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VERS UN NOUVEL INSTRUMENT MONDIAL SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE

Rapport établi par William Duncan
Secrétaire général adjoint

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

Report drawn up by William Duncan
Deputy Secretary General

Document préliminaire No 3 d'avril 2003
à l'intention de la Commission spéciale de mai 2003
sur le recouvrement international des aliments
envers les enfants et autres membres de la famille

Preliminary Document No 3 of April 2003
for the attention of the Special Commission of May 2003
on the International Recovery of Child Support and
Other Forms of Family Maintenance

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6 Model Form for Acknowledgement of Receipt of an Application for the Recovery Abroad of Maintenance*

*as drafted by the Special Commission on Maintenance Obligations of April 1999

CHAPTER I INTRODUCTORY MATTERS

A) The mandate for the new instrument and its background

1. Special Commissions of the Hague Conference on Private International Law were held in November 1995 and April 1999 to examine the operation of the Hague Conventions concerning maintenance obligations[1] and of the *New York Convention on the Recovery Abroad of Maintenance*.[2] The second of these Special Commissions was asked, in addition, to examine "the desirability of revising those Hague Conventions, and the inclusion in a new instrument of rules on judicial and administrative co-operation".[3]

2. The Special Commission of November 1995, with the assistance of a Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance drawn up by Michel Pelichet,[4] examined in detail a large number of practical problems concerning the operation of the four Hague Conventions and the New York Convention.[5] It was not the purpose of the Special Commission of November 1995 to consider the need or otherwise for a new instrument. The Special Commission therefore did not consider in any detail matters which might be regarded as relevant to that issue, such as the reasons why many States have not become Parties to one or more of the existing Conventions.

3. Preparations for the 1999 Special Commission included the administration of a Questionnaire[6] (hereafter referred to as the "1998 Questionnaire") to States Parties to the Hague and the New York Conventions and to non-Party States which were Members of the Hague Conference, with a view to identifying continuing problems in the operation of these Conventions and to elucidating the reasons why certain States had not ratified or acceded to them. Extracts from the responses to that Questionnaire were made available in a preliminary document,[7] and a note on the desirability of revising the Hague Conventions on maintenance obligations and including in a new instrument rules on judicial and administrative co-operation was drawn up in preparation for the 1999 Special Commission.[8]

4. On the question of reform of the system, the Special Commission of April 1999 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,*

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[1] *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children*; *Hague Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children*; *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*; *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.

[2] Of 20 June 1956.

[3] *See* Final Act of the Eighteenth Session of the Hague Conference on Private International Law, 19 October 1996, under Part B, 7.

[4] *See* "Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance", drawn up by Michel Pelichet, Preliminary Document No 1 of September 1995.

[5] *See* "General Conclusions of the Special Commission of November 1995 on the operation of the Hague Convention relating to maintenance obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance", drawn up by the Permanent Bureau, Preliminary Document No 10 of May 1996.

[6] *See* Questionnaire on Maintenance Obligations, drawn up by William Duncan, First Secretary, Preliminary Document No 1 of November 1998 for the attention of the Special Commission of April 1999.

[7] *See* "Extracts from the Responses on the Questionnaire on Maintenance Obligations", Preliminary Document No 3 of April 1999 for the attention of the Special Commission of April 1999.

[8] *See* "Note on the desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation", drawn up by William Duncan, First Secretary, Preliminary Document No 2 of January 1999 for the attention of the Special Commission of April 1999.

– *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.

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)."[9]

5. 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."[10]

6. 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".[11] These

[9] *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau in December 1999.

[10] Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference, Preliminary Document No 10 of June 2000, p. 17, para. 9 (< http://www.hcch.net/e/workprog/genaff.html >).

[11] Working Document No 4 from Commission I, distributed on 24 April 2002.

decisions were incorporated in the Final Act of the Nineteenth Session of the Hague Conference on Private International Law.[12]

B) Preparations for the negotiations

7. The Permanent Bureau began its preparations in earnest for the negotiations on the new instrument in 2001 / 2002. The process of research and consultation was commenced and a detailed Questionnaire[13] was administered (hereafter referred to as the "2002 Questionnaire") to Member States of the Hague Conference, States Parties to the New York Convention, and to relevant international governmental and non-governmental organisations. The Questionnaire was divided into four parts which concerned first, practice under existing international instruments,[14] second, practice under national systems, third, the elements to be included in the new instrument and, fourth, negotiating partners. The third part of the Questionnaire was designed to test opinion in a preliminary way on the principal elements that might be included in the new instrument. Responses to the Questionnaire have been received from 25 States and 2 international organisations.[15]

8. The Secretary General of the Hague Conference on Private International Law has convened a first Special Commission to commence negotiations on the new instrument to meet in The Hague from 5-16 May 2003. Invitations have been extended to all Member States of the Hague Conference, to the States Parties to the New York Convention who are not Member States of the Hague Conference,[16] and to a number of other States selected either on the recommendation of Member States or by reason of their interest in the subject-matter.[17] Invitations have also been extended to relevant international and non-governmental organisations.

9. It is expected that a second meeting of the Special Commission will take place in the first half of 2004, and it is hoped that a Diplomatic Session to approve a final Convention text will be held in the first half of 2005. Beyond this, it will be for the Special Commission meeting in May 2003 to decide upon working methods, including the establishment of any working or drafting groups. The Permanent Bureau hopes also that certain regional meetings may be possible between sessions of the Special Commission.

C) The purpose and scope of this Report

10. This Report is written to support the work of the forthcoming Special Commission. Its first objective is to identify and discuss some of the more important structural issues that will need to be resolved in negotiations. What are the principal elements that the new instrument should contain and how should these be approached? Given the mandate, which states that provisions relating to administrative co-operation will be an essential

[12] The Hague, 13 December 2002, Part C, paragraph 1.

[13] *See* "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, Preliminary Document No 1 of June 2002 for the attention of the Special Commission on Maintenance Obligations.

[14] This part of the Questionnaire asked respondents to update or supplement responses given to the 1998 Questionnaire.

[15] Australia, Austria, Canada, Chile, China (Hong Kong Special Administrative Region), Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Japan, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Panama, Romania, Slovakia, Switzerland, Sweden, United Kingdom, United States of America, the Instituto Interamericano del Niño, the United Nations.

[16] Algeria, Barbados, Burkina Faso, Cape Verde, Central African Republic, Colombia, Ecuador, Guatemala, Haiti, Holy See, Niger, Pakistan, the Philippines and Tunisia.

[17] Andorra, Bahamas, Belize, Bolivia, Burundi, El Salvador, Fiji, Honduras, Iceland, India, Jamaica, Malawi, Mauritius, Moldova, Mongolia, Nicaragua, Nigeria, Uzbekistan, Paraguay, St Kitts, Thailand, Trinidad and Tobago, Turkmenistan, Uganda, Viet Nam, Zambia and Zimbabwe.

element in the new instrument, the Report lists in some detail the factors which will need to be taken into account in devising efficient structures and procedures for international co-operation.

11. There are a number of specific matters not covered in this Report which will be the subject of separate studies. For example, a separate note is being prepared on the various issues surrounding the establishment of parentage in the context of international maintenance recovery. Another note will look into mechanisms for achieving the rapid and low cost transfer of maintenance payments from one country to another, and into the issues surrounding rapid communication, particularly by electronic means, of case specific information and documentation. Again, further work will be needed on the subject of service costs and provisions for legal aid and assistance. The Special Commission of May 2003 may identify other matters on which the Permanent Bureau will need to carry out further studies.

12. This Report makes many references to the responses to the Questionnaires of 1998 and 2002. A separate preliminary document will provide a collation of these responses. The Permanent Bureau would like to express its gratitude for the immense work that has gone into the preparation of the responses. In discussing the responses to questions which were designed to test opinion on the possible elements to be included in the new instrument, the Report is careful to respect the fact that these opinions have been expressed in a preliminary non-binding way. For this reason, summaries of views expressed on these matters are deliberately set out without attributions to particular States, except where this seems to be necessary.

D) Some relevant developments in national systems

13. "A quarter of a century has passed since the last two Hague Conventions on maintenance obligations were drawn up. It is worth noting certain trends in the development of domestic systems of family support which have been in evidence during the intervening years, and which may have some relevance in considering appropriate reforms at the international level. Some of the legal systems represented during the negotiations twenty-five years ago shared certain common features. Maintenance awards were for the most part determined by courts on an individualised basis, with the judge having a considerable degree of discretion in determining what constituted reasonable maintenance for a dependant having regard to the resources of the liable relative and the needs of the dependant. This system of individualised justice has come under increasing criticism in several jurisdictions on the basis that in its practical operation it tends to be very costly and ineffective. The amounts of maintenance awarded are often small, not justifying the expense of a detailed judicial inquiry, and problems of enforcement have tended to be chronic especially in the longer term. The burden on lone parents of instituting maintenance proceedings and taking measures to enforce judgements has been a heavy one, often undertaken with little prospect of obtaining an adequate or regular income in the long term. The problems of poverty surrounding single parent families has been met in part by increased public assistance. At the same time, many governments have become concerned by the consequent fiscal burden in so far as it arises from a failure by liable relatives to honour family commitments. The result has been the introduction of various reforms, some still at an experimental stage, designed on the one hand, to reduce the burden on individuals of pursuing maintenance claims and to secure a regular income for dependant family members, especially children, and on the other, to enforce more effectively and at lower cost private support obligations. ……."[18]

14. This passage taken from the 1999 Note, was followed by a description of more specific developments in national child support systems. These are recalled here with some additions and updatings.

[18] *See* Preliminary Document No 2 of January 1999, footnote 8 above, at paragraph 9.

- In some countries there has been a change in the way in which maintenance is assessed from a broad discretionary basis to one (which has a longer history in certain States) in which calculation proceeds on the basis of a more or less refined formula, designed to increase predictability and certainty (and indirectly encourage agreement) and to reduce the length and costs of hearings. The formulae differ from one country to another: they are often complex and sometimes difficult to understand. This is a matter of some relevance when considering whether it is desirable to adopt applicable law rules requiring authorities / judges in one country to apply the assessment criteria which are peculiar to another country. [19]

[19] Generally speaking, child support formulae, whether judicially or legislatively established, involve a balance between the child's needs and the liable parent's ability to pay, but precise formulae differ from country to country and between states within certain federal systems. The following are examples.

In the United Kingdom, the Child Support Act 1991 introduced a complicated formula, contained in algebraic form in the schedule to the Act, under which the liable parent could be required to pay at the rate of 50% of disposable income after tax and various allowances. Following the publication in 1999 of a White Paper entitled "A new contract for welfare: children's rights and parents' responsibilities", the UK Government announced the introduction of a new formula based on a flat percentage of the absent parent's after tax income, 15% for one child, 20% for two children and a maximum of 25% if there are 3 or more children. *See* Child Support, Pensions and Social Security Act 2000.

Under the new German law on child maintenance (*Kindesunterhaltsgesetz*), which came into force on 1 July 1998 (BGBl [*Bundesgesetzblatt* / Official Gazette] 1998 I 666), maintenance may be requested either in the form of a *fixed amount* (*Individualunterhalt*), or a *percentage of the relevant standard amount* (*Regelbetrag*). A fixed amount is usually claimed on the basis of one of the various tables established by the courts in the past (the best known being the *Düsseldorfer Tabelle*) and which continue to be used. The standard amounts are determined in a statutory instrument (*Regelbetrag-Verordnung*) which is annexed to the new law so as to enable amendment by the executive (presumably on a two-yearly basis). The statutory instrument distinguishes three different age categories of the maintenance creditor; it also establishes specific amounts applicable to the Eastern part of Germany (the former GDR). The standard amounts serve essentially as an assessment basis for the issuing of a so-called 'dynamic maintenance title' (*Unterhaltstitel in dynamisierter Form*). *Example*: Let us assume the maintenance debtor has a net income of 4500 DM and the child is 15 years old; according to the *Düsseldorfer Tabelle*, the fixed amount of maintenance would be 713 DM, which equals to 142% of the relevant standard amount determined by the statutory instrument (*i.e.* 502 DM); since this is below the limit of 150% fixed by the law, the maintenance debtor is entitled to a 'dynamic maintenance title'. The particular benefit of a dynamic maintenance title lies in the fact that the amount to be paid by the maintenance debtor is *automatically adjusted* if the standard amounts are changed or if the maintenance creditor moves into the next age category. Furthermore, a dynamic maintenance title is *immediately enforceable*. The standard amounts also serve as a decisive marker for the possibility of a simplified maintenance procedure (*See* footnote 21).

In the United States, in order to be eligible for Federal funding of child support enforcement programmes, individual states must adopt guidelines for child support. (*See* the Child Support Enforcement Program under Title IV-D of the Social Security Act.) Some states employ percentage tables based on the liable parent's net or gross income. Federal law requires state guidelines to meet the following criteria –

- take into consideration all earnings and income of the non-custodial parents;
- be based on specific descriptive and numeric criteria and result in a computation of the support obligation;
- provide for the child's health care needs, through health insurance coverage or other means.

Within these criteria state guidelines vary widely. There are three principal types –

- An income shares guideline is based on the concept that the child should receive the same proportion of parental income that he would have received if the parents lived together. Thirty-four states use an income shares guideline.
- The basic principle of the percentage of income guideline is that the non-custodial parent should pay a flat percentage of gross or net income in child support. These guidelines often include an adjustment for pre-existing support orders, and take into account the number of dependents. Seventeen states use the percentage-of-income guideline.
- The Melson guideline is a comprehensive formula with three basic principles: (1) parents should keep sufficient income for their basic needs and to encourage continued employment; (2) parents should not retain any excess income until the basic needs of the dependents are met; and (3) when income is sufficient to provide the basic needs of the parents and all dependents, the dependents are entitled to

- In some countries the function of determining the amount of maintenance to be paid, at least in the first instance, has become an administrative rather than a judicial function, not necessarily involving a hearing, with the objective again of reducing costs and improving efficiency.[20] Administrative procedures are sometimes limited to claims for maintenance at or below a subsistence level.[21]

- There has been a tendency in a number of countries for systems of child support, on the one hand, and systems for spousal support or the support of other family members, on the other, to diverge in terms of both procedure and substance. In particular, most of the newer administrative systems have been established primarily for child support purposes and, although there is sometimes provision for cases of child and spousal support to be joined, maintenance for spouses and other family members is usually left for determination judicially.[22] These divergences can make international co-operation more complicated in that interaction may be required between a diversity of administrative and judicial authorities in respect of one family's maintenance needs.

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share any additional income so that they can benefit from the non-custodial parent's higher standard of living. Three states use the Melson guideline.

In Sweden, maintenance support is based on a percentage of the annual income of the liable parent reduced by a basic allowance. The percentage rate depends on the number of children for whom the liable parent is responsible. The basic allowance, which is retained from after tax income, covers housing and other living expenses as well as support owed to dependents living with the liable parent.

In Canada, judicially established formulae (*See Paras* v. *Paras* [1971] 1 OR 130 (Ont. C.A.) and Levesque v. Levesque [1994], 4 R.F.L. (4th) 373 (Alta C.A.)) have been replaced by federal Guidelines, based on Tables which establish monthly child support payments by reference to the liable parent's income, with the percentage increased for the number of children and modified slightly by income levels. The tables differ for each Province and Territory in accordance with different tax rates. The Guidelines are in the form of regulations made pursuant to legislation amending the Federal Divorce Act 1985.

In Austria, where maintenance payments continue to be assessed by the courts, guidelines established by the courts operate based on the statistically calculated average needs for children of a certain age and a certain percentage of the net income of the maintenance debtor.

In Australia, child support is calculated on the basis of a percentage of non-exempted income, 18% for one child, 20% for two, 32% for three, 34% for four and 35% for 5 or more children.

In Norway, child support is determined as a percentage of the debtor's gross income, 11% for one child, 18% for two, 24% for three and 28% for 4 or more children. In special cases, such as low income debtors, the amount is determined on a discretionary basis. From October 2003, reforms will come into effect entailing a more complex system of assessment based on a number of specified criteria.

In countries such as France, the Czech Republic, Finland, Japan, Luxembourg, Malta, Panama, Slovakia and Switzerland, formula systems are not used to assess child support.

[20] Systems of administrative assessment of child support now operate in the United Kingdom, Australia, New Zealand, Denmark, Finland (where parents reach agreement), Norway, Sweden and Austria. The judicial process continues to operate in Canada, Chile, China (Hong Kong Special Administrative Region), the Czech Republic, Estonia, France, Germany, Japan, Luxembourg, Malta and Slovakia. In Switzerland and Panama, both systems may be used. In the United States, different states operate different systems but recent legislative changes in many individual states have emphasised the use of administrative processes.

[21] For example, under the new German law (*See* footnote 19), for maintenance claims below a certain level (150% of the standard amount), a simplified procedure applies conducted by a non-judicial officer (*Rechtspfleger*), involving in most cases no formal hearing, and the possibility of only a limited range of defences. In Australia the Child Support Agency (an administrative body) issues child support assessments which establish the amount of a debtor's liability according to a statutory formula. In the United Kingdom, a Child Support Agency is responsible for the assessment, collection and enforcement of child support. In the United States, states may use administrative procedures or other legal processes for establishing and enforcing orders more quickly than is usually possible with court proceedings.

[22] This is the case, for example, in Australia and Austria.

- There is a further complication in that it is not yet clear whether some of the newer administrative authorities will or will not play a role in respect of international cases. For example, the UK child support authorities deal only with domestic cases and international cases are dealt with by the courts. The Australian child support authority, on the other hand, handles international cases[23] and there is a special agreement between Australia and New Zealand providing for co-operation between the support agencies in international cases.[24]

- Mechanisms for locating liable relatives, determining their resources, and enforcing maintenance orders have become more sophisticated. The use, for example, of orders providing for automatic deductions from wages at source has by now become commonplace. Government controlled databases (relating for example to revenue, social welfare or public licensing) are being employed more frequently both in gathering relevant information and in assisting with enforcement.[25]

- State involvement in securing private maintenance, motivated in part by a wish to reduce costs to the State, has intensified in certain jurisdictions. There is a tendency in some States towards the integration of public and private support systems, and an acceptance that the effective enforcement of private obligations often requires the initiative of the State in bringing and enforcing claims against the recalcitrant maintenance debtors.[26] Systems of advance payment by the State of maintenance due to a maintenance creditor are sometimes used.[27]

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[23] For example, foreign child support orders which are entitled to recognition in Australia are forwarded directly to the Australian Child Support Agency for registration and enforcement. The Agency may also make assessments against debtors resident abroad.

[24] The agreement, which entered into force on 1 July 2000, was designed partly to reduce complexity and costs for parents who, before this date, had to proceed through the courts. The New Zealand and Australian authorities are now able to collect child support liabilities as assessed by the other authority.

