reply at or before the hearing, the court will confirm the provisional order under this section.

(8) Where a registered order has been varied by an order (including a provisional order which has been confirmed) made by the competent Maltese court or by a competent court in a reciprocating country, the registered order shall, as from the date on which the order was made, have effect as varied by that order and, where that order was a provisional order, as if that order had been made in the form in which it was confirmed and as if it had never been a provisional order.

(9) When a registered order has been revoked by an order made by the competent Maltese court or by a competent court in a reciprocating country, including a provisional order made by the first-mentioned court which has been confirmed by a competent court in a reciprocating country, the registered order shall, as from the date on which the order was made, be deemed to have ceased to

have effect except as respects any arrears due under the registered order at that date.

(10) The Registrar shall register any order varying a registered order other than a provisional order which is not confirmed.

MALTA ARMED FORCES ACT

- 149.** (1) Where by virtue of a judgement, decree or order which is enforceable in Malta an order has been made against any person (hereinafter referred to as "the defendant") for the payment of any periodical or other sum specified therein for or in respect of—
(a) the maintenance of his wife, child or ascendant; or
(b) any costs incurred in any proceedings relating to any such order by or on behalf of the person in whose favour the order has been made,
and the defendant is an officer or man of the regular force, then (whether or not he was a member of that force when the said order was made) the Commander or any officer authorised by him may order such sum to be deducted from the pay of the defendant and appropriated in or towards satisfaction of the payment due under the order of the court as the Commander or officer thinks fit.
Cap. 12.
(2) Where to the knowledge of the court making an order in pursuance of article 381(3) of the Code of Organization and Civil Procedure, or varying or revoking any such order, the defendant is an officer or man of the regular force the court shall cause the registrar of the court to send a copy of the order to the Commander or an officer authorised by him.
(3) The Commander or an officer authorised by him may by order vary or revoke any order previously made under this article, and may treat any order made under this article as being in suspense at any time while the person against whom the order was made is absent as mentioned in article 144(1)(a).

MARRIAGE ACT

20. (1) If a marriage is declared to be void the effects of a valid marriage shall be deemed to have existed, in favour of the spouses until the judgment of nullity has become a *res judicata* when both spouses had contracted the marriage in good faith.
- (2) The effects of a valid marriage shall be deemed to have always existed with reference to the children born or conceived during a marriage declared to be void as well as with reference to children born before such marriage and acknowledged before the judgment declaring the nullity.
- (3) If only one of the spouses was in good faith such effects shall apply in his or her favour and in favour of the children.
- (4) If both spouses were in bad faith the effects of a valid marriage shall apply only in favour of the children born or conceived during the marriage declared to be void.
- (5) Notwithstanding any other provision, the spouse who was responsible for the nullity of the marriage, is bound to pay maintenance to the other spouse in good faith for a period of five years, which duty shall cease if the party in good faith marries during such period.

SOCIAL SECURITY ACT

- 30.** (1) Subject to the provisions of this Act, a person who satisfies the relevant contribution conditions and who has not yet reached pension age, shall be entitled to Unemployment Benefit in accordance with Part I of the Third Schedule to this Act for any day of unemployment, excluding Sundays, provided he is registered under Part One of the Register kept in accordance with the provisions of the Employment and Training Services Act; sohowever that where the insured person is the head of household whose total weekly means (taking account of all the members of the household) calculated in accordance with Part VI of the Second Schedule to this Act do not exceed the scale rate for that household, as determined by the relevant column of Part I of the Sixth Schedule to this Act, such insured person shall be entitled to Special Unemployment Benefit in accordance with Part I of the Third Schedule to this Act in lieu of Unemployment Benefit; and whether such head of household has been in insurable employment or not, he shall nonetheless be entitled to Social Assistance in accordance with the provisions of this article:
- Provided that where a person in respect of whom this subarticle applies becomes self-occupied under and in accordance with the provisions of any of the Manpower Incentive Schemes announced by Government, he shall nonetheless remain entitled to the assistance aforesaid during the first twelve weeks of his becoming self-occupied if -
- (a) on the day of his becoming self-occupied he is over eighteen years of age but under fifty years of age; and
 - (b) during the twelve consecutive months immediately prior to the day on which he becomes self-occupied he had been registered under Part One of the Register as aforesaid in this sub-article:
- Provided further that, where a person becomes entitled to Unemployment Benefit or Special Unemployment Benefit as aforesaid in this sub-article, if his spell of unemployment extends into a new benefit year which is related in terms of the Eleventh Schedule to this Act to two consecutive contribution years during which less than 20 contributions had been paid or credited in his respect, such person shall, nonetheless, but save as provided for in sub-article (2), remain entitled to Unemployment Benefit or Special Unemployment Benefit, as the case may be, till the last day of such spell of unemployment.
- (2) Subject to the provisions of this Act, a person in respect of whom sub-article (1) applies shall only be entitled to receive Unemployment Benefit or Special Unemployment Benefit under this article up to a maximum of 156 benefit days; sohowever that, the grand total of benefit days by way of such benefit or Sickness Benefit added together shall, in no case, exceed at any time the grand total number of reckonable contributions paid by the person concerned:
- Provided that -
- (i) where his entitlement to such benefit is