[25] For example, under the new Canadian federal legislation (*See* footnote 19 above), certain federally controlled databanks, including that kept by Revenue Canada for income tax purposes, will be accessible to help locate defaulters. To assist with enforcement at the federal level, there is the possibility of suspension of a passport or a federally granted license, such as a fishing permit. Some provincial governments have also enacted similar legislation allowing, for example, suspension of the driver's license of a defaulting maintenance debtor. *See* also below paragraph 99.

[26] In the United Kingdom, for example, it has been suggested that child maintenance should become one element of an integrated welfare service. New computer software is being tried out making it possible to deal with child support applications, income support applications and housing benefits all in one. (*See* Government Green Paper, *Children First: A New Approach to Child Support*, 1998, Department of Social Security.)

[27] The Committee of Ministers of the Council of Europe adopted on 4 February 1982 a Recommendation on payment by the State of advances on child maintenance (No R(82)2), under which "payments of advances on child maintenance will be made under a system set up by the State where a person who is under a legal obligation to pay maintenance, which has become enforceable by compulsory process, has failed to comply with his obligations". In Austria such a system, which is not linked to the social security system, was introduced earlier by an Act of 1976. In 1996, the Austrian State paid advances amounting to 935,4 million Schillings, 44% of which was repaid by maintenance debtors (information supplied by Dr Werner Schütz, Ministry of Justice, Austria).

In Sweden, an Act relating to Advance Payments on Maintenance Allowances (1964:143) combined a system of advance payment of child maintenance with a State-guaranteed minimum allowance for children, thus linking the system for enforcing private maintenance obligations with the public system of child support. The State, under this system, was entitled to seek reimbursement of that element of the maintenance allowance with constituted an advance payment. In 1993 / 1994 the cost to the State of advance payments amounted to over SEK 4,000 million, approximately 25% of which was reimbursed to the State by liable persons. This system has been abolished by a Maintenance Support Act of 1996 (1030), under which the child's entitlement to a maintenance allowance is not made dependent upon the determination of a support liability under civil law. The Social Insurance Office, following payment of the allowance, decides on the appropriate contribution by any liable person, based on a percentage of his or her annual income, reduced by a basic allowance. (*See* Ake Saldeen, New Rules on Financial Support of Children Entitled to Maintenance, *The International Survey of Family Law* 1996, International Society of Family Law (1998 Kluwer Law International).)

CHAPTER II ADMINISTRATIVE CO-OPERATION

A) Preliminary considerations

15. The system established by the New York Convention of 1956, though still providing the only global framework for administrative co-operation in the international recovery of maintenance, suffers from major operational problems. It remains clear that a large number of States Parties do not fulfil even their most basic obligations under the Convention. Among those that do, there exist divergences in interpretation and practice under the Convention relating to a wide range of issues which are described in more detail below.[28] The system of co-operation set out in the Convention lacks specifics in areas such as documentation and translation requirements, time lines, progress reports, information exchange and paternity establishment. At the same time, other instruments, such as the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations,* suffer from the absence of an integrated system of administrative co-operation. It is obvious, both from the Conclusions and recommendations of the Special Commission of April 1999, as well more recently from the responses to the 2002 Questionnaire, that the establishment of an effective system of administrative co-operation will be an essential, and perhaps the most important, element in the new instrument on the international recovery of maintenance.

16. Our consultations suggest that, in devising a modern system of administrative co-operation, the following objectives should be kept to the fore –

- the system should be capable of processing requests swiftly, in particular making full use of the new communication technologies;
- the system should be cost effective. The costs involved should not be disproportionate, having regard to the relatively modest level of most maintenance orders. It should be seen to give good value for money when comparing administrative costs against the amounts of maintenance recovered;
- the obligations imposed on co-operating States should not be too burdensome and should take into account differing levels of development and resource capacities. On the other hand, it has to be recognised that an efficient structure must involve some outlay of resources. No purpose is served by devising a cheap but ineffective system;
- the system should be flexible enough to provide effective links between very different national systems, administrative or judicial, for the collection, assessment and enforcement of maintenance;
- the system should be efficient in the sense of avoiding unnecessary or over complex formalities and procedures;
- the system should be user-friendly – easy to understand and transparent.

17. It will be necessary also to maintain a sensible distinction between those elements of the administrative structure and process which need to be set out in the Convention itself and those which may rather be referred to within the Explanatory Report which will accompany the Convention, or which may be advanced by the development of recommendations or agreed good practices as experience of the Convention grows. In the course of this chapter an attempt is made to set out fairly exhaustively the issues that need to be confronted in devising a new and effective system. It should not be

[28] *See* below, paragraphs 24 to 27.

assumed that in all cases the solution is to be found by inserting provisions within the Convention itself.

B) The existing structures

18. The principal multilateral instrument providing for administrative co-operation between States in the international recovery of maintenance is the *United Nations Convention of 20 June 1956 on the Recovery Abroad of Maintenance* which now has 58 States Parties, 2 more than in April 1999 when its practical operation was last reviewed at The Hague. The Convention establishes a system of co-operation through "transmitting" and "receiving" agencies established in each State Party whose task it is to facilitate the recovery of maintenance by a "claimant" in one Contracting Party from a "respondent" "who is subject to the jurisdiction of another Contracting Party".[29]

19. Application is made by the claimant to the transmitting agency in his / her country. The application must be accompanied by "all relevant documents", including, where necessary, a power of attorney authorising the receiving agency to act on behalf of the claimant, a photograph of the claimant and, where available, a photograph of the respondent.[30] The transmitting agency must take all reasonable steps to ensure that the requirements (concerning, for example, the evidence necessary to prove a maintenance claim and the manner of its submission) of the State of the receiving agency are complied with.[31] Each Contracting State is obliged to inform the Secretary General of the United Nations as to those requirements.[32] Unless satisfied that the application is not made in good faith, the transmitting agency sends the documents to the receiving agency, having satisfied itself that they are regular as to form in accordance with the law of the State of the claimant.[33] Where a maintenance order (final or provisional) already exists the transmitting agency must, at the request of the claimant, transmit it together with, where necessary and possible, a record of the proceedings.[34]

20. The role of the receiving authority is to take, on behalf of the claimant, "all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance".[35] The receiving agency has an obligation to keep the transmitting agency "currently informed" and, where it is unable to act, to inform the transmitting agency of its reasons and return the documents.[36] The Convention lays down procedures for the making of "letters of request" for further evidence provided that provision is made for such letters of request under the law of both Contracting States.[37]

21. Transmitting agencies and receiving agencies must not charge any fees in respect of services rendered under the Convention.[38] Claimants may not be required, by virtue of their status as aliens or non-residents, to furnish any bond, make any payment or deposit any security for costs or otherwise.[39] They are also entitled to equal treatment and the same exemptions from costs and charges as are given residents or nationals of the State where proceedings are pending.[40]

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[29] Article 1.1.
[30] Article 3.3.
[31] Article 3.4.
[32] Article 3.2.
[33] Article 4.
[34] Article 5.
[35] Article 6.1.
[36] Article 6.2.
[37] Article 7.
[38] Article 9.3.
[39] Article 9.2.
[40] Article 9.1.

22. It should be added that remedies provided by the New York Convention were designed to be in addition to, not in substitution for, remedies available under national or international law.[41] This has meant, for example, that most States Parties to the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, which does not itself contain provisions for administrative co-operation, operate the two Conventions in a complementary way.

23. The *Inter-American Convention on Support Obligations*, concluded at Montevideo on 15 July 1989,[42] has no provisions for administrative co-operation through especially established authorities. At the European level, there does exist a *Convention between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments*, concluded at Rome on 6 November 1990, but it has not come into force. It was designed to be complementary to the *Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (as amended),[43] so that the system of co-operation is confined to securing the reciprocal recognition and enforcement of existing judgments relating to maintenance; it does not provide for co-operation in obtaining an original order. The system of co-operation, organised through Central Authorities in each State, includes the obligation to "seek out and locate the debtor and his assets",[44] to obtain relevant information from government departments or agencies in relation to the debtor,[45] to facilitate the transfer of maintenance payments to the creditor,[46] and in cases of default to use "all appropriate means of enforcement provided for in the State addressed which are applicable …".[47]

C) Problems which have been experienced by States with existing systems of co-operation

24. As a prelude to the discussion of possible provisions in the new instrument dealing with administrative co-operation, it may be helpful to list in some detail the problems associated with current systems and in particular with the New York system. The following inventory is drawn from responses to the Questionnaires of 1998 and 2002, and from the proceedings and reports of the two Special Commissions of 1995 and 1999. It is certainly not suggested that these problems are experienced in all cases. However, they appear to be sufficiently important or common to be taken into account in considering appropriate provisions in the new instrument.

a) Structural problems

(i) The operation of the New York Convention varies from State to State. There are many States Parties in which the Convention does not operate at all, or operates unilaterally (*i.e.* with respect to outgoing cases only), or operates with great difficulty. The primary cause is that, for a variety of reasons associated usually with economic difficulties, the States concerned have not established, or properly resourced, efficient administrative structures to carry out the obligations imposed by the Convention. The absence of a co-operative network supporting the operation of the Convention will have reinforced this problem.

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[41] Article 1.2.

[42] The Montevideo Convention is set out in Annex 2 of the Addendum to this Report. States Parties to the Convention are: Argentina, Belize, Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay and Uruguay.

[43] *See* below, footnote 118.

[44] Article 3.2(i).

[45] Article 3.2(ii).

[46] Article 3.2(iv).

[47] Article 3.2(v).

(ii) While most States Parties to the New York Convention are prepared to use the New York system in conjunction with other relevant instruments, such as the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, this practice is not universally accepted. United Kingdom jurisdictions, for example, continue to take the view that the two Conventions should be operated in the alternative.

(iii) There remains disagreement between States parties to the New York Convention as to whether its procedures are available only to the creditor himself or herself or may be utilised also by a public body to whom the rights of the creditor have in some way been subrogated. The importance of this issue and of achieving co-ordination on this point between the New York Convention and the Hague Convention of 1973 were highlighted in the conclusions of the Special Commission of 1999.[48]

(iv) The New York Convention is designed primarily to give assistance to a maintenance "claimant" (see Article 1.1) in prosecuting or enforcing abroad a claim for maintenance. Although Article 8 of the Convention extends its provisions to "applications for the variation of maintenance orders", the provisions are not explicitly extended to a maintenance debtor who is seeking modification of an existing maintenance decision. There remains a difference in State practice on this issue, revealed during the Special Commission of 1999.

"*During the discussion, a divergence in the interpretation of Article 8 New York Convention became apparent. A number of States interpret Article 8 as applying also to applications for modification by the debtor (Austria, Morocco, Poland, Switzerland). In contrast, other experts did not accept that view, and based their interpretation of Article 8 on the overall purpose of the New York Convention, reflected in its other provisions, in particular Article 1(1), which is to assist maintenance creditors (Ireland, Croatia, Luxembourg, Commonwealth Secretariat, International Society on Family Law).*"[49]

(v) Although it was the almost unanimous opinion of the Special Commission of 1995 that the operation of the New York Convention system does not require that there be an existing maintenance decision rendered in the State of origin, certain States (for example, France and Belgium) continued to apply this requirement. This approach stands in contrast to the overwhelming (though not unanimous) support shown by respondents to the 2002 Questionnaire for 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".[50]

(vi) The New York Convention does not include provision to monitor and review its operation, or any framework in which to encourage consistency in interpretation and implementation of its obligations. The lack of co-ordination / support in implementing the Convention has resulted in a fragmented approach which has had a negative effect on the Convention's success.

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[48] "*It was generally agreed that the role of public authorities within the international system for the recovery of maintenance was a matter of increasing importance, and that this matter would constitute an important element in any new or revised international instrument. The importance of achieving co-ordination on this issue between the New York Convention and the Hague Conventions on recognition and enforcement was also raised.*" *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", footnote 9 above, at paragraph 22.

[49] *Ibid*, paragraph 29.

[50] *See* Preliminary Document No 1 of June 2002, footnote 12 above, question 34(c).

b) Functions of co-operating organs

(i) Co-operation from the requested State in locating a debtor, which is not a specific requirement of the New York Convention, is often non-existent or insufficient.

(ii) The provision of information by authorities on the law and procedures operating in their own countries is often less than satisfactory. In particular, there is frequently a lack of clarity about the documents required to be produced to support an application in the requested State.

(iii) Authorities in many countries will not or cannot respond to "limited service requests" made prior to the submission of an application for recovery. Such requests (for example, to ascertain the whereabouts or resources of a potential respondent or for the collection of DNA samples) may be necessary in order to assess whether an application is worth submitting.

(iv) In general a number of responses to the 2002 Questionnaire suggest insufficient clarity in the reciprocal obligations of co-operating organs.

(v) Co-operation in relation to procedures for determining paternity is not an explicit requirement under the New York Convention and is often in practice unsatisfactory.

c) Problems of process

25. Problems of delay are a recurring theme in the responses to the 2002 Questionnaire. These delays relate to the processing of applications for recovery and to enforcement procedures. Their causes include –

- ?? inadequate or incorrect contact information concerning authorities;
- ?? difficulties in making contact with foreign organs;
- ?? inefficient procedures;
- ?? failure to employ rapid means of communication;
- ?? the imposition of unnecessary and time-consuming formalities / procedures / paperwork;
- ?? detailed information sent by a transmitting agency is not processed quickly enough, and becomes out of date;
- ?? excessive documentary and / or translation requirements;
- ?? inordinate time spent in attempting to obtain a voluntary payment;
- ?? the use of non-standard forms;
- ?? varying approaches to procedure;
- ?? failure to supply required documents;
- ?? failure to employ suitably skilled and knowledgeable staff able to identify problems with applications and propose efficient solutions;
- ?? inefficient methods of collecting and transmitting payments by debtor, resulting in reduced payments after bank charges / currency conversion fees have been deducted.

26. The problems of delay are exacerbated by the absence of time lines and procedures for making authorities mutually accountable for the progress of cases. It is often difficult to obtain reports on progress or reasons for delay.

27. At the same time it is important to recognise that delays are not always the result of problems within the process of administrative co-operation. They may also result, for example, from an excessive workload on courts or the ingenuity of a debtor in frustrating the system by using delaying tactics.

d) Costs

28. Practices regarding the payment of costs for administrative services vary from country to country. Despite the rule under the New York Convention that fees may not be charged by the transmitting and receiving agencies "in respect of services rendered under this Convention",[51] there is concern among some agencies in relation to the actual and potential costs which they do or may incur under the Convention, and in relation to the unequal burdens which result from divergent State practices.[52]

D) Constructing the new instrument – administrative co-operation

29. The following is in the form of a checklist and discussion of some of the elements relating to administrative co-operation which may need to be considered for inclusion in the new instrument. The checklist draws on the experience with current systems of administrative co-operation, not only in the field of maintenance recovery, but also in areas such as international child abduction and intercountry adoption, fields in which the Hague Conference has developed a particular expertise. The matters reviewed draw also from the experience gained through the development of a Guide to Good Practice under the 1980 Convention[53] and from the discussions in various Special Commissions which have reviewed the operation of the Hague Conventions of 1980 and 1993.[54]

a) Authorities charged with co-operation and their functions

(i) Central Authorities – designation

a Is a Central Authority to be designated in each Contracting State?

b Should there be standard provisions for the appointment of more than one Central Authority in multi-unit States?

c Should designation of Central Authorities together with their contact details be communicated to the Permanent Bureau and, if so, at what time?

(ii) Central Authorities – general responsibilities and non-delegable responsibilities

a Is the standard formula appropriate which requires Central Authorities to cooperate with each other and to promote co-operation amongst the competent authorities in

[51] Article 9.3.

[52] *See* Preliminary Document No 2 of January 1999, footnote 8 above, at paragraph 45(v).

[53] *See* "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part 1: Central Authority Practice", Preliminary Document No 3 of June 2002, and "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part 2: Implementing measures", Preliminary Document No 4 of July 2002, both drawn up by the Permanent Bureau, for the attention of the Special Commission of September / October 2002.

[54] *See* "Report and Conclusions of the Special Commission concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 27 September – 1 October 2002", submitted by the Permanent Bureau, Preliminary Document No 5 of March 2003 for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference.

their States to achieve the objects of the Convention, *i.e.* primarily to facilitate the international recovery of maintenance?[55]

b Should Central Authorities be given any non-delegable responsibilities, such as, for example, the provision of information concerning laws, procedures, forms and services in their respective jurisdictions relevant to the international recovery of maintenance,[56] to keep other Central Authorities informed about the operation of the Convention and, as far as possible, to eliminate obstacles to its application.[57]

(iii) Central Authorities – responsibilities that may be delegated

30. How should the functions of Central Authorities, which may be exercised directly or through other authorities or bodies, be defined? Examples, all of which are assumed to be in an international context, are as follows –

- to discover the whereabouts of the debtor;
- to seek out relevant information concerning the assets of the debtor and their location;[58]
- to encourage voluntary payment of maintenance obligations;
- to facilitate the enforcement of maintenance decisions or determinations which are entitled to recognition under the Convention;
- where there is no existing foreign order or determination, or it is not possible to recognise and enforce such order or determination, to initiate or facilitate the institution of judicial or administrative proceedings with a view to securing a maintenance decision;
- where necessary, to assist the applicant in having effective access to the relevant authorities, including where the circumstances so require, by the provision or facilitation of legal aid and advice;[59]
- to facilitate the transfer of maintenance payments to the creditor;[60]
- to ensure, where the payments due to the maintenance creditor are not made, the use of all appropriate means of enforcement provided for in the State addressed;[61]
- to provide assistance in establishing the parentage of a child, for the purpose of maintenance proceedings in any Contracting State;[62]
- to initiate or facilitate the institution of judicial or administrative proceedings to obtain any necessary "provisional or urgent measures that are territorial in nature and whose purpose is to secure the outcome of a pending or anticipated support claim".[63]

31. It will also be necessary to consider how to define the extent of such responsibilities. For example, should the responsibility be to "take all appropriate

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[55] *Cf. Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, Article 7(i).

[56] *Ibid*, Article 7(2)(*a*).

[57] *Ibid*, Article 7(2)(*b*).

[58] *Cf.* Rome Convention, Article 3.2.

[59] Questions concerning the provision of legal aid and assistance will be explored more fully in a separate document.

[60] *Cf.* Montevideo Convention, Article 20 and Rome Convention, Article 3.2(iv).

[61] *Cf.* Rome Convention, Article 3.2(v).

[62] *See* "Parentage and International Child Support Responses to the 2002 Questionnaire and an analysis of the issues", drawn up by Philippe Lortie, First Secretary, Preliminary Document No 4 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance.

[63] *Cf.* Montevideo Convention, Article 15(vi).

measures",[64] or "all appropriate steps"?[65] Should the responsibilities arise only in the context of applications for the recovery of maintenance or, on the other hand, should certain of the responsibilities arise from the making of a "limited service request" for the purpose of determining whether the application will be appropriate?

32. In considering the extent of the responsibilities to be imposed on Central and other Authorities it will be necessary to keep in mind resource (human and material) considerations. This matter is also linked to the question of whether or not services provided by Central Authorities should be free of charge.[66]

33. Consideration will also need to be given to the question of whether all or any of the services should be made available to a public body acting on behalf of, or seeking to recover monies already paid to, a maintenance creditor.

(iv) Other authorities or bodies to whom responsibilities may be delegated

34. How are the authorities, to whom Central Authority responsibilities may be delegated to be defined? These would presumably include public authorities but should the Convention go beyond this? If delegation to "other bodies" is permitted, is there a need for a system of accreditation as provided for in the 1993 Convention[67] or not?[68] If a system of accreditation is applied, what criteria should be set out in the Convention, and should there be any requirements concerning the supervision or oversight of such accredited bodies?

35. Where other authorities or bodies are given responsibilities under the Convention, it would presumably be necessary for the Permanent Bureau also to be informed of their designation, contact details and, where necessary, of the extent of their responsibilities.

b) Process

(i) A procedural framework

36. Should the Convention set out basic procedures to be followed by the authorities in the two countries concerned? The New York Convention in Articles 3 to 7 sets out such procedures. An analogy is Chapter IV of the Hague Convention of 1993 which establishes a procedural framework for intercountry adoption. The many concerns which have been expressed over the lack of clarity surrounding current procedures may suggest that some essential procedural steps at least should be clarified within the Convention. What should these be? The following headings explore some of the more detailed issues.

(ii) An application process

(i) Should the applicant always be obliged to introduce his / her application before the authorities of his / her own State? This is the model employed in the New York Convention.[69]

[64] *Cf. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Article 7(2) and Hague Convention of 1993, Article 9(1).

[65] *Cf. Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, Article 31(1).

[66] *See* below paragraphs 51 to 55.

[67] *See* Articles 9, 10 and 11.

[68] *See*, for example, the Hague Convention of 1996, Article 31.

[69] *See* the New York Convention, Article 3. *Cf.* Hague Convention of 1993, Article 14. Contrast Hague Convention of 1980 which allows applications to the Central Authority of the child's habitual residence or of any Contracting State for assistance in returning the child.

(ii) Should the Convention allow an applicant the right to introduce proceedings directly in the State addressed without the intervention of a Central Authority?[70]

(iii) Should this be a matter to be determined by each Contracting State?

(iv) What functions should the Central Authority in the applicant's country perform, in particular –

- what obligations of advice and assistance should there be in respect of the preparation of the application?[71]
- presumably there would be an obligation to transmit the application to the relevant authority in the other Contracting State, but subject to what conditions? Should the transmitting agency be under an obligation to satisfy itself first that the documents are "regular as to form, in accordance with the law of the State of the claimant"?[72] Should the transmitting agency be allowed to refuse to transmit an application where there is evidence of bad faith,[73] or where it is manifest that the application is not well founded?[74]

(v) Should the application be in the language of the State addressed, or in French or English, the languages of the Hague Conference?

(vi) Should States be able to make a reservation in the Convention about language application and documentation?

(vii) Should the Central Authority send an acknowledgement of receipt?

c) Documentation

37. The question of what documentation should accompany an application for recovery of maintenance has been a recurring source of concern, which has been again reflected in the responses to the 2002 Questionnaire. The Report and Conclusions of the 1999 Special Commission contains the following passage –

> "*14 Responses to the Questionnaire had indicated that, on the one hand, Receiving Agencies often experience difficulties in obtaining a complete dossier which is properly translated, and, on the other hand, that Transmitting Agencies often do not know precisely what is required by Receiving Agencies. The costs involved in the translation of documents had also appeared as a real source of concern. Discussion in the Special Commission concentrated on the possibilities of limiting the number of documents required in international cases, and on reducing the necessity for translations.*
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> *15 The question of limiting the number of documents required was discussed also during the Special Commission of 1995, and a consensus had been reached that photographs of the parties should not be required. However, it appeared that in some States the overall number of documents required had increased since 1995. It was pointed out that, in enforcement proceedings, national rules of procedure often unavoidably required several documents, for example, proof that the maintenance order was final or at least enforceable in the country of origin.*
>
> *16 Various suggestions were made to reduce the number of documents to those that were essential. For example, the decree of divorce in respect of a child's parents should not be required when this has been made separately*

[70] *Cf.* the position under the Hague Convention of 1980, Article 29.

[71] *See* New York Convention, Article 3.4 which requires the agency to "take all reasonable steps to ensure that the requirements of the law of the State of the receiving agency are complied with".

[72] *See* New York Convention, Article 4.2.

[73] *Ibid*, Article 4.1.

[74] *See* Hague Convention of 1980, Article 27.

from a decision on child support. One suggestion was that in child support cases no documents should be required other than the maintenance order, the birth certificate of the child and, if the parents' marriage was not dissolved, the parents' marriage certificate."

38. The approach to documentary requirements adopted by the New York Convention may be summarised as follows –

- it is the requirements of the law of the State addressed which must be satisfied;[75]
- each Contracting State must inform the Secretary General of the UN of its requirements;[76]
- subject to such requirements, certain minimum information should be included in the application, as set out in Article 4.[77]

39. It may be added that the model form for a Request for Judicial and / or Administrative Assistance for the Recovery Abroad of Maintenance, which was developed in the course of and following the 1999 Special Commission, contains a list of documentation that may accompany an application.[78] It is not suggested that all documents in this list must be supplied[79] in each case; it is more in the nature of a checklist. Nor is it suggested that the list is exhaustive.[80] Indeed, the model form for Acknowledgement of Receipt of an Application for the Recovery Abroad of Maintenance contains a standard clause enabling the requested authority to specify additional documentation that may be required.

40. With regard specifically to applications for the enforcement of an existing order, international instruments tend to be more specific as to the documents to be furnished. Examples are Article 17 of the *Hague Convention of 2 October 1973 on the Recognition*

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[75] *See* Article 3.4.

[76] *See* Article 3.2.

[77] *Article 4 - Transmission of documents*

1. The Transmitting Agency shall transmit the documents to the Receiving Agency of the State of the respondent, unless satisfied that the application is not made in good faith.

2. Before transmitting such documents, the Transmitting Agency shall satisfy itself that they are regular as to form, in accordance with the law of the State of the claimant.

3. The Transmitting Agency may express to the Receiving Agency an option as to the merits of the case and may recommend that free legal aid and exemption from costs be given to the claimant.

[78] 1 Petition / application for maintenance
2 Judicial or administrative maintenance decision
3 Certificate by Transmitting Agency that the decision is no longer subject to ordinary forms of review in the State of origin
4 Certificate that the decision is enforceable
5 Certificate of summons
6 Certificate of service of decision establishing maintenance liability
7 Acknowledgement of parentage
8 Birth certificate(s)
9 Marriage certificate
10 Power of Attorney
11 Current statement of amounts paid and amounts due
12 Family civil status certificate
13 Certificate of continuing schooling for each child for whom maintenance is payable
14 Information regarding transmission of payments collected
15 Most recent tax assessment or notice of non-liability
16 Information concerning the location of the Respondent / Debtor
17 Claimant's / Creditor's description of real / personal property belonging to the Respondent / Debtor.

[79] "In the course of discussion of the proposed model forms, the hope was expressed that the list of documents would not encourage Agencies to ask for all the documents mentioned, but only those considered relevant and necessary", *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", footnote 9 above, at paragraph 21.

[80] *See* explanation given by Mr Morgan (Australia), who chaired the Working Group established to draw up the model forms, "Report and Conclusions of the April 1999 Special Commission", footnote 9 above, at paragraph 20.

and Enforcement of Decisions Relating to Maintenance Obligations and Article 12 of the Montevideo Convention.[81]

41. The challenge which confronts the framers of the new instrument may be stated thus –

- ?? how to reduce uncertainty, costs and delays arising from documentary requirements and, in particular –
  - how to achieve clarity as to what documents are required in relation to a particular application;
  - how to reduce documentary requirements to a necessary minimum;
  - how to bring some degree of uniformity or consistency in the documentary requirements of different States.

42. A number of general questions will therefore need to be addressed as follows –

- ?? Should the Convention include a list of the minimum information / documentation required to accompany an application?
- ?? Should the principle be maintained that the required information / documentation is a matter for the State addressed?
- ?? Should any attempt be made to standardise documentation requirements?[82]
- ?? Should a general principle be adopted that limits required documents to those that are relevant and necessary?
- ?? What procedures should be followed to ensure that documentation requirements of Contracting States are made known? (Note: it appears that the current New York system, requiring notification to the Secretary General, is not working well in practice.)

d) Standard or model forms

43. Responses to question 33(j) of the 2002 Questionnaire, asking for opinions on whether standard forms should be a key element in the instrument were mixed. About

[81] *Article 17* (Hague Convention of 1973):

The party seeking recognition or applying for enforcement of a decision shall furnish –

(1) a complete and true copy of the decision;

(2) any document necessary to prove that the decision is no longer subject to the ordinary forms of review in the State of origin and, where necessary, that it is enforceable;

(3) if the decision was rendered by default, the original or a certified true copy of any document required to prove that the notice of the institution of proceedings, including notice of the substance of claim, has been properly served on the defaulting party according to the law of the State of origin;

(4) where appropriate, any document necessary to prove that he obtained legal aid or exemption from costs or expenses in the State of origin;

(5) a translation, certified as true, of the above-mentioned documents unless the authority of the State addressed dispenses with such translation.

If there is a failure to produce the documents mentioned above or if the contents of the decision do not permit the authority of the State addressed to verify whether the conditions of this Convention have been fulfilled, the authority shall allow a specified period of time for the production of the necessary documents.

No legalisation or other like formality may be required.

Article 12 (Montevideo Convention):

A request for enforcement of an order shall include the following:

a. A certified copy of the order;

b. Certified copies of the documents needed to prove compliance with Article 11.e and 11.f;

c. A certified copy of a document showing that the support order is final or is being appealed

[82] *See* also below under Model Forms.

half the respondents gave the development of standard forms a high priority. Other opinions ranged from the view that standard forms were not desirable and should not be mandatory, to the view that, while standard forms might be desirable, they should not be a primary focus and negotiations should not be delayed in an attempt to reach agreement on them.

44. Leaving aside for the moment the question of whether any agreed forms should be mandatory (*i.e.* standard forms) or simply recommended as a model (*i.e.* model forms), it is well to bear in mind the value of some degree of standardisation. The following passage appears in the Report and Conclusions of the 1999 Special Commission –

> *"The value of model forms for the transmission and receipt of applications was re-emphasised. They facilitate the presentation of information and provide the opportunity to summarise and list documents. While they cannot act as substitutes for required documents, they may reduce the need for full translations of the original documents. …"*[83]

45. In addition to this, the familiarity of standardised forms, even when translated into different languages, facilitates and speeds the handling of applications. Standard forms also highlight common or shared needs, rather than differences, between States. It seems to the Permanent Bureau that the potential benefits of standard forms in strengthening trust and co-operation, as well as in expediting applications, are such that efforts at standardisation should continue to be made. The model forms on Request for Judicial and / or Administrative Assistance for the Recovery Abroad of Maintenance and for the Acknowledgement of Receipt of an Application for the Recovery Abroad of Maintenance which emerged from the Special Commission of 1999 are included in annexes 5 and 6

e) Translation requirements

46. Concerns over translation requirements and costs have also been a recurring theme in the Special Commissions of 1995 and 1999, as well as in the responses to the 2002 Questionnaire. It has been suggested that some countries require too many documents to be translated or that they are not selective enough in specifying which parts of documents, especially judicial decisions, require to be translated. Excessive charges for translation are also alleged. Inadequate translations are a cause of delays.

47. The position under the New York Convention was summarised thus in the April 1999 note –

> *"(vi) … A strict application of the New York Convention procedures requires the transmitting agency to have translated all the relevant documents and, under Article 9, to bear the costs. This may be very expensive and is not always done. The Special Commission of 1995 recognised a need to modify the translation requirements to cover only those documents, and only those elements of any judgment concerned, which are absolutely essential. However, the Special Commission did not decide upon any specific method of achieving this result."*[84]

48. The same document summarised the position under the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations as follows –

> *"The requirement of Article 17, paragraph 5, of the 1973 Convention that the party seeking recognition or applying for enforcement of a decision should furnish a translation, certified as true, of various documents including* "a

[83] *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", footnote 9, above, at paragraph 18.

[84] *See* Preliminary Document No 2 of January 1999, footnote 8 above, at paragraph 45(vi).

complete and true copy of the decision*", has been a source of some friction. The General Conclusions suggest that some limits should be placed on the current requirements and that, with regard to the decision itself, the requirement should apply only to the essential part of a judgment,* "the operative clause and the reasoning, *i.e.* the part which solely concerns the maintenance obligation …*".*[85]

49. And the following is the summary of the somewhat inconclusive discussion on the subject during the Special Commission of 1999 –

> *"As regards the translation of required documents, an expert from Portugal mentioned a new rule of civil procedure introduced in his jurisdiction in 1997 according to which the translation of official documents should not be required except where necessary. The Chairman observed that the need to translate official documents could be reduced in two ways. One way was to limit the translation requirement to cases where the receiving authority expressly requested it; a second option was to substitute a requirement that there be a certified translation of the relevant portion of the order. The Austrian Expert admitted his scepticism as to the possibility of limiting the translation requirement to a portion of the foreign judgment. In Austria the Constitution requires the use of the official language, German, at least when the requested authority is judicial, and this constitutional principal is regarded in Austrian jurisprudence to apply to judgments in their entirety. One expert proposed reinforcing the powers of transmitting authorities. They could be charged with guaranteeing the authenticity of the original judgment, thereby obviating the need to translate the entire judgment."*[86]

f) Speed

50. The chronic problems of delay in processing applications, and some of the causes of delay, have already been described above.[87] It is clear from the 2002 Questionnaire responses, from consultations and discussion at the Special Commissions of 1995 and 1999 that a primary objective of the new instrument must be to provide a faster moving and more responsive system for the processing of applications. Many of the matters discussed in the preceding paragraphs have implications for the speed of the process. In addition, the following matters deserve consideration –

- the question arises whether there should be a general provision in the new instrument, similar to that in Article 11 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* requiring judicial and administrative authorities to act "expeditiously" in proceedings for the recovery of maintenance. It would perhaps be going too far to import the wording of Article 2 of the same Convention, which provides for the use of "the most expeditious procedures available";
- the suggestion has been made that the new instrument should contain some time lines, *i.e.* periods within which certain actions should be completed or responses given, and that there should be an obligation on the authority addressed to report periodically on progress. The New York Convention in Article 6(2) requires the receiving agency to keep the transmitting agency "currently informed", but this appears not always to be observed in practice. An example of a specific time line is to be found in Article 11 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which entitles an applicant or the Central Authority of the requesting State to request reasons for delay if a decision has not been

[85] *See* Preliminary Document No 2 of January 1999, footnote 8 above, at paragraph 15(g).

[86] *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", footnote 9 above, at paragraph 17.

[87] *See* section on "Problems of process" above at paragraphs 25 to 27.

reached within six weeks from the date of commencement of proceedings. This is not a guarantee of action, but it does enable some pressure to be placed on the Central Authority addressed when there occur unexplained delays.

?? Should the new instrument contain a provision encouraging or mandating or authorising the use of the most rapid means of international communication, in particular electronic means? The point is well made in the US response to question 32 of the 2002 Questionnaire –

"Electronic Communication of Case Information: There are serious problems with getting and updating all needed case information in a low-cost, efficient, and timely manner. Case information correspondence by surface or air mail is time-consuming, expensive, and difficult to automate. We need to consider how the new instrument can take advantage of developments in electronic communication. Perhaps the instrument could provide that most information could be transmitted electronically, and only a few key documents must be transmitted by surface or air mail.

Informal case update information, for example, should certainly be acceptable when transmitted electronically. The negotiators should also consider which of the official documentation required to process a request (completed forms, petitions, testimony, decisions, orders and other official court or administrative documents; payment records; birth and marriage certificates; photographs; etc.) might be transmitted electronically and used in official proceedings in the Requested State."[88]

?? Should there be some method of reviewing the performance of authorities, and in particular the length of time it takes for them to process applications? There will be further discussion of this subject below in Chapter VI.[89] It may be said here that one of the most effective ways of bringing poor performance to the attention of particular authorities is to have the facts, for example the average times for processing applications, presented in an objective and

comparative manner.[90] This in turn raises the question whether there should be an obligation on authorities to report and / or to provide statistics on certain aspects of their handling of cases under the new instrument.

g) Costs

51. The point has already been made that any system devised should be cost effective. There are two perspectives here. First, costs for the applicant should not be such as to inhibit use of the process. Second, the cost of services to Contracting States should not be disproportionate to their benefits in terms of achieving support for dependants and in consequence reducing burdens on taxpayers.

52. Cost factors have already been in part addressed in preceding paragraphs in the context of achieving a more efficient and less burdensome process, and in reducing procedural requirements to a necessary minimum. The particular question that arises

[88] This matter will be taken up again in a separate report.

[89] *See* in particular paragraphs 160 to 162.

[90] *See* Survey of cases dealt with under the 1980 Convention, "A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (revised version of November 2001)", drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias, Preliminary Document No 3 of March 2001 for the attention of the Special Commission of March 2001, also available on the Hague Conference website (<www.hcch.net>) at <http://www.hcch.net/e/conventions/reports28e.html>.

here is whether the services provided by authorities in carrying out their Convention obligations should be charged for or supplied free of charge.

53. The United Nations Convention in Article 9.3 provides that "transmitting and receiving agencies should not charge any fees in respect of services rendered under the Convention". Article 26 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* similarly provides that "each Central Authority should bear its own costs in applying this Convention", and it prohibits Central Authorities and other public services of Contracting States from imposing "any charges in relation to applications submitted under this Convention". However, the 1980 Convention allows a reservation in relation to costs "resulting from the participation of legal counsel or advisors or from court proceedings", and permits the authorities to recover certain categories of costs from an abducting parent or a parent who is preventing the exercise of rights of access.

54. A somewhat different approach is adopted in the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* which, in Article 38, provides –

> "*1 Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.*
>
> *2 Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.*"[91]

55. In devising an approach to the question of costs in the context of the international recovery of maintenance, the following considerations will need to be taken into account –

- applicants for maintenance generally have very limited resources and even small financial barriers may inhibit use by them of services;
- the question of costs is linked to the extent of the services which Contracting States will be required to make available;
- if public authorities are to have access to administrative services under the Convention, to assist in the recovery of maintenance on behalf of the creditor or to recoup monies already paid to the creditor, the idea that all services should be supplied cost free may meet with some resistance;
- if debtors are to have access to administrative services under the Convention to assist, for example, in obtaining a modification of an existing order, this may also have implications for the cost structure;
- the possibility of making charges against the debtor for certain services or of recovering some costs from maintenance paid (*i.e.* in cases where the maintenance exceeds subsistence level) should perhaps be borne in mind;
- finally, the issue of costs or administrative services is inextricably linked to the question of costs for legal services. In some countries, as has already been pointed out,[92] the assessment and recovery of maintenance is primarily

[91] The Hague Convention of 1993 provides in Article 32(2) that "only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid". The context, however, is rather different. The charging of actual costs to applicants for intercountry adoption is widely practised; the Convention's provisions are designed to prevent the making of improper financial gains.