- exhausted he shall not requalify for such benefit before the lapse of an aggregate period of thirteen calendar weeks in insurable employment since the last day of his receiving such benefit; and
- (ii) when his entitlement to such benefit is not exhausted but is less than 156 days and he has not been in insurable employment thereafter for at least an aggregate period of thirteen calendar weeks, he shall only be entitled to receive the difference resulting between his original entitlement and the number of benefit days already received by way of such benefit.
- (3) For the purposes of this article a person shall not be deemed to be unemployed on any day (even though he may be, on any such day, registered under Part One of the Register kept in accordance with the provisions of the Employment and Training Services Act)-
- (a) if he is following any gainful occupation on that day or has done work for which remuneration is ordinarily payable, whether or not any remuneration has in fact been received;
 - (b) if he is on holiday;
 - (c) if, notwithstanding that his employment has come to an end or has been interrupted, he receives, in respect of that day, wages or any payment by way of compensation for the loss of the remuneration which he would have received for that day if the employment had not come to an end or been interrupted;
 - (d) if he does not ordinarily work on every day of the week (excluding Sundays and public holidays) and has, in the week in which the said day falls, been employed or self-occupied to the full extent normal in his case.
- (4) A person who is the head of household and who is - Cap. 343.
- (a) incapable of work by reason of a serious disease or bodily or mental impairment and would, but for this incapacity, have been gainfully occupied or registered as unemployed under Part One of the Register kept in accordance with the provisions of the Employment and Training Services Act; or Cap. 343.
 - (b) certified by the Corporation established by the Employment and Training Services Act, to be unemployable; or
 - (c) over pension age,
- shall also be entitled to receive Social Assistance under and in accordance with the provisions of this article notwithstanding the fact that he is not registered as an unemployed person as aforesaid in sub-article (1).
- Cap. 343.
- (5) A head of household who is registered under Part Two of

the Register kept in accordance with the provisions of the Employment and Training Services Act, and who, had he been registered under Part One of the said Register, would have been entitled, in accordance with this article, to Social Assistance, shall, nonetheless, be entitled to apply for Social Assistance and have his application referred by the Director to the Board established under article 128, and if the Board shall determine that Social Assistance is due to any person on behalf of that household as provided in article 129, then the person so designated by the Board shall become entitled to Social Assistance at such rate as the Board may, in accordance with the provisions of the said article 129 determine.

(6) Subject to the provisions of this Act, the Social Assistance to which a head of household is entitled shall be such weekly amount as will bring the total weekly means of all the members of his household, who are neither employed persons nor self-occupied persons in terms of this Act, calculated in accordance with Part VI of the Second Schedule to this Act, up to the scale rate of that household, as determined by Part I of the Sixth Schedule to this Act; sohowever that -

(a) where in the household there are members, not being the head of household and his wife, who are either employed persons or self-occupied persons in terms of this Act, such weekly amount of Social Assistance shall be reduced by the difference obtaining between the scale rate that would otherwise had been applicable to the household had such members not been employed persons or self-occupied persons as aforesaid in this sub-article and the scale rate that is in fact applicable to the household in respect of all the other members of the household; and

(b) where the head of household is entitled to Social Assistance by reason of his being registered under Part One of the Register referred to in sub-article (1), such Social Assistance shall be payable on a daily basis; and, for this purpose, such daily rate of assistance shall be arrived at by dividing the aforesaid weekly rate of such assistance by six, but no such assistance shall be payable in respect of Sundays:

Provided that -

(i) if there are special circumstances in any household the weekly amount of Social Assistance may be increased by the Director as may be appropriate to meet those circumstances; and

(ii) where in any household a member is or becomes an inmate of a state-owned hospital or a stateowned institution he shall still be deemed to form part of that household during the first six months starting from his first day of admission to such hospital or institution unless it is a stateowned institution for the care and welfare of old people as is specified by the Minister by notice

up to such sum as would have been due by such relatives or relative had the person to whom Social Assistance is paid had claimed maintenance from such relatives in accordance with the provisions of the Civil Code; sohowever that, in any case where the spouses are separated, whether *de jure* or *de facto*, the Director shall refer the case to the Director General (Social and Family Affairs) appointed by the Prime Minister for his investigations and the submission of a situation report to the Director within one month. The Director may, if he so deems fit in the circumstances of the case, request the aforesaid Director General to update any such reports at such intervals as the Director may deem fit, and the Director shall take due account of such reports in the exercise of his discretion under this sub-article.