[92] *See* above at paragraph 14.

an administrative process, while in other countries it is judicial. Issues of reciprocity will arise if, in a country providing an administrative system, services are provided free of charge, while in a country relying on the judicial process equivalent legal assistance is not granted.[93]

[93] The question of costs and legal aid will be taken up again in a separate report.

CHAPTER III RECOGNITION AND ENFORCEMENT OF MAINTENANCE DECISIONS

A) Preliminary considerations

56. Almost all of the States which responded to question 33 of the 2002 Questionnaire were of the view that provisions for the recognition and enforcement of foreign maintenance decisions should be a key element in the new instrument. Almost all also thought that such provisions should be a core part of the instrument, and not optional.

57. Non-recognition of an existing decision is not necessarily fatal to the international recovery of maintenance. Indeed, most respondents to the 2002 Questionnaire believe that, in cases where recognition of an existing order is not possible, the authorities of the State where the debtor resides should be under an obligation to provide assistance to the creditor in obtaining a new decision. But this fallback position is a second best for at least three reasons. The first is that it involves duplication of effort, with associated delays and additional costs. The second is that it gives rise to a situation in which two probably conflicting maintenance decisions are in existence, both of which have validity but in different countries. The third is that, if an existing order is not entitled to recognition, it may be very difficult for the creditor to collect arrears that accrued under that order. The case for an effective and widely-applicable system for the recognition and enforcement of foreign maintenance decisions is therefore compelling.

58. Consultations and responses to the 2002 Questionnaire suggest that the following are some of the general factors that should be taken into account in devising an appropriate system –

- the system adopted should be one which is capable of attracting universal support;
- the procedures for recognition and enforcement need to be simple and cost effective. Again, it has to be borne in mind that maintenance decisions generally involve relatively modest sums which do not justify the use of cumbersome and expensive procedures;
- the need for speed in a system whose purpose is to provide for the support of needy dependents is obvious;
- the risks involved in adopting a principle of automatic recognition and summary enforcement are relatively low, given that maintenance payments are mostly modest and periodic in nature. The risk that the debtor may be reduced to a below-subsistence income is low; within many national systems of enforcement devices (*e.g.* protected earnings rates) exist to prevent this. Provided that there remains a right of subsequent challenge for the debtor, irregularities or injustices should generally be remediable before any serious injustice is done. In other words, there is much to be said for a strong presumption in favour of automatic and immediate recognition and enforcement;
- for Contracting States to have full confidence in the new system, there should be some understanding or assurance that the methods of enforcement available in reciprocating States are effective and that they do not place excessive burdens on the creditor. While it is unrealistic and perhaps inappropriate to expect the new instrument to stipulate precise methods of enforcement which should be used in national systems, experience with other Hague Conventions has demonstrated that any serious failing in domestic systems of enforcement can undermine the effectiveness of an otherwise

satisfactory system of international co-operation.[94] It is also important that there be no discrimination against foreign creditors as regards access to enforcement procedures.[95]

B) Existing multilateral, regional and bilateral conventions and arrangements

a) The Hague Conventions of 1958 and 1973 on recognition and enforcement of maintenance obligations

(i) A brief description

59. The principal features of the Conventions may be summarised as follows. They provide for a system of reciprocal recognition and enforcement of decisions among Contracting States relating to maintenance obligations. The 1958 Convention was confined to obligations in respect of children, while the 1973 Convention applies to any maintenance obligation arising from a family relationship, parentage, marriage or affinity (Article 1). Neither Convention lays down uniform rules governing the exercise by an authority of jurisdiction to make a decision relating to maintenance. However, rules of indirect jurisdiction operate, in the sense of being conditions of recognition or enforcement. These conditions are:

- that the creditor or debtor had his habitual residence in the State where the decision was rendered at the time when proceedings were instituted (1958 and 1973 Conventions); or
- that both Parties were nationals of that State (1973 Convention); or
- that the defendant submitted to the jurisdiction (1958 and 1973 Conventions); or
- that the decision was given by reason of a divorce, legal separation or annulment by an authority of a State recognised as having jurisdiction in such matters (1973 Convention).

60. The principal grounds for refusal of recognition or enforcement are:

- manifest incompatibility with the public policy of the State addressed (1958 and 1973 Conventions);
- fraud in relation to procedure (1973 Convention);
- the existence of prior proceedings between the same Parties and having the same purposes in the State addressed (1973 Convention);
- incompatibility with a prior decision rendered in the State addressed (1958 and 1973 Conventions).

61. Recognition and enforcement of decisions rendered by default are subject to certain notice requirements in both Conventions.

62. A number of features of the 1973 Convention indicate the breadth of its scope. The Convention includes obligations towards public bodies claiming reimbursement of benefits given to a maintenance creditor. It applies to decisions made by judicial or administrative authorities, and to settlements made by or before such authorities.[96] It applies to

[94] *See* "Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Preliminary Report," drawn up by William Duncan, Deputy Secretary General, Preliminary Document No 4 of March 2001 for the attention of the Special Commission of March 2001 at paragraph 41.

[95] *See* below paragraph 101.

[96] *See* Article 1(2) and Chapter IV.

modification decisions or settlements, and to any part of a broader decision or settlement which concerns maintenance obligations.[97] While there is a general principle that the decision concerned must no longer be subject to ordinary forms of review in the State of origin, this does not apply to provisionally enforceable decisions or provisional measures if similar decisions could have been rendered in the State addressed.[98]

63. The State addressed is bound by the findings of fact on which the State of origin based its jurisdiction and there can be no review of the merits of the decision in the State addressed other than that provided for by the Convention.

(ii) Strengths and weaknesses

64. Responses to the 1998 Questionnaire had suggested that the regimes established by the Hague Conventions of 1958 and 1973 were working reasonably well.[99] The 1973 Convention in particular has many robust features which have stood the test of time (for example, the definition of a maintenance decision given in Article 1) and many features which were forward-looking (for example, the Convention's application to decisions rendered by administrative authorities[100], and its special provisions relating to public bodies which claim reimbursement of benefits provided for a maintenance creditor).[101] Although the number of States Parties to the 1973 Convention remains relatively small,[102] the Convention continues to attract active attention from a number of other States.[103]

65. One substantive feature of the 1973 Convention which has inhibited more widespread ratification is the principle, well known and well accepted in many European and other jurisdictions, that a maintenance decision will be entitled to recognition where it has been made by the authorities of the State where the creditor had his or her habitual residence at the time when proceedings were instituted.[104] The principle of a "creditor's jurisdiction" is, as will be seen, included in the Council of the European Community *Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*,[105] where it appears also as a direct ground of jurisdiction. In other words, it is not only a principle that defines a condition on which recognition and enforcement may be based; it also defines a ground for exercising original jurisdiction.[106] The same is true of the Montevideo Convention.[107]

66. Most of the shortcomings in the 1973 Hague Convention, which have been exposed in the Special Commissions of 1995 and 1999, are of an operational character. It is of

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[97] *See* Articles 1, 2, 3 and 21.

[98] *See* Article 4.

[99] *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999",footnote 9 above, at paragraph 23. *See* also Preliminary Document No 2 of January 1999, footnote 8 above, at paragraph 69.

[100] Article 1.

[101] Chapter IV.

[102] The 1973 Convention has been ratified by Australia, Czech Republic, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey and the United Kingdom and acceded to by Estonia, Lithuania and Poland. The relationship between the status of the 1958 and the 1973 Conventions is described in the 1999 Note at paragraph 11. The current States Parties to the 1958 Convention are Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Liechtenstein, Netherlands, Norway, Portugal, Slovakia, Spain, Suriname, Sweden, Switzerland and Turkey.

[103] *See*, for example, the recent accession by Australia on 1 February 2002. Lithuania also acceded to the Convention on 5 June 2002 with entry into force on 1 July 2003. Canada is known to be giving some consideration to ratification of the 1973 Convention.

[104] Article 7.1.

[105] Council Regulation (EC) No 44/2001 of 22 December 2000. The same principle is contained in the Lugano Convention, as well as in the original *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* of 27 September 1968. *See* footnote 118 below.

[106] *See* Article 5.2.

[107] Article 8(a) and see below Chapter IV.

some value to list these briefly here, as they each indicate matters which may need to be taken into account when devising the new instrument –[108]

- the 1973 Convention does not itself provide for a system of administrative co-operation and, in certain States, there has been a reluctance to use the New York Convention in conjunction with the 1973 Convention.[109] Among those countries that do operate the two Conventions in a complementary manner, there is doubt as to whether decisions made in favour of public authorities which are enforceable under the Hague Convention may benefit from the New York system of administrative co-operation;
- neither the 1958 nor the 1973 Convention provides for services to locate a debtor and a debtor's assets;
- the 1973 Convention has given rise to a debate on the question of the competence of authorities of the State addressed to modify a maintenance decision which is otherwise enforceable;[110]
- the absence of an applicable law provision relating to limitation periods on an action for enforcement has given rise to concerns;[111]
- the provisions concerning legal aid and assistance in recognition and enforcement proceedings have been the subject of much debate;[112]
- documentary and translation requirements (see Article 17, paragraph 5) of the 1973 Convention have been the cause of friction;[113]
- particular problems have occurred in relation to the temporal application of the Convention;[114]
- the 1973 Convention contains no specific provisions concerning maintenance decisions which are "index-linked".[115]

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[108] For a fuller explanation see Preliminary Document No 1 of September 1995 , footnote 4 above, at paragraphs 62-66; Preliminary Document No 2 of January 1999, footnote 8 above, at paragraph 15; and "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999" , footnote 9 above, at paragraphs 23-30.

[109] *See* above at paragraph 24.

[110] The conclusion on this matter reached by the Special Commission of 1999 was summarised thus by the Chairman: "The Chairman concluded by noting that, in general, States do not modify foreign maintenance decisions at the enforcement stage; that most States do not recognize the jurisdiction of the State of the debtor's residence to modify a maintenance decision; and that there is a divergence of practice under Article 8 of the New York Convention as to whether or not administrative assistance under the Convention may be afforded to applications for modification made by the debtor."

[111] *See* Preliminary Document No 10 of May 1996, footnote 5 above, at paragraphs 25-27.

[112] *See* particularly "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999, ", Part C, footnote 9 above. The matter of legal aid and advice will be taken up in a separate preliminary document.

[113] *See* the Report and Conclusions of the Special Commission on Maintenance of April 1999, footnote 9 above, at paragraphs 14-16.

[114] *See* Preliminary Document No 1 of September 1995, footnote 4 above, at paragraphs 62-66.

[115] *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", footnote 9 above, at paragraphs 25 and 26. During the discussion, it was apparent that many States have indexation systems. Generally, these entail automatic indexation, that is, the indexation is applied to maintenance amounts without the necessity for a court order. This is the case in the Netherlands, Finland, Norway, France and Sweden. In addition, Germany introduced indexation on 1 July 1998. (The German system is described in Preliminary Document No 2 at page 6, footnote 12.) In contrast, in Switzerland, only judges may apply indexation to maintenance orders. In Australia, there is a mixed system. While court maintenance orders are not index-linked unless expressed to be so, recently adopted child support legislation does provide for index linking. In general, States apply indexation to maintenance debts annually. However divergences were apparent as regards the bases for indexation. Many States rely on their consumer price index, while others have different bases for calculation of the applicable rate. In addition, the timing of indexation varies, *i.e.* the date from which the new maintenance debt applies. (*e.g.* Australia – 1 July; France – variable; Norway – 1 June; Sweden – 1 February.) In general, it appeared that few problems were encountered in the recognition and enforcement of orders entailing indexation provided that the indexation was clearly explained (Switzerland, Netherlands, Finland, Norway). An Expert from the United States stated that, while the United States did not have difficulty in principle in enforcing such orders, it was important that the authority in the requesting State calculate the new amount of the maintenance obligation. The Conclusions of the Special Commission on this point were

67. The "creditor's jurisdiction" principle has inhibited universal ratification of the 1973 Convention. In the United States, for example, principles of jurisdiction which do not require that the defendant should be subject to the personal jurisdiction of the court or authority rendering the maintenance decision have been held to be unconstitutional by the US Supreme Court. Therefore, the United States could not be a party to a Convention that included a mandatory direct rule of jurisdiction, or a mandatory rule conditioning recognition and enforcement, which is based solely on the habitual residence of the creditor.[116]

b) The Brussels and Montevideo regimes

68. The Brussels / Lugano regimes[117] and the Montevideo Convention[118] differ from the Hague Conventions in that they provide rules of direct jurisdiction. The rules provided for in the Brussels / Lugano regimes favour the maintenance creditor by giving him or her a choice of proceeding against the debtor either in the State of the debtor's domicile or habitual residence, or in the State where the creditor is himself or herself domiciled or habitually resident. The maintenance debtor, on the other hand, for example if modification of the original order is being sought, may only bring proceedings (under the principal rule in Article 2)[119] in the State of the defendant's (*i.e.* the creditor's) domicile

summarised thus by the Chairman: *"The Chairman concluded that decisions which were subject to indexation should be recognised and enforced, provided that the indexation was clear on the face of the decision. Both the rate of indexation and the date from which it applies should be made clear."*

[116] *See*, in particular, the explanation given in the essay by Robert G. Spector, "Towards an accommodation of divergent jurisdictional standards for the determination of maintenance obligations in private international law", which appears as an annex to the United States response to the 2002 Questionnaire. In that essay it is stated, "Unfortunately, the United States has recently reconsidered the issue of child-centered jurisdiction during the process of studying the interstate child support system. After a long and serious debate, the United States Commission on Interstate Child Support and the drafters of the Uniform Interstate Family Support Act determined that any attempt to base jurisdiction on the residence of the maintenance creditor or the child would be unconstitutional under the United States Supreme Court's interpretation of the Due Process Clause as applied to the exercise of jurisdiction by state courts in maintenance cases." (US Commission on Interstate Child Support, "Supporting our Children: A Blueprint for Reform" 79-85 (1992)). *See* also *Kulko* v. *Superior Court of California* 436 US 84 (1978); Gloria F. Dehart, Comity, Conventions and the Constitution: State and Federal Initiatives in International Support Enforcement, 28 *Family Law Quarterly* 89 (1994), and Marygold S. Melli, The United States and the International Enforcement of Family Support, in N. Lowe and G. Douglas, *Families Across Frontiers* (1996 Kluwer Law International), 715-731.

[117] The original *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, of 27 September 1968, as amended by 3 Accession Conventions, operates now only in the relations between Denmark and the 14 other European Union Member States. Among those 14 States 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 now operates. This is a revision of the 1968 Brussels Convention, but the basic approach to jurisdiction in respect of maintenance claims has been retained. On 16 September 1988 EU Member States and EFTA States concluded the *Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, which is a parallel Convention to the 1968 Brussels Convention but open to third States. Work on the revision of the Lugano Convention, which should bring that Convention into approximate alignment with the Council Regulation, is not yet complete. The States Parties to the Lugano Convention, along with the EU States, are Switzerland, Norway, Poland and Iceland.

[118] The Inter-American Convention on Support Obligations, adopted at Montevideo 15 July 1989 (entered into force 6 March 1996). The Convention has been ratified by Belize, Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay and Uruguay, and has been acceded to by Argentina. The Convention has been signed by Colombia, Haiti, Peru and Venezuela.

[119] References, except where otherwise indicated, are to the Articles of the Council Regulation.

or habitual residence.[120] The Montevideo Convention goes further by offering the claimant three choices of forum. These consist of the two provided for under the Brussels / Lugano Conventions, and in addition jurisdiction is given to the authorities of the State with which the "support debtor" has personal links, such as property or income.

69. These direct rules of jurisdiction also condition the circumstances in which maintenance decisions may be recognised and enforced under the two instruments, though the two instruments, as will be seen, adopt different approaches to the possibility of authorities in the State addressed reviewing the jurisdiction of the originating court or authority.[121]

70. The Brussels Regulation contains a number of provisions concerning recognition and enforcement which distinguish it from the 1973 Hague Convention.[122] The circumstances in which recognition and enforcement may be refused are different.[123] Also worth noting

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[120] A court having jurisdiction, according to its own law, to entertain proceedings concerning the status of a person (*e.g.* divorce proceedings) also has jurisdiction to deal with ancillary matters of maintenance, unless its jurisdiction is based solely on the nationality of one of the parties. *See* Brussels Regulation Article 5.2. There is a proposal to add a further ground of jurisdiction under the Brussels Regulation. Where maintenance matters are ancillary to proceedings concerning parental responsibility, the court having jurisdiction to entertain those proceedings will also have jurisdiction to deal with maintenance. *See* Article 7 in the Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility replacing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, Commission of the European Communities, Brussels 17.5.2002 COM(2002)222 Final/2.

[121] *See* in particular Brussels Regulation, Article 35.3 and the Montevideo Convention, Article 11(a).

[122] The principles underlying the approach adopted in the Council Regulation are explained as follows in the Preamble at paragraphs (16), (17) and (18):

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

The reforms embodied in the Council Regulation constitute part of the ongoing work within the European Community for the creation of a genuine judicial area based on the principle of mutual recognition of judicial decisions (Conclusions of the Tampere European Council, Point 33).

[123] Article 5 of the 1973 Hague Convention reads as follows -

Recognition or enforcement of a decision may, however, be refused –

*(1) if recognition or enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed; or*

(2) if the decision was obtained by fraud in connection with a matter of procedure; or

(3) if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted; or

(4) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

Article 34 of the Brussels Regulation reads as follows –

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

are certain features of the Brussels Regulation which are designed to ease or simplify recognition and enforcement. For example, a judgment under the Brussels Regulation is entitled to recognition "without any special procedure being required",[124] and there is a general principle that the jurisdiction of the originating court or authority may not be reviewed.[125] On the other hand, the Hague Convention contains certain provisions geared specifically towards maintenance decisions which do not have a counterpart in the Brussels Regulation. One example is Article 11 of the Hague Convention of 1973 which extends enforcement to "payments already due", *i.e.* to arrears of maintenance.[126]

71. The documentary requirements of the Brussels Regulation[127] and the Montevideo Convention[128] differ. Additionally, the Brussels Regulation like the Hague Convention of 1973 stipulates that no legalisation or other similar formality shall be required in respect of the documents to be furnished.[129]

c) US bilateral arrangements

72. The United States is not Party to the Hague or to the New York Conventions nor to any regional Convention concerning maintenance obligations. Prior to 1996, most individual states within the United States had reciprocal enforcement arrangements with some 20 countries (and, in the case of Canada, with individual provinces), but not all states had arrangements with all of these countries. Since 1996, bilateral arrangements have been negotiated at the federal level. The background to this federal involvement is explained as follows in the US response to the 2002 Questionnaire –

> "*The U.S. Congress established the national Child Support Enforcement Program in 1975 under Title IV-D of the Social Security Act (title IV-D), 42 U.S.C. §§ 651-669a. The Child Support Enforcement Program is a joint federal, state and local partnership designed to ensure that parents provide support to their children. …*
>
> *Federal law requires states, as a condition for receiving certain federal funds, to adopt a variety of specified laws or procedures to accomplish the objectives of the Child Support Enforcement Program. One of the required laws, the Uniform Interstate Family Support Act (UIFSA) of 1996, was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide for a uniform reciprocal process for the establishment and enforcement of child support obligations across state lines. …*
>
> *The nationwide adoption of UIFSA brings uniformity among states in the processing of interstate cases; it provides for the recognition and enforcement of sister state orders; it establishes rules so that there is only one outstanding*

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[124] *Ibid*, Article 33.1.

[125] *Ibid*, Article 35.3.

[126] It should be noted in this context that EU States subject to the Brussels Regulation may still avail of the 1973 Hague Convention.

[127] Article 53 of the Brussels Regulation reads as follows –

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

[128] Article 12 of the Montevideo Convention reads as follows –

A request for enforcement of an order shall include the following:

a. A certified copy of the order;

b. Certified copies of the documents needed to prove compliance with Article 11.e and 11.f [concerning notice of proceedings and the opportunity to present a defence]*;*

c. A certified copy of a document showing that the support order is final or is being appealed.

[129] Article 56.

child support order between the parties; and it establishes rules among states for establishing and modifying support orders. ….

Title IV-D and UIFSA have special provisions for international cases. In general, if a foreign country is determined under either federal or state law to be a "reciprocating" country, it is treated as if it were a state of the United States for purposes of child support enforcement, and all of the procedures and enforcement mechanisms available under title IV-D and UIFSA for interstate cases are available for cases from that foreign country."

73. The relevant 1996 federal legislation[130] authorises the Secretary of State to declare any foreign country a reciprocating country provided that country establishes procedures for the establishment and enforcement of support owed to United States residents which are substantially in conformity with the following standards –

- there must be a procedure for establishment of paternity and for the establishment and enforcement of orders of support for children and custodial parents, including procedures for collection and appropriate distribution of support payments under such orders;
- such procedures, including legal and administrative assistance, must be provided to United States residents at no cost;
- a Central Authority must be designated with responsibility for facilitating support enforcement and ensuring compliance with the mandatory requirements.

74. Reciprocal obligations are assumed by the United States, including the provision of cost free support enforcement services in the United States to persons resident abroad.

75. The existing bilateral arrangements made by the United States under these provisions take various legal forms ranging from parallel unilateral policy declarations[131] to more formal agreements (*e.g.* with the Netherlands, Australia, Portugal and Norway).[132] The model on which current agreements are based is included as the first annex to the US response to the 2002 Questionnaire. It is also annexed to this Report.

76. The most noticeable feature of the Model Agreement is that recognition and enforcement of a foreign maintenance decision is not conditioned on specific indirect rules of jurisdiction. Either State is in effect permitted to apply its own standards. In other words, a decision given in the originating State will be recognised and enforced if, on the same facts, the exercise of jurisdiction would have been possible in the requested State.[133] "Under this principle, it would not matter what jurisdictional bases the requesting State's court articulated when it rendered the judgment. The crucial question

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[130] 42 USC, paragraph 659A.

[131] With various Canadian Provinces, the Czech Republic, Ireland, Poland and the Slovak Republic. Many more arrangements are currently under negotiation.

[132] *See*, *e.g.* Agreement between the Government of the Kingdom of the Netherlands and the Government of the USA for the Enforcement of Maintenance (Support) Obligations of May 2001, reproduced in the *Netherlands International Law Review*, Vol. XLVIII, 2001 at p. 383.

[133] *See* Article 7.1 of the Model Agreement and the further explanations provided in Robert G. Spector's essay "Towards an accommodation of divergent jurisdictional standards for the determination of maintenance obligations in private international law", Annex 3 to the United States response to the 2002 Questionnaire, where it is explained at page 11, footnote 16, that this approach was originally used in the Uniform Child Custody Jurisdiction Act, paragraph 14, which provided that –

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

is whether, regardless of the reason stated by the court of the requesting State, the facts of the case would support jurisdiction under the rules of the requested State. If so, the judgment should be recognised."[134] If not, the requested State should take appropriate steps to establish a new decision.

77. It has been argued in favour of this approach that, quite apart from its flexibility which accommodates varying approaches to jurisdiction in different countries, it works well in practice and results in the recognition of most maintenance decisions. The United States has proposed in its response to the 2002 Questionnaire that this "fact-based" approach to recognition and enforcement should be embodied in the new instrument and that its adoption "would avoid a prolonged and futile effort to develop uniform jurisdictional standards".[135]

78. As there will no doubt be discussion of this proposal in the Special Commission, it may be helpful to raise here one or two practical matters which may merit consideration. Under the approach proposed by the United States matters are straightforward where the ground of jurisdiction relied on by the originating court or authority is one which is also available in the State addressed, and indeed this is probably the most common situation. On the other hand, when the originating authority has relied on jurisdictional grounds which are not available in the State addressed, practical issues of information and proof arise. The classic case would be one where the originating court or authority has relied on the residence of the creditor in circumstances where the State addressed does not make provision for a "creditor's jurisdiction", but does allow a variety of other potentially applicable bases of jurisdiction.[136] It will obviously be important for the creditor to know in advance (even before deciding whether it is better to start proceedings in her own or the debtor's country) whether the order will be recognised in the State where the debtor resides. This implies knowledge of the grounds of jurisdiction accepted in the State addressed (*i.e.* the State where the debtor is resident). So the first practical point is that, for the system to work well, Contracting States will need to provide accurate and full information concerning their own jurisdictional standards in maintenance cases. This is easier to achieve in a bilateral setting. Within a multilateral framework, it would perhaps be necessary to require Contracting States to provide, upon ratification of or accession to the new instrument, information on their jurisdictional standards to a body such as the Permanent Bureau of the Hague Conference for the information of other Contracting States. This information would have to be kept up-to-date.

79. There is also the question of how the State addressed is to verify that its jurisdictional standards would on the same facts have been met. Again, this problem will not arise in the more usual case where the ground relied on in the originating State is one which is accepted in the State addressed. Where this is not the case, a difficulty may arise because the facts which might ground jurisdiction in the State addressed will not necessarily have been in issue in the original proceedings. If, for example, an originating court has founded its jurisdiction on the creditor's residence, it will not have considered whether the facts of the case satisfy other possible bases of jurisdiction which are relevant in countries which do not accept a creditor's jurisdiction. So the practical questions which arise are as follows. Where the originating court or authority has relied on a ground of jurisdiction which is not available in the State addressed, how are the authorities of the State addressed to satisfy themselves that their own jurisdictional

[134] *See* Robert G. Spector's essay cited above in footnote 116, pp. 11-12.

[135] *See* U.S. response to question 33(b).

[136] *See* for example the bases for jurisdiction set out in the U.S. Uniform Interstate Family Support Act, below at paragraph 112.

standards would have been met? Is there a way of solving this problem without unduly attenuating or complicating procedures for recognition and enforcement?[137]

80. Some other features of the United States Model Agreement should be noted. Enforceable maintenance decisions include those decisions which arise from a determination of parentage.[138] The Model Agreement applies to arrears,[139] and to "the modification in amounts due under an existing maintenance agreement".[140] It specifies that documents transmitted under it are exempt from legalisation and that the physical presence of the child or custodial parent is not required in proceedings under the agreement.

C) Constructing the new instrument

81. In devising appropriate provisions for recognition and enforcement in the new instrument two major challenges confront the negotiators –

- how to construct bases for recognition which are both acceptable in principle and capable of universal application;
- how to shape procedures for recognition and enforcement of maintenance decisions which combine fairness with speed and efficiency.

a) Possible approaches to the bases for recognition

82. It can perhaps be assumed that there will be general agreement with the principle that a maintenance decision made by a court or an authority of the country in which the debtor had his or her residence (whether habitual or otherwise) at the time of the institution of proceedings should be entitled to be recognised and enforced abroad. The same is probably true of a decision made on the basis of submission by the respondent to the jurisdiction. These matters may therefore be set aside for the moment.

83. There will clearly be many States (for example, States Parties to the Hague Convention of 1973 and the Montevideo Convention, and States of the European Union) that will wish to continue to recognise and enforce, and have recognised and enforced, decisions given by a court or an authority in the country where the creditor has his or her residence (whether habitual or otherwise) at the relevant time. On the other hand at least one State, the United States would be unable to become a party to an instrument that required it to recognise a decision based solely on the residence of the creditors, for reasons which are made clear in the US response to the 2002 Questionnaire.[141]

84. The approach to recognition proposed by the United States (see paragraphs 76 and 77 above), which for present purposes will be called the "fact-based approach", has much to commend it. As a matter of principle (leaving aside the practical issues raised above),[142] it is hard to argue against the proposition that, at least as a minimum, a State should be prepared to recognise decisions made in the same circumstances which justify the assumption of jurisdiction by its own courts or authorities.[143] The fact-based

[137] For further discussions, *see* below paragraphs 91 to 98.

[138] Article 7.1.

[139] Article 2.2.

[140] Article 2.2.

[141] *See* part 33 b) of the response.

[142] *See* above at paragraphs 78 and 79.

[143] This same "reciprocity" principle was accepted, in the context of divorce recognition, by the English Court of Appeal in *Travers* v. *Holley* [1953] P. 246. "It would be contrary to principle and inconsistent with comity if the Courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claimed for themselves." Per Hodson LJ, at p. 257. In Germany also it is this approach which provides the basis for recognition and enforcement of judgments in cases not covered by international instruments.

approach also entails that States which themselves accept a creditor's jurisdiction would be bound to recognise foreign decisions based on that same foundation. However, the fact-based approach does not guarantee that such decisions will be recognised universally, nor does it allow for the fact that some States may be prepared to go beyond their own jurisdictional standards in recognising foreign maintenance decisions.

85. Is it possible to find a compromise between the "fact-based approach" suggested by the United States and "creditor's jurisdiction" favoured by many other States? Ideally, such a compromise should maximise the possibilities of recognition while preserving the interests of the proponents of the two approaches. One possible approach would be to include in the new instrument both the "fact-based approach" and the "creditor's jurisdiction" approach, and, as between the two, offer Contracting States two options, as follows –

- ?? to accept both the creditor's jurisdiction and the fact-based approach as alternative bases for recognition (accepting that there will often be considerable overlap between the two);
- ?? to accept the fact-based approach, but not the creditor's jurisdiction.

86. There is theoretically a third option, *i.e.* to accept, as between the two approaches, only the creditor's jurisdiction approach. This would need to be considered if serious objections are raised against the fact-based approach. However, the widespread acceptance of the fact-based approach in the context of the United States' many bilateral negotiations and arrangements suggests that it may not be necessary to consider this third option.[144]

87. If there were agreement that the two options should be available in the new instrument, an issue of reciprocity appears to arise. If one State refuses to recognise a decision based on a particular jurisdictional ground (creditor's jurisdiction), would this not create an imbalance? The problem is in fact more theoretical than real. A State which itself accepts a creditor's jurisdiction is unlikely to want to exclude it as a basis for recognition. Indeed this would be inconsistent with the reciprocity principle which underlies the fact-based approach. Any theoretical possibility of this kind could, in any event, be overcome by limiting the right to refuse recognition of decisions based solely on the creditor's residence to those States which do not themselves allow the exercise of jurisdiction on this basis. The following very rough draft gives an idea of what a provision along these lines might look like. The draft takes into account also cases where the debtor is resident in the originating jurisdiction or has submitted to that jurisdiction.

> *1 A maintenance decision made by a court / authority in one Contracting State (the State of origin) shall be recognised and enforced in all other Contracting States if –*
>
> a *the debtor was (habitually) resident in the State of origin at the time proceedings were instituted;*
>
> b *the debtor submitted to the jurisdiction;*
>
> c *the facts in the case would,* mutatis mutandis, *have supported jurisdiction under the rules of the requested State;*[145] *or*

[144] In addition to the bilateral arrangements mentioned above, the United States have been involved in bilateral negotiations with about fifteen other countries. In no case, according to the State Department, have objections been raised to the fact-based jurisdictional approach.

[145] The form of words used in the U.S. model is as follows: "the facts of the case support recognition and enforcement under the applicable laws and procedures of the State addressed."

d *the creditor was (habitually) resident in the State of origin at the time proceedings were instituted.*

2 A Contracting State whose own authorities or courts are not permitted to make a maintenance decision based solely on the residence of the creditor within the jurisdiction may make a reservation in respect of paragraph 1(d)*.*[146]

88. To summarise the advantages of an approach of this sort –

- it includes recognition of decisions based on creditor's jurisdiction for those States who favour this principle and wish to have it expressed explicitly in the new instrument, and it ensures mutual recognition and enforcement of such decisions among such States;
- it accommodates States which would find it impossible to recognise and enforce a decision based solely on the creditor's residence within the jurisdiction of the originating court or authority;
- no State is obliged to recognise or enforce a foreign decision in circumstances where *mutatis mutandis* its own authorities / courts would not be able to exercise jurisdiction;
- for those States currently Parties to the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, this approach would not (leaving aside for the moment the question of nationality jurisdiction under Article 7(2) of the 1973 Convention) result in any reduction in the range of circumstances in which recognition and enforcement of foreign decisions may at present be afforded. This assumes, of course, that those States would not wish to enter the reservation.

89. With regard to the question of nationality, what is to be done in respect of the rule of the 1973 Hague Convention (Article 7(2)) requiring recognition where the maintenance debtor and creditor were nationals of the State of origin at the time when proceedings were instituted? The rule has no counterpart in the Montevideo Convention nor in the Brussels Regulation. The tendency in recent Hague Conventions has been to reduce the role of nationality as a connecting factor. Whether or not nationality continues to offer a realistic enough test for the recognition of maintenance decisions will need to be considered. It may be added that in any event, should the fact-based approach proposed by the United States be adopted as one of the options, those States that continue to apply nationality as a basis for jurisdiction will among themselves continue to recognise and enforce each other's decisions.

90. It may also be appropriate to consider whether connections other than residence between the defendant and the originating State should be considered for inclusion among the bases for recognition and enforcement. An example is provided by the Montevideo Convention which, in Article 8(c), allows jurisdiction to the authorities of "the State to which the debtor is connected by personal links such as possessing property, receiving income or retaining financial benefits".[147] Another example is the jurisdiction

[146] It might perhaps be possible to devise a more positive formula making use of a declaration rather than a reservation procedure. For example,

A Contracting State may declare that recognition and enforcement on the basis of paragraph d *will be afforded only if there exists a personal nexus between the debtor and the State where the creditor was resident at the relevant time.*

[147] Such a basis for exercising jurisdiction would, however, be regarded as exorbitant in certain systems, including under the Brussels / Lugano regime.

which, under the Brussels Regulation, is given to a court having jurisdiction on a matter of status.[148]

b) Combining fairness with speed and efficiency

91. A number of factors will need to be taken into account in shaping procedures for recognition and enforcement which combine fairness with speed and efficiency. There are first a range of logistical matters, most of which have already been discussed in the previous chapter, which have an effect on speed and efficiency. These are –

- the reduction of documentary and translation requirements to a necessary minimum, particularly with regard to the judgment or decision itself;
- the employment of standard forms;
- the use of rapid and efficient means of communication;
- adherence to time lines;
- the abolition of the requirements for legalisation.

92. There is the question of what should be grounds for refusing recognition or enforcement. Are the matters set out in Article 5 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* satisfactory?

> "*Article 5*
>
> *Recognition or enforcement of a decision may, however, be refused –*
>
> *(1) if recognition or enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed; or*
>
> *(2) if the decision was obtained by fraud in connection with a matter of procedure; or*
>
> *(3) if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted; or*
>
> *(4) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed."*

93. There are next the procedures themselves for recognition and enforcement. A number of issues arise here relating in particular to the process of verification in the State addressed. With regard to recognition rather than enforcement, should the obligation be to recognise "by operation of law"[149] or "without any special procedure being required".[150]

94. Presumably, the authorities of the State addressed should be bound by findings of fact on which the jurisdiction of the originating court or authority was based.[151] There also should be no review of merits by the authorities of the State addressed.[152] There is the question of the extent to which the authorities of the State addressed may review the jurisdiction of the originating court or authority. Should this be limited in some way?[153]

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[148] *See* above, footnote 120.

[149] *See*, for example, the 1996 Hague Convention, Article 23(1).

[150] *See* Brussels Regulation, Article 33.1.

[151] *See* 1973 Hague Convention, Article 9.

[152] *See* 1973 Hague Convention, Article 12.

[153] *See* Brussels Regulation, Article 35.3.

How, in particular, should the matter be handled if the "fact-based approach" to recognition proposed by the United States is favoured?

95. How should the process of declaring a decision or judgment enforceable or registering the decision or judgment for the purpose of enforcement be handled? Is it enough to say that each State must apply "a simple and rapid procedure"?[154] Should the declaration of enforceability be made immediately on production of an authenticated decision or judgment, without at that stage there being any review of possible grounds for non-recognition?[155] Or should one go further and abolish *exequatur*? Take, for example, the provisions of Article 47 which appear in the current proposal for a Council of the European Community *Regulation concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility*.[156] The proposal is to require recognition and enforcement of a limited class of family law orders "without the need for a declaration of enforceability and without any possibility of opposing its recognition",[157] provided that the judgment has been certified in the originating State in accordance with a number of specified requirements.[158] No appeal lies against the issuing of the certificate.[159]

96. If an approach along these lines were favoured with regard to maintenance decisions, the question would arise of what should be the conditions of certification. In other words, what exactly should the originating authority or court attest to? Examples might be –

- ?? that the debtor has been given notice and sufficient time and opportunity to contest the decision;
- ?? that the maintenance has been calculated taking into account the needs of the creditor and the resources of the debtor;[160]
- ?? that the decision is no longer subject to ordinary forms of review in the State of origin and that it is enforceable there.[161]

97. A more difficult question is whether the originating court or authority should or could make an attestation concerning the bases for exercising jurisdiction. It would be easy enough to certify that the debtor was resident in or submitted to the jurisdiction at the relevant time or that the creditor was resident in the jurisdiction, if these were the actual bases for exercising jurisdiction. But in the case of the "fact-based" approach to recognition, how can the originating court or authority be in a position to certify that on the same facts the authority or the court addressed would have been entitled to exercise jurisdiction? The certifying court can only attest to the facts and may not, at the time of making the decision, be aware of the factors which may become relevant for the purposes of recognition in another State.

98. There are perhaps two approaches to resolving this problem. The first is to accept that, where a creditor is relying on the "fact-based" approach to obtain recognition and enforcement, there will have to be some kind of control or process of verification of jurisdiction by the court or authority in the State addressed. This process could be assisted if additional information, not so far provided by the originating court / authority, were to be furnished, on request, as part of the case co-operation called for under the Convention. The alternative is not to require the originating court or authority to make any attestation as to jurisdiction. In other words, the certified foreign decision would be

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[154] *See* 1996 Hague Convention, Article 26(2), *see* footnote 149 above.

[155] *See* Brussels Regulation, Article 41.

[156] 15366/02 JUSTCIV 194, as at 10 December 2002.

[157] Article 47.1.

[158] Set out in Article 47.2.

[159] Article 48.

[160] *Cf. Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, Article 11, paragraph 2.

[161] *Ibid*, Article 4.

entitled to automatic recognition and enforcement. The debtor could then be given the opportunity to raise objections to recognition and enforcement in subsequent separate proceedings. Thus, there would be a strong presumption in favour of recognition and enforcement and the onus of raising objections would fall on the debtor.

c) Enforcement under national law

99. A wide range of enforcement methods and procedures operates at national level, as is shown in the responses to questions 27 and 28 of 2002 Questionnaire. With regard to methods of enforcement, wage withholding, garnishment from bank accounts and other sources, deductions from social security payments, forced sale of property and committal to prison as a last resort are now fairly wide spread. Other mechanisms which are less common include tax refund intercepts, division of pension benefits, credit bureau reporting, denial, suspension or revocation of various licenses (for example, driving licenses), attachment of lottery earnings, and passport denial. National procedures concerning enforcement also differ in the degree to which the burden of pursuing enforcement is taken from the shoulders of the creditor and assumed by the authorities.

100. It is usual for an international instrument dealing with recognition and enforcement of foreign decisions to provide that the procedures for enforcement should be governed by the law of the State addressed.[162] Nevertheless, as has already been noted,[163] difficulties, or markedly different levels of performance, in relation to enforcement at national level can sometimes undermine otherwise satisfactory international co-operation, as well as the sense of fairness necessary to underpin mutual confidence. If any form of bilateralisation is eventually built into the structure of the new instrument,[164] there is little doubt that the adequacy, effectiveness or equivalence of another country's enforcement methods and procedures will be a matter that will be taken into account when decisions are being made about whether or not to enter into binding treaty relationships.

101. Is it possible to build into the new Convention provisions which guarantee at least some level of mutuality with regard to enforcement? It would probably not be feasible to impose an obligation to adopt specific procedures or measures of enforcement. There might, however, be room for a principle of non-discrimination guaranteeing that those seeking to enforce foreign maintenance decisions are entitled to the full range of enforcement measures and procedures available in purely domestic proceedings. This is a principle which is not universally applied at present. For example, in England and Wales the full range of enforcement methods available to domestic creditors through the Child Support Agency, including, for example, loss of a driving license, is not available to foreign creditors proceeding through the courts.

102. In order to promote mutual confidence, the new instrument might contain provisions requiring transparency in relation to enforcement methods and procedures. This implies that a State should, when ratifying or acceding to the instrument, supply details of the enforcement methods and procedures which are available, and should also perhaps supply information to other States on a regular basis as to the operation of its enforcement procedures with respect to foreign applicants. Information might also be supplied concerning limitations on enforcement under national law, including any provisions which limit the amount that a debtor may be ordered to pay by reason of inability to pay or because of a "protected earnings" system, *i.e.* one under which the earnings of the debtor are not allowed to fall below a certain fixed level. The availability of information of this kind would be important in order that the creditor may avoid the frustration and costs of commencing enforcement proceedings which have no prospects of success.

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[162] *See*, for example, the 1993 Hague Convention, Article 13.

[163] *See* paragraph 58 above.

[164] *See* below paragraphs 164 to 168.

CHAPTER IV JURISDICTION TO MAKE AND MODIFY MAINTENANCE DECISIONS

A) General considerations

103. Question 33(d) of the 2002 Questionnaire asked respondents to give their views on whether the new instrument should contain uniform direct rules of jurisdiction applying to the determination and modification of maintenance decisions. There was a division of opinion. Several respondents were of the view that such uniform rules should be a core element of the new instrument. Some respondents were opposed. A middle ground was occupied by those respondents who, while recognising the potential value of uniform rules, felt that this was not a priority and / or that it was unrealistic to expect that agreement could be reached at the multilateral level on such a difficult issue.

104. As has been suggested in the previous chapter, there is probably a broad consensus on the exercise of original jurisdiction by the courts / authorities of the country where the defendant had his / her (habitual) residence at the time of the institution of proceedings. There would probably also be agreement that original jurisdiction may be based on submission by the defendant to the jurisdiction or on agreement between the parties concerning the exercise of jurisdiction. On the other hand, as we have seen, the idea that the creditor should, as an alternative, have access to the courts / authorities of the country where he / she resides or is domiciled is not universally accepted. The argument for this option, which is favoured in two regional instruments, is based on a wish to protect the (usually) weaker party (*i.e.* the creditor) by offering him / her a convenient forum in which to bring his / her claim, *i.e.* on home ground. However, a "creditor's jurisdiction", as we have seen, raises for the United States Constitutional "due process" concerns *vis à vis* the debtor. This view is based on a concern that the process should be neutral, rather than favouring one party. It is not a view that is opposed to the interests of the creditor; it is rather one that insists that, in fairness to the debtor, creditor's residence or domicile should be supplemented by some evidence of a personal nexus between the debtor and the creditor's home State. In fact, it is probable that the two systems (*i.e.* jurisdiction based on creditor's residence / domicile alone and jurisdiction requiring some personal nexus between the forum and the debtor) do not diverge in their practical outcomes nearly as much as the doctrinal division might suggest. It seems likely that in the great majority of cases in which creditors institute proceedings in the State in which they have their habitual residence, the link between the debtor and that State is sufficient to satisfy systems which require such a nexus.[165] Nor is it obvious that any of the major practical problems currently experienced by States in the international recovery of maintenance derive from the absence of uniform rules for exercising original jurisdiction. It should also be noted that the "Commonwealth" provisional orders scheme, and the "application system", which are mentioned below,[166] proceed on the basis that the courts / authorities where the creditor is resident do not have jurisdiction to make a final enforceable order.

105. The more serious problems are in fact much more associated with absence of agreement in respect of jurisdiction to modify existing maintenance decisions. With regard to this difficult problem of modification jurisdiction, there is again lack of uniformity, but deriving from different causes and having different and more serious consequences. One of the deepest divisions is between, on the one hand, those States (such as the United States

[165] *See* David Cavers, International Enforcement of Family Support, 81 *Columbia Law Review* 994 (1981), and Marygold S. Melli, The United States and the International Enforcement of Family Support, in N. Lowe and G. Douglas, *Families Across Frontiers* (1996 Kluwer Law International), pp. 715-731. *See* also the bases for jurisdiction permitted under the U.S. Uniform Interstate Family Support Act, below at paragraph 112.

[166] *See* below paragraphs 115 to 118.

of America) which favour a general principle of continuity, with a strong preference for retaining jurisdiction to modify a maintenance decision in the originating court / authority and, on the other hand, those States which favour the view that jurisdiction to modify should shift relatively quickly, following changes in the residence of one of the parties, to a new forum. There are two recurring cases –

- Case A: A maintenance decision is made in State A at a time when all parties are resident / domiciled there. The debtor subsequently changes his residence to State B and, on the basis of changed circumstances, seeks a modification downward of his maintenance payments.
- Case B: A maintenance decision is made in State B at a time when all parties are resident / domicile there. The creditor moves to State A and seeks a modification upwards.

106. If, in Case A, State A is one which adheres to the continuity principle and claims continuing jurisdiction to modify its own decisions, while State B is prepared to modify on the basis that jurisdiction has shifted, the result is two competing decisions, the original decision which remains valid in State A and the modified decision which is valid in State B. In Case B, on the other hand, neither State may be prepared to amend the original order.

107. The creation of uniform rules governing modification jurisdiction might seem to offer the solution. However, judging by the responses to the 2002 Questionnaire, it will be very difficult to reach agreement on what those rules should be. It is difficult to establish a comprehensive uniform approach to modification jurisdiction without also agreeing on an approach to original jurisdiction and, as we have seen, there are serious doctrinal divisions in respect of both matters. There is also a risk that the imposition of uniformity which is not based on consensus will result in marginalizing certain States and prejudicing the prospects of universal ratification of the new instrument. A judgment may have to be made as to whether the price of striving for uniformity in relation to direct rules of jurisdiction is worth paying, or whether, on the other hand, there may be other ways of approaching the real practical problems that arise in this area, *i.e.* the problems of conflicting decisions arising principally from the exercise of modification jurisdiction.

B) Existing approaches to jurisdiction

a) The Brussels regime

108. Uniform direct rules of jurisdiction to make or modify maintenance decisions do not at present exist on a global level. They do exist at the regional level. It has already been explained that the rules contained in the current Brussels Regulation favour the maintenance creditor by giving him / her the choice of proceeding against the debtor either in the State of the debtor's domicile,[167] or in the State where the creditor is himself or herself domiciled or habitually resident.[168] Also, if the matter is ancillary to proceedings (such as divorce) concerning the status of the person, the court which, according to its own law, has jurisdiction to entertain those proceedings has jurisdiction to deal with maintenance unless that jurisdiction is based solely on the nationality of one of the parties.[169] Where modification of an existing order is sought, the creditor maintains the same advantages. The debtor, on the other hand, may only bring modification proceedings

[167] Article 2.1. *See* paragraph 68 above.

[168] Article 5.2.

[169] Article 5.2. *See* footnote 120 above for proposals to extend jurisdiction to a court having jurisdiction to deal with matters of parental responsibility.

(under the principal rule of jurisdiction)[170] in the State of the defendant's (*i.e.* the creditor's) domicile.

109. It should be added that these rules as a whole apply only if the defendant is domiciled in a Member State of the European Union.[171] If the defendant (*i.e.* the debtor for the purposes of establishing original jurisdiction or the creditor where the debtor is seeking modification) is not domiciled in a Member State, jurisdiction is governed by the law of each Member State.[172] The Regulation also makes provision for prorogation of jurisdiction, *i.e.* jurisdiction founded on agreement between the parties,[173] or based on the appearance of the defendant, unless appearance was entered only to contest the jurisdiction.[174]

b) The Montevideo Convention

110. The Montevideo Convention is similar to the Brussels Regulation in giving the creditor a choice of applying for maintenance either in his or her own jurisdiction or that of the debtor. The relevant rule is set out in Article 8 of the Convention –

> "*Article 8*
>
> *At the option of the creditor, support claims may be heard by the following judicial or administrative authorities:*
>
> *a. Those of the State of domicile or habitual residence of the creditor;*
>
> *b. Those of the State of domicile or habitual residence of the debtor; or*
>
> *c. Those of the State to which the debtor is connected by personal links such as possessing property, receiving income or obtaining financial benefits.*
>
> *Notwithstanding the provisions of this article, a judicial or administrative authority of another State shall also have jurisdiction if the defendant appears before it without challenging its jurisdiction.*"

111. On the question of modification jurisdiction, the Montevideo Convention is different from the Brussels Regulation. It provides in Article 9 that "Actions to increase the amount of support may be heard by any of the authorities mentioned in Article 8", but where it comes to actions to discontinue or reduce support, these may be heard only "by the authorities of the State that set the amount of support".[175]

c) The United States approach to jurisdiction under UIFSA

112. The approach to original jurisdiction in the United States is summarised thus by Professor Spector in the paper which forms part of the United States response the 2002 Questionnaire –

> "*In cases involving monetary awards, such as maintenance cases, the jurisdictional standards dictated by the Constitution are based on the relationship between the defendant-debtor, and the forum. Jurisdiction over a*

[170] Article 2.1.

[171] *See* the wording of Article 2.1 and the opening words of Article 5.

[172] Article 4.1.

[173] Article 23.

[174] Article 24.

[175] Article 9.

defendant who is a resident of the state is always permitted. The relationship required for a state to exercise jurisdiction over a non resident defendant in family maintenance cases has been codified in the Uniform Interstate Family Support Act, which has been enacted in all fifty states of the United States. That Act provides that a state may exercise jurisdiction over a nonresident defendant in the following circumstances:

(A) the individual is personally served with a legal citation within the state;

(B) the individual submits to the jurisdiction of the state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving the objection to the state's jurisdiction;

(C) the individual resided with the child in the state;

(D) the individual resided in the state and provided prenatal expenses or support for the child;

(E) the child resided in the state as a result of the acts or directives of the individual;

(F) the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse;

(G) the individual asserted parentage in the state's putative father registry.

All of these enumerated circumstances have been found to be in conformity with the Due Process Clause of the United States Constitution. Conspicuously absent from the list of enumerated circumstances is an exercise of jurisdiction based solely on the residence of the maintenance creditor. Under the Constitution, courts in the United States may not exercise jurisdiction over a nonresident defendant if the defendant has no relationship to the forum. Therefore, the enumerated circumstances mentioned in the Uniform Interstate Family Support Act represent the furthest extent of the ability of any United States court to exercise jurisdiction over a nonresident defendant for the purpose of entering a maintenance order."

113. In the Report prepared for the 1999 Special Commission, the view was expressed that the US Constitutional issues surrounding jurisdiction based on creditor's residence "should perhaps not be regarded as an insuperable obstacle [to achieving agreement on uniform rules] but rather as a challenge to devise a rule which minimises any potential unfairness to maintenance debtors".[176] It was also thought to be significant that the *Uniform Interstate Family Support Act* of 1996 had instituted a number of rules "to provide a tribunal in the home State of the supported family with the maximum possible opportunity to secure personal jurisdiction over an absent respondent".[177] In his paper, Professor Spector responds as follows –

"*Unfortunately, the United States has recently reconsidered the issue of child-centered jurisdiction during the process of studying the interstate child support system. After a long and serious debate, the United States Commission on Interstate Child Support and the drafters of the* Uniform Interstate Family Support Act *determined that any attempt to base jurisdiction on the residence of the maintenance creditor or the child would be unconstitutional under the United States Supreme Court's interpretation of the Due Process Clause as applied to the exercise of jurisdiction by state courts in maintenance cases. Thus, the Uniform Act expands those actions of*

[176] *See* Preliminary Document No 2 of January 1999 footnote 8, above, at paragraph 63.

[177] *See* Preparatory Note to the Act, Section II, paragraph 3.

a maintenance debtor that would subject him to jurisdiction to the limits allowed by the Supreme Court but does not attempt to base jurisdiction on the habitual residence of the maintenance creditor or of the child."

114. With regard to modification jurisdiction, the United States, as stated above, favours a continuity principle under which modification must be sought in the jurisdiction that entered the original decision as long as one or more of the parties continues to reside in that jurisdiction. This principle, embodied in UIFSA, is designed to avoid the generation of multiple orders. The same principle is applied in relation to foreign decisions. Unless the parties have agreed otherwise, a United States state may not modify a foreign decision unless all parties have left the originating country and the requirements of personal jurisdiction are met. At the same time, United States authorities / courts will not recognise a foreign order which modifies a United States order in circumstances where the United States authority / court has continuing jurisdiction. Two types of problem arise here within the international situation. First, competing orders may arise where the authority of a state in the United States asserts continuing jurisdiction, while the foreign court / authority claims the right to exercise modification jurisdiction. Secondly, a lacuna can arise where an authority of a state in the United States refuses to accept jurisdiction to modify a foreign order on the basis that the foreign court / authority has continuing jurisdiction, while that same foreign court / authority does not itself accept that it has continuing jurisdiction. Because of this problem, some modifications to the general rule are currently under consideration in the United States.[178]

d) The "Commonwealth" provisional orders system[179]

115. A system of reciprocal enforcement of maintenance orders (REMO), based on provisional orders was established in the 1920s in the United Kingdom[180] and several other countries.[181] The system is sometimes referred to as the "Commonwealth" system. Where an applicant who is resident in one reciprocating country wishes to obtain a maintenance order against a respondent in another, she first applies for a provisional order from the courts / authorities in her own country. Such an order can be made without notice to, and in the absence of, the respondent. However, the order becomes enforceable only if and when confirmed by a court / authority in the reciprocating country where the respondent is resident. In order to bring this about, a certified copy of the original provisional order, summarising the evidence given in the proceedings, and a

[178] The U.S. response to the 2002 Questionnaire points out that NCCUSL has proposed amendments to the 1996 version of UIFSA that specifically address a number of international child support enforcement issues. The 2001 UIFSA amendments, which have not yet been uniformly adopted by U.S. states, include a provision that a U.S. state may modify a foreign child support order if the foreign country or political subdivision "will not or may not modify its order pursuant to its laws. ..." Although as a general rule any requests for modification should be heard by the tribunal that issued the order, it is recognised that in certain cases, modification would not be possible, absent action by the Requested Party. Such a stalemate may occur, for example, if a foreign country requires that parties be physically present to obtain a modification of a child support order, but it lacks the authority to compel a nonresident to appear. The U.S. state in such circumstances "may assume jurisdiction to modify the child-support order and bind all individuals subject to the personal jurisdiction [of the state] whether or not consent to modification of a child-support order otherwise required ... has been given or whether the individual seeking modification is a resident of [the U.S. state] or the foreign country or political subdivision." UIFSA 2001 § 615.

[179] For a full description of the system as it operates in the UK, *see* Dicey & Morris, *The Conflict of Laws*, 13th edition, edition by Lawrence Collins, paragraphs 18.175 to 18.181, and for Canada, *see* J.-G. Castel, *Canadian Conflict of Laws*, 4th edition, paragraphs 279-288.

[180] *See* Maintenance Orders (Facilities for Enforcement) Act 1920, as amended by Maintenance Orders (Reciprocal Enforcement) Act 1992.

[181] The "Commonwealth" provisional orders scheme is embraced by most of the States of the Commonwealth including by the territorial units of these States, e.g. Canadian provinces and territories and overseas dependant territories of the United Kingdom. Such bilateral agreements are negotiated between these jurisdictions and sometimes with third States such as Austria, Germany, Norway or the states of the United States.

certificate of the grounds on which the making of the order may have been opposed, as well as statements identifying the respondent and indicating his whereabouts, are sent to the responsible authorities in the reciprocating jurisdiction. The court / authority addressed in the reciprocating country may confirm the order, either with or without alteration, or, if the respondent establishes grounds on which he might have opposed the making of the order, may refuse to confirm it. The court addressed does not apply its own substantive law in confirming the order. Before deciding whether or not to confirm the order, the court / authority may remit the case to a court / authority in the originating country for the taking of further evidence. Once confirmed, the order is registered by the court and enforced in the State addressed, as if it had been made by the registering court / authority.

116. The originating court / authority maintains jurisdiction to vary or revoke a confirmed provisional order, but any variation will need to be confirmed in the reciprocating jurisdiction, unless it involves a reduction in the rate of payments or the respondent has appeared or been given appropriate notice. The court / authority addressed also has jurisdiction to vary or revoke the original decision. The "shuttlecock" procedure applies to the confirmation of provisional orders varying or revoking maintenance orders, just as it does to the confirmation of provisional maintenance orders.

117. At first glance, this provisional order system appears to represent a fair balance, in that it permits the maintenance creditor to open proceedings before the courts / authorities of the country where she lives (without the inconvenience of having to serve notice on the respondent abroad), while at the same time the order does not become enforceable before the respondent has had an opportunity to contest it before the courts / authorities of the country where he is resident. The complications of enforcing a foreign order do not arise, because the order is made by the authorities of the State in which it is enforced, *i.e.* the State where the debtor is resident. In practice, however, it appears that the operation of the "shuttlecock" system can be complex and slow, involving as it does two or more sets of procedures. In our consultations, we did not find that the provisional order system attracted much support. Both in Canada and Australia there is now a preference for an "application" system, *i.e.* a system under which the maintenance creditor receives assistance in her home country in preparing an application which is then transmitted to the country where the debtor resides for a determination to be made in that country.[182]

118. The "application system" model is notable in that, on the one hand it accepts that the determination of maintenance may have to be made in the debtor's jurisdiction, while at the same time it acknowledges the need to provide appropriate support to the creditor in making the application from the country in which she is resident.

C) Is it feasible to develop uniform rules of direct jurisdiction?

119. The difficulties in achieving uniformity in rules of direct jurisdiction on any subject-matter at a global level are well known and are at the moment being considered by the Hague Conference in the context of international jurisdiction and the effects of foreign

[182] This, for example, is the approach taken in the *Inter-Jurisdictional Support Orders Act 2001* (Manitoba), Division I of which sets out procedures whereby a claimant, who is ordinarily resident in Manitoba, completes a "support application" and submits it to the authority in Manitoba, which must then review the application to ensure that it is complete and forward it as soon as possible to the reciprocating jurisdiction.

judgments in civil and commercial matters.[183] Although the problems are less complex than in the field of civil and commercial judgments generally, the construction of uniform rules for maintenance proceedings would be a formidable challenge. It is hard to see how to achieve a compromise between systems which, in relation to original jurisdiction, place priority on convenience for vulnerable dependants, and those which, for due process reasons, require a personal nexus between the forum and the defendant. A compromise may perhaps be more easily attainable between the two opposing views on modification jurisdiction. Indeed, in another but related context, that of jurisdiction to make protection orders in relation to children, agreement concerning modification jurisdiction was eventually reached on uniform rules in the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*.[184]

120. What are the possibilities? One could try to devise a rule which respects personal jurisdiction but at the same time reduces to a minimum the circumstances in which creditor's jurisdiction could not be exercised. In other words, an attempt could be made to expand to its limit the concept of a personal nexus between the defendant and the forum. However, this may leave constitutional uncertainties and one would still be left with difficulty in a case where no personal link between the debtor and the forum can be constructed. An example would be a case where a mother, who has her habitual residence in State X, conceives a child in State Y by a father who is living in that State and then institutes proceedings against the father in State X. Another example would be one where a mother who has been living with her child and the father in State X moves from that State with the child to State Y and there brings proceedings against the father.

D) What can be done about modification jurisdiction?

121. If it is true, as has been suggested above, that the main practical disadvantage of the absence of uniform rules lies in the area of modification jurisdiction and that the principal problem is the generation of multiple decisions, it is worth considering whether there are more focused ways of relieving this difficulty. Two typical cases will be considered, the first where the debtor's residence changes following the making of the original decision, and the second where the creditor's residence changes.

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[183] There have so far been five Special Commissions on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial maters, in June 1997, in March 1998, in November 1998, in June 1999 and in October 1999. *See* "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters" adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar", Preliminary Document No 11 of August 2000, "International jurisdiction and foreign judgments in civil and commercial matters", Preliminary Document No 7 of April 1997, "Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters", Preliminary Document No 8 of November 1997, and "Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters", Preliminary Document No 9 of July 1998, all drawn up by Catherine Kessedjian.

From the first of these Special Commissions a trend took shape which would exclude maintenance obligations from the scope of the future Convention. (*See* Prel. Doc. No 9, paragraph 9.)

"Maintenance obligations" are also excluded from the scope of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (Article 4) and "maintenance obligations between spouses" are excluded from the scope of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* (Article 1).

[184] *See*, in particular, Article 5(2) which accepts that jurisdiction to make and modify protection orders (including, for example, custody orders) shifts with a change in the child's habitual residence. However, the issues are different from those which arise in maintenance proceedings. There are far stronger reasons to tie jurisdiction to the child's habitual residence in the area of child protection.

a) Change in the debtor's residence

122. *H and W are living in the United States of America in state X, together with their 7-year old daughter D. Their relationship breaks down and the authorities in state X fix child support at $250 per week. While W continues to live in state X with D in her custody, H moves to live abroad in State Y and there he begins a relationship with G and has a child E by her. He now claims that he is unable to pay $250 per week support for D for two principal reasons. He has reduced means because of his obligations to E and he claims that, owing to the differences in the tax and social welfare regimes of State Y, he has less disposable income. He wishes to have the $250 a week order modified downwards, and he wants to have the authorities in State Y make the adjustment.*

123. It is clear that, if the authorities in State Y make an order reducing the child support payable, that order would not be entitled to recognition in United States state X which will, under UIFSA principles, claim continuing jurisdiction. The original order will continue to run, and to clock up arrears, in United States state X.

124. It is an interesting and perhaps surprising fact that, if State Y were a European Union State and the Brussels Regulation were to be applied to this modification application (it is not applicable because the defendant in the modification proceedings is not domiciled in a Member State of the EU) a similar result would follow. Under that regime a debtor seeking modification may not, absent agreement or submission by the defendant, bring proceedings in the jurisdiction where he is resident; he must bring those proceedings where the defendant (in this case the creditor) is domiciled. In other words, this is a case where the UIFSA principle of continuing jurisdiction and the Brussels principle of creditor's jurisdiction produce the same outcome.

125. This is not, of course, to suggest that the same outcome will be produced in every case (see examples below). But the coincidence in relation to this case, which is one of the typical situations which give rise to concern, suggests that it might be possible to devise a rule which will tackle at least part of the problem of modification jurisdiction. The rule might be somewhat along the following lines –

> "*Where an order has been made by a court / authority of the State where at the time of the institution of proceedings both the creditor and the debtor were resident, and the debtor has subsequently changed his / her residence to another State but the creditor has not, proceedings to modify the original order may not, in the absence of agreement or submission, be instituted in that other State.*"

126. Certain provisos should be entered. The first is that it would be important to ensure that the debtor is given appropriate assistance, through the process of administrative co-operation, in bringing modification proceedings in the State of origin. The court / authority of origin should have the full facts available concerning the matters on which the debtor is relying in applying for modification; the system of administrative co-operation should help to ensure that this is the case and that unnecessary delays do not occur. (We understand from our consultations that, in cases where at the moment debtors seek modification in an originating United States state, serious delays sometimes occur.) It is also possible that, under its own rules, a particular State would not allow its authorities / courts to exercise modification jurisdiction in circumstances of this kind. These considerations suggest that the general principle set out above should not operate (a) where there is unreasonable delay in addressing the modification application in the originating State, and (b) where under its own rules the originating State lacks jurisdiction to modify its own order.

127. It should be remembered that if, in the example, state X modifies its original order, that modified decision would fall to be enforced in State Y. This would be possible if the approach to recognition and enforcement suggested in the previous chapter is adopted. It should also be recalled that the State in which enforcement is to take place will be required to apply its own rules to the manner in which enforcement is to take place, and those rules may themselves place certain limits on what at the end of the day the debtor can be compelled to pay.

b) Change in the creditor's residence

128. *H and W are living in the United States of America in state X, together with their 7-year old son S. H and W separate. The authorities in state X fix child support at $250 per week. H continues to live in state X but W subsequently moves together with S, who is in her custody, to live in State Y (i.e. outside the U.S.). After living there for two years she claims that the child support should be raised because her expenses related to S have increased and because H is now earning a higher salary. She would like to make the modification application in State Y where she is living.*

129. Here there seems to be little chance of reconciling the two systems. Assume that State Y would allow W to bring her modification application before its courts / authorities and that she does so and that child support is increased to $350 per week. The courts / authorities of United States state X may claim continuing jurisdiction and not enforce the modified order against H. The absence of an agreed jurisdictional standard in this case means that W will in effect have to bring her modification proceedings before the courts / authorities of a foreign State.

130. Whether this constitutes an unfair imposition on W depends very much on the degree of assistance and support she is given in making her modification application abroad. If there is swift and effective co-operation between the two authorities concerned, any inconvenience to W could be minimised. Moreover, the fact that the modification would be made in the State where H is resident means that enforcement efforts are likely to be more successful. It may not be the ideal situation for those countries which advocate a creditor's jurisdiction, but it is one which is remediable through close co-operation.

c) Other factual situations

131. Facts can of course be much more complicated than in the two cases set out above. It is possible, for example, that the creditor and debtor are already living in different countries when the original decision is made and that the application to modify follows a change in either the creditor's or the debtor's residence to a third country. For example –

- H is resident in State Z. W is resident in State Y. W obtains a child support order in State Y. H moves to United States state X. W's order based on creditor's jurisdiction, would probably not be entitled to recognition in United States state X, nor probably would the authorities in state X recognise any modification made in State Y even though it is exercising in effect a continuing jurisdiction. The maintenance creditor seeking enforcement in the United States would in this case need to seek an enforceable order in state X.
- H is resident in United States state X. W is resident in State Y. W obtains a support order in United States state X. H subsequently moves to State Z. Here, presumably, W would obtain a modification in her country of residence which would be enforceable in State Z, assuming that State Z accepts a creditor's jurisdiction.

- The facts are as in the example above except that it is W who subsequently moves to State Z. Here W would, in effect, have to seek modification in United States state X.

d) Other approaches to the problems of modification jurisdiction

132. It has already been suggested that one of the principal requirements for overcoming the problems associated with modification jurisdiction is the establishment of a fast and effective system of co-operation, combined with appropriate supports for the creditor or debtor, so that when a modification has to be applied for in what appears to one of the parties to be an inconvenient forum, the inconvenience is minimised for the applicant.

133. Another possibility is to consider whether there may be certain substantive principles which might act as a check upon an authority / court exercising modification jurisdiction in an international case. Examples might be –

- that a court / authority should not order modification without taking into account the factors upon which the originating court / authority based its order;
- a change of residence should not, without more, be considered as a change of circumstance sufficient to justify a modification;
- where modification is sought following a change in the residence of one of the parties, the court / authority should take into account the reason (where ascertainable) for the change in residence, and in particular whether that change was effected in order either to increase or reduce a maintenance liability.[185]

E) Some general conclusions on direct jurisdiction

134. (1) If agreement were possible on uniform direct rules of jurisdiction, there would obviously be advantages. These would include clarity and foreseeability. While uniform rules would also avoid conflicting original decisions, this is not as serious a problem with maintenance (particularly child support) as with other civil or commercial matters. The practical advantages of uniform rules would show themselves primarily in the context of modification cases in that uniform rules would help to prevent a situation in which the original order and the modified order both remain valid in the different countries concerned.

(2) By the same token, the disadvantages of lack of uniformity in direct rules of jurisdiction show themselves most markedly in the context of modification cases. Some of these disadvantages can be ameliorated. In particular, agreement might be possible on a principle of continuing jurisdiction in those cases where the creditor has remained resident in the originating State.

(3) An essential way of reducing inconvenience is to ensure that, when an applicant for a modification order has to bring his / her application in a foreign country, there is in operation an efficient and effective system of co-operation between the authorities concerned to ensure speed in the necessary exchange of information/documentation, and that the applicant is provided with the appropriate supports. Arguably, the development of an effective system of co-operation will be far more important for the success of the new instrument than agreement on uniform standards of jurisdiction. It is of some relevance to note that, in the negotiations concerning the Hague Convention of 1993 on

[185] A third possibility is to consider applicable law principles in the special context of modification applications. For example, should there be a general, but not invariable, principle that the modifying court/authority should apply the same law as was applied by the originating court/authority. This would probably not be appropriate in all cases and, given the differences in approach to applicable law even at the stage of making an original decision, it would be difficult to reach agreement on this.

Intercountry Adoption, attempts to achieve agreement on uniform jurisdictional standards were abandoned in favour of the development of co-operation procedures which respected the proper role which both the receiving country and the country of origin have in securing the protection of the child.[186]

(4) It is important to ensure that, where a change in the residence of one of the parties occurs, modification jurisdiction is not exercised lightly. Some substantive principles may help in achieving this.

(5) With regard to the exercise of original jurisdiction, concerns over unfairness to the creditor or the debtor which may arise from the operation of jurisdictional standards which may be thought to be unfair either to the creditor or to the debtor, can also be addressed, at least in part, by ensuring that the conditions set out in (3) above are met.

[186] *See* Chapters III and IV of the 1993 Convention which establish the structure and detailed procedures for co-operation.

CHAPTER V APPLICABLE LAW

A) General considerations

135. Responses to question 33(c) of the 2002 Questionnaire, which asked whether applicable law principles should be a key element in the new instrument, were mixed. A substantial minority of respondents felt that such principles should be included as a core element. A much smaller minority was opposed to their inclusion. A middle group of respondents felt that the inclusion of such principles should not be a priority, or reserved their position on the question. Among that middle group of respondents were States that were of the opinion that, while the approach to applicable law should be discussed, it might be very difficult to reach agreement and that this should not be allowed to delay progress on other areas. Some respondents drew attention to particular matters which would benefit from agreed applicable law principles, for example, the question of the "*mode de représentation en justice*" of the minor (France), or the question of limitation periods (Sweden). Some other respondents suggested that the new instrument should address only certain selected but unspecified matters, rather than address applicable law in its entirety.

136. There is little doubt that if an attempt is made to include in the new instrument a comprehensive set of applicable law principles, the task will be a formidable one. Although there already exists a multilateral scheme in the form of the two Hague Conventions on applicable law of 1956 and 1973, discussion of these Conventions at the 1995 and 1999 Special Commissions, which is summarised below, suggests that re-evaluation of these Conventions would not be a simple matter. Moreover, these are Conventions which have attracted a relatively modest number of ratifications and accessions, largely within the European area,[187] and among States which have a tradition of applying foreign law in maintenance cases.[188] The construction of an applicable law regime which would be attractive to a more universal set of States, including those which have a tradition of applying principally forum law to maintenance cases, will obviously be even more difficult. Indeed, with the increasing use of often highly complex formulae for the assessment of maintenance or child support in many national systems,[189] it may be very difficult to shift common law systems from the general rule that, as a matter of practicality alone, forum law should apply to the quantification of maintenance.

137. Given that, on the one hand, there is a substantial number of States that have an interest in a general applicable law regime while, on the other hand, there is a substantial minority of States which may not be in a position to subscribe to such a regime, what are the consequences in terms of the development of a new instrument? One possibility would be to include an applicable law regime as an optional element in the new instrument, *i.e.* one in respect of which a reservation (opt out) or declaration (opt in) could be entered. Another possibility would be to leave this element out of the new instrument and to have separate discussions on revision of the existing Hague Conventions. This second possibility would not be in keeping with the concept of a "comprehensive" instrument. On the other hand, it would enable discussion to concentrate and to move ahead more rapidly on those matters on which a universal approach is feasible.

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[187] 1956 Convention: Austria, Belgium, China (Macau Special Administrative Region only), France, Germany, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland, Turkey. 1973 Convention: Estonia, France, Germany, Italy, Japan, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland, Turkey.

[188] For the reasons why certain States have not ratified or acceded to the Hague Conventions of 1956 and 1973, *see* Preliminary Document No 3 of April 1999, footnote 7 above, pp. 78-81. In fact, most of the States mentioned therein did not have reasons of principle for not ratifying or acceding, and some were considering ratification or accession.

[189] *See* footnote 19 above.

138. At the same time, there are particular matters on which it may be easier to obtain agreement that a common approach, including the possibility of the application of foreign law in certain cases, would be wise. Apart from those specific matters mentioned by respondents to the Questionnaire, there is also the question of entitlement to support or maintenance for a child or other dependent. Which law, for example, should govern the age at which a child ceases to be entitled to receive maintenance? Discussion of a limited set of applicable law issues where there is at least some prospect of consensus may have considerable benefits both in terms of substance and in terms of avoiding a long and perhaps futile attempt at gaining consensus on a general applicable law regime.

B) The Hague Conventions of 1956 and 1973 on the law applicable to maintenance obligations

139. The main features of the two Hague Conventions of 1956 and 1973 on the law applicable to maintenance obligations are described fully in the note prepared by Michel Pelichet for the 1995 Special Commission.[190] These were summarised as follows in the note prepared for the 1999 Special Commission –

> "*18 …..The two Conventions differ in two important respects. First the 1956 Convention determines the law applicable to maintenance obligations only in respect of children, while the 1973 Convention applies to maintenance obligations "arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate." Second, the rules under the 1956 Convention apply only when the law designated is that of a Contracting State, while the rules under the 1973 Convention are universal in the sense that they apply even if the applicable law is that of a non-Contracting State.*
>
> *19 In many important respects the two Conventions adopt similar approaches. Both Conventions give first priority to the law of the child's / dependant person's habitual residence. Where a change of habitual residence occurs both Conventions apply the law of the new habitual residence from the time that the change occurs. Both Conventions permit a Contracting State to make a reservation that its internal law shall apply if the creditor and the debtor are both Nationals of that State, and if the debtor has his habitual residence there. Both Conventions accept subsidiary connecting factors in the interests of the child / dependant person. But here similarities end.*
>
> *20 Under the 1956 Convention the law designated by the national conflict rules of the authority seised is applicable if the law of the child's habitual residence gives no right to maintenance. The 1973 Convention, on the other hand, provides for a cascade of subsidiary connecting factors, in the event of the creditor being unable to obtain maintenance by virtue of the law of his or her habitual residence. The first alternative is the law of the common nationality of the creditor and debtor. If under that rule the creditor is still unable to obtain maintenance from the debtor, the internal law of the authority seised applies.*
>
> *21 By way of exception Article 8 of the 1973 Convention lays down a special rule governing maintenance obligations between divorced spouses and the revision of decisions relating to such obligations. In any Contracting State in which the divorce is granted or recognised, the applicable law is the law applied to the divorce. The same rule applies to legal separations, and cases where a marriage has been declared void or annulled. Article 9 of the 1973 Convention contains a special rule concerning the right of a public body to*

[190] *See* Preliminary Document No 1 of September 1995, footnote 4 above, Chapter I(A).

obtain reimbursement of benefits provided for a maintenance creditor. The governing law is that to which the body is subject.

22 Article 10 of the 1973 Convention specifies some of the matters which are determined by the applicable law, as follows:

"(1) whether, to what extent and from whom a creditor may claim maintenance;

(2) who is entitled to institute maintenance proceedings and the time limits for their institution;

(3) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor."

23 Under both Conventions the application of the law designated under the Convention may be refused if it is manifestly incompatible with public policy (ordre public). In addition, the 1973 Convention contains a substantive requirement that, in determining the amount of maintenance, the needs of the creditor and the resources of the debtor must be taken into account.

24 Article 7 of the 1973 Convention makes an exception to the normal applicable law rules by allowing the maintenance debtor to object to a request for maintenance by a person related collaterally or by affinity if no such obligation exists under the law of the parties' common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence. The 1973 Convention, by Article 13, permits a reservation limiting the scope of the Convention to maintenance obligations between spouses and former spouses, or in respect of a never married person below/under 21 years of age."

140. Issues and problems arising from the two Hague Conventions, which were discussed fully at the Special Commissions of 1995 and 1999, are explained and discussed in detail in the notes and conclusions associated with those two Special Commissions.[191] They may be briefly summarised here as follows –

- the law applicable to the determination of parentage, where it arises as an incidental question in maintenance proceedings, was discussed in both Special Commissions. The conclusion of the 1995 Special Commission supported the view that the applicable law is that which governs the maintenance obligation (*i.e.* the main question),[192] but divergent approaches still existed at the time of the 1999 Special Commission;[193]
- Article 8 of the 1973 Convention provides that the law applicable to a divorce shall, in the Contracting State where the divorce is granted or recognised, govern the maintenance obligations of the divorced spouses, as well as any revision of those obligations. The 1995 Special Commission, while acknowledging that this rule had been the subject of some criticism, approved the basic principle as "guaranteeing the foreseeable nature of maintenance relationships between the former spouses in the long term".[194] An argument in favour of giving the parties greater autonomy in relation to applicable law in these circumstances was raised in the 1995 Special Commission[195] and was

[191] *See* Preliminary Document No 1 of September 1995, footnote 4 above; Preliminary Document No 10 of May 1996, footnote 5 above; Preliminary Document No 2 of January 1999, footnote 8 above; and "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", footnote 9 above.

[192] *See* Preliminary Document No 10, May 1996 footnote 5 above, at paragraphs 29 and 30.

[193] See "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999" footnote 9 above, at paragraph 6.

[194] *See* Preliminary Document No 10 of May 1996 footnote 5 above, at paragraph 33.

[195] *Ibid*, paragraph 35.

discussed at some length in the 1999 Special Commission.[196] The conclusions of the discussion are summarised thus in the Report and Conclusions of the 1999 Special Commission –

"37 The issues raised by the decision by the Netherlands Supreme Court of 21 February 1997 concerning the interpretation of Article 8 of the Hague Convention of 1973 were the subject of some discussion. The Court had 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. The responses to the Questionnaire suggest that the national courts of other States Parties are for the most part unlikely to adopt the same approach (see Preliminary Document No 3 at pages 72-74). It was pointed out that differing emphases could be placed on the interpretation of the Supreme Court's decision – that it is an instance of the growing tendency to apply forum law, that it is an example, by way of exception of the application of the law of the country with which the spouses have their closest connection, and that it constitutes recognition of the importance of party autonomy in determining the applicable law.

38 On the question of the desirability of movement towards greater party autonomy, reference was made to the increasing role of party autonomy in related spheres of family law such as that of succession law. (See, for example, the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.) The importance of safeguards against any undue influence was raised, as well as a possible conflict between a movement towards greater party autonomy on the one hand, and on the other hand, the shift in certain countries towards the calculation of maintenance payments by way of a simple administrative procedure focussed on the law of the forum. A firm view was expressed by the expert of one State Party to the 1973 Applicable Law Convention against the need for any revision of Article 8."

141. Quite apart from the question of whether party choice may displace the law apparently applicable under Article 8, there exist a number of other issues surrounding maintenance agreements and the law applicable to them. These are discussed more fully in the 1999 Note[197] and may be summarised as follows –

- what, if any, should be the limits on party autonomy, *i.e.* on the parties' freedom to choose their own governing law? In particular, should there be some real connection between the law chosen and the situation of the parties, and can the parties by their choice evade mandatory rules which would otherwise be applicable?[198]
- which law governs the formal and essential validity of any choice of law agreement?[199]
- whether the parties have or have not made an express choice of law, which law should govern the obligations arising under maintenance agreements? There remains continuing doubt as to whether it is the rules of the 1973 Convention, and in particular Article 8, which should apply or whether generally applicable rules of private international law should govern maintenance agreements.[200]

[196] *See* Preliminary Document No 2 of January 1999 footnote 8 above, paragraphs 29-41.

[197] *Ibid*, paragraphs 33-41.

[198] *Ibid*, paragraphs 34 and 35.

[199] *Ibid*, paragraph 36.

[200] *Ibid*, paragraph 37 and 38.

C) The Montevideo Convention

142. The Montevideo Convention, unlike the Brussels Regime, also contains in Articles 6 and 7 applicable law principles. The approach is similar to that of the Hague Conventions to the extent that the rules are designed to operate to the advantage of the creditor. However, rather than the "cascade" approach adopted in the 1973 Hague Convention, the Montevideo Convention simply provides two alternatives and requires a court or authority to select the one which is more favourable to the creditor. In effect, the court or authority is given the burden of looking into both laws and working out what the consequences of their application would be in the particular circumstances.

> *"Article 6*
>
> *Support obligations, as well as the definition of support creditor and debtor, shall be governed by whichever of the following laws the competent authority finds the most favorable to the creditor.*
>
> *a. That of the State of domicile or habitual residence of the creditor:*
>
> *b. That of the State of domicile or habitual residence of the debtor.*
>
> *Article 7*
>
> *The applicable law pursuant to Article 6 shall determine:*
>
> *a. The amount of support due and the timing of and conditions for payment:*
>
> *b. Who may bring a support claim on behalf of the creditor; and*
>
> *c. Any other conditions necessary for enjoyment of the right to support."*

D) Some other approaches to applicable law

143. Other approaches to applicable law issues may be gleaned by reference to the responses to questions 4 (law applicable to questions of eligibility), 11 (law applicable to assessment of maintenance), and 16 (law applicable to the determination of paternity) of the 2002 Questionnaire.

a) <u>The law applicable to the eligibility of a child to obtain maintenance</u>

144. Canadian Provinces and Territories adopt a cascade approach, though one more limited than that set out in the Hague Convention of 1973. In the common law Provinces and Territories the applicable law is the law of the State where the child is ordinarily resident and, if the child is not entitled to support under that law, then the law of the forum.[201] In Quebec, the applicable law is successively the law of the domicile of the maintenance creditor and then the domicile of the debtor.

145. In Slovakia and Sweden, the applicable law is not determined successively. In Slovakia, the national law of the State of the creditor applies, while in Sweden it is the State of the habitual residence of the dependent, unless the parties agree otherwise. In Finland, where a maintenance obligation is decided by an administrative authority, Finnish internal law applies. Where the obligation is determined by a judge, a distinction is made between legitimate and illegitimate children. If the child is illegitimate, Finnish law

[201] *See*, for example, the Inter-Jurisdictional Support Orders Act (Manitoba), Section 12(1).

continues to apply. For a legitimate child, the applicable law is the law of the State of which the child is a citizen. In the United States of America it is generally the law of the forum which applies, including relevant Federal law.

b) The law applicable to the eligibility of the spouse or other family member to obtain maintenance

146. In the common law Provinces and Territories of Canada, the applicable law is forum law and, if under that law the claimant is not entitled to support, then the law of the jurisdiction where the parties last maintained a common habitual residence.[202] In relation to ex-spouses the Divorce Act applies. In the civil law Province of Quebec, the applicable law is the law of the domicile of the maintenance creditor and then successively the law of the domicile of the debtor. In relation to ex-spouses or separated spouses, the law of the divorce / nullity / separation applies.

147. In Slovakia and Sweden, the applicable law is the same as for children. In Finland, Finnish internal law applies to decisions made by an administrative authority. The applicable law for a judicial decision is the law of the State where the creditor is domiciled. In the United States of America, maintenance obligations relating to a spouse or other family member are generally governed by state law without federal oversight.

c) The law applicable to assessment of maintenance for a child, a spouse or other family member

148. In Canadian Provinces and Territories, both common law and civil law, forum law applies.[203] In Sweden, unless the parties have agreed otherwise, the applicable law is the law of the State where the dependent has his / her habitual residence. In Slovakia, it is the national law of the creditor's State which applies. In the United States, the law of the forum applies, including any applicable federal law. In the case of child support, state law operates within the broad federal mandates.[204] State law almost entirely controls establishment of spousal maintenance, and totally controls maintenance of other family members.

d) The law applicable to the determination of parentage

149. This matter is discussed in a separate document devoted to the issue of determining parentage.

E) Conclusions

150. This chapter has provided only a brief summary of the principal problems surrounding the 1956 and 1973 Hague Conventions on applicable law relating to maintenance obligations and has given some indication of alternative approaches to applicable law issues. It has been enough to show that, if a review is to take place, the issues involved are many and complex. This is also suggested by the conclusions reached in the report which was prepared for the 1999 Special Commission, as follows –

> "*65 Arguably the time is ripe for a more fundamental appraisal of the correct approach towards the law applicable to maintenance obligations. There exist in relation to the* Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations *substantial problems concerning choice of the applicable law by the parties themselves, the law applicable to maintenance agreements, the rule in the Convention which applies the law governing the divorce to the maintenance obligations of divorced spouses, as well as the*

[202] *Ibid*. Section 12(3).

[203] *Ibid.* Section 12(2).

[204] Federal Law 42 U.S.C. paragraph 667. Federal Regulations 45 C.F.R., paragraph 302.56. *See* above at paragraph 72.

question of the law applicable to any incidental question, particularly that of paternity.

66 Indeed there may even be a case for reconsidering the role of the law of the forum. There is an argument, for example, that at a time when States are seeking cost-effective and speedy mechanisms for determining maintenance, and are increasingly using administrative procedures for that purpose, the application of foreign law is not only costly and time-consuming but may not always be feasible."

151. However, it should also be emphasised that neither the 1995 nor the 1999 Special Commissions were able to suggest alternatives or solutions to the problems raised; nor did they conclude that, in view of the difficulties, the 1973 Convention had ceased to serve its basic purpose.

CHAPTER VI BUILDING CO-OPERATION AND SECURING THE EFFECTIVE AND CONSISTENT IMPLEMENTATION OF THE NEW INSTRUMENT

A) General considerations

152. The new instrument will be a practical working tool, setting out procedures to be observed in particular cases and containing detailed provisions for co-operation between authorities in the different Contracting States. Its provisions will be applied and interpreted in countries all around the world which have different legal and administrative cultures. At the same time, there will probably be no executive or judicial body to which Contracting States may turn to remove blockages or to enforce obligations on recalcitrant partner States or to provide binding interpretations of the Convention's text. This chapter considers what can be done to ensure –

- ?? that the instrument is effectively implemented in Contracting States;
- ?? that practice and interpretation under the Convention is kept reasonably consistent in Contracting States;
- ?? that operational problems and blockages are confronted and resolved in a timely fashion;
- ?? that the mutual confidence among Contracting States, which is necessary for effective co-operation, is developed and maintained.

153. These same challenges have confronted those already existing Hague Conventions which establish systems of administrative and judicial co-operation in the areas of child protection and legal co-operation. The Hague Conference has indeed been in the forefront in developing post-Convention services to support the effective operation of its instruments. The Permanent Bureau now spends 50% of its time on post-Convention activities.[205] It is the Permanent Bureau's view that this type of activity is absolutely essential to maintain the health and vitality of workable international systems of co-operation, and that even more intensified post-Convention work will be needed if the new instrument on maintenance obligations is to be a success.[206]

154. Question 33(h) of the 2002 Questionnaire asked for views on whether provisions aimed at securing compliance with obligations under the new instrument should constitute one of its key elements. The responses show that issues of compliance are a major concern for many States. Most respondents felt that provisions concerning compliance should be included in the new instrument. A minority felt that this was unnecessary and that States should, as a matter of course, be expected to meet their international obligations under the new instrument. Certain States recognised that securing compliance requires a wide range of efforts, including monitoring of the operation of the Convention, education and support.

155. This chapter considers various measures which may contribute to effective implementation, consistent practices, the development of mutual co-operation and understanding among Contracting States, and compliance with Convention obligations.

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[205] *See*, "The Hague Conference on Private International Law: Resources Deficiencies and Strategic Positioning", PricewaterhouseCoopers Report, Preliminary Document No 19 of March 2002 for the attention of Commission I (General Affairs and Policy of the Conference) of the XIXth Diplomatic Session – April 2002.

[206] For a description of work undertaken by the Permanent Bureau in support of the 1980 Hague Convention, *see* W. Duncan, "Action in support of the Hague Child Abduction Convention: A view from the Permanent Bureau", *New York University Journal of International Law and Politics*, Vol. 33 (2000) 103.

B) Point of entry requirements

156. It is normal to require States, at the time of entry into a system of international co-operation, to provide certain basic information needed by other Contracting States to enable co-operation to take place. Obviously, contact details of Central Authorities and other bodies with Convention responsibilities will be required. This information should be supplied at the time of ratification / accession to the Permanent Bureau, to be placed on the Hague Conference website and disseminated by other means.[207]

157. The question arises whether any other point of entry information should be required. For example, should there be an obligation to provide information describing the basic procedures for obtaining or enforcing a maintenance decision under the Convention, the documentary requirements for proceedings under the Convention,[208] the jurisdictional standards applied by the new Contracting State (for purposes of recognition and enforcement),[209] the procedures applicable to the obtaining of legal aid and other similar forms of assistance, and the enforcement mechanisms that are available within that State?

158. Although there are no similar requirements within, for example, the 1980 Hague Convention, the practice has been approved under that Convention of encouraging new acceding States to provide answers to a simple standard Questionnaire setting out some basic information about their legal systems which is relevant to the operation of the 1980 Convention.[210] This voluntary Questionnaire is administered by the Permanent Bureau, and is designed also to assist the existing Contracting States to decide whether or not to accept the new accessions.[211]

C) Support for effective implementation

159. Effective implementation requires efforts primarily at the national level. However, experience with other Hague Conventions shows that much can be done to support and assist a State in its efforts to integrate a new Convention successfully into its own legal and administrative system. The following are examples –

- the development of a Guide to Good Practice on implementing measures, offering States examples of the measures (legislative, administrative, structural and educational) taken by other States to achieve successful implementation;[212]
- the provision of technical advice and assistance by the Permanent Bureau;

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[207] *See*, for example, Article 13 of the 1993 Hague Convention –

"*The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law*."

Perhaps, unfortunately, the article does not specify the time at which the communications should be made. *See* also Articles 29, 44 and 45(1) of the 1996 Convention.

[208] *Cf.* Article 3, paragraph 2, of the New York Convention –

"*2. Each Contracting Party shall inform the Secretary-General as to the evidence normally required under the law of the State of the Receiving Agency for the proof of maintenance claims, of the manner in which such evidence should be submitted, and of other requirements to be complied with under such law.*"

[209] *See* above at paragraph 78.

[210] *See* Hague Conference website at <http://www.hcch.net/e/conventions/menu28e.html>.

[211] Under the procedure provided for in Article 38. *See* below at paragraph 165.

[212] *See*, for example, the Guide to Good Practice: Part II - Implementing Measures under the 1980 Convention <http://www.hcch.net/e/conventions/guide28e.html> .

- the holding of a Special Commission to discuss aspects of implementation;[213]
- assistance in the training of persons and authorities who at the national level will have the responsibility to implement the Convention.

D) Monitoring

160. The Permanent Bureau at present helps to monitor the operation of the three modern Hague Children's Conventions, as well as other Conventions which involve systems of administrative or judicial co-operation. This may involve –

- collection and analysis of national case law relating to the particular Convention;[214]
- promotion of research into the functioning of particular Conventions;
- the maintenance of statistics making it possible to track general trends in the operation of the Convention;[215]
- addressing Questionnaires to States Parties concerning the functioning of different Conventions.

E) Promoting consistent interpretation and good practice

161. Among the measures which may be taken to ensure consistent interpretation and the adoption of best practices are –

- the collection and dissemination of case law under the Convention;[216]
- the development of Guides to Good Practice;[217]
- the promotion of uniform or similar case management systems;[218]
- the use of standard forms;
- the holding of international seminars / training sessions for those, including judges, responsible for implementing the Convention;
- the establishment and maintenance of networks, including regular channels of communication,[219] among those responsible for implementing the Convention.

F) Review

162. The practice has developed of holding at regular intervals (about every four years) Special Commissions to carry out general reviews of the operation of a number of the Hague Conventions. Some Hague Conventions specifically authorise the Secretary General to convene such Special Commissions.[220] These review sessions (attended typically by

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[213] For example, a Special Commission was held in 1994 to discuss aspects of implementation of the 1993 Hague Convention.

[214] *See*, for example, the establishment of INCADAT, the international Child Abduction Database (<http://www.incadat.com>). *See* also M. Sumampouw, *Les nouvelles conventions de La Haye, leur application par les juges nationaux*, Martinus Nijhoff, The Hague, 1996.

[215] States Parties to the 1980 Hague Convention are requested to provide the Permanent Bureau with annual statistics according to an agreed standard form. At present, work is being undertaken to establish an electronic statistical database (INCASTAT) for the 1980 Convention.

[216] *See* above footnote 214.

[217] *See* above footnotes 53 and 212.

[218] Work is currently being undertaken in relation to the development of an electronic case management system for Central Authorities under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

[219] *See*, for example, the Judges' Newsletter on International Child Protection which is now published biannually by the Hague Conference on Private International Law.

[220] 1993 Hague Convention, Article 42, and 1996 Hague Convention, Article 56.

Central Authority personnel, policy makers, judges, non-governmental organisations and other international organisations) are supported by preparatory studies carried out by the Permanent Bureau, usually on the basis of a Questionnaire which will have been administered to Contracting States. These general review sessions are helpful in identifying systemic problems within the international systems of co-operation, divergences of practice and more specific blockages. They are also helpful in developing close and effective working relationships between authorities in the different Contracting States. They usually result in approval of a range of recommendations to improve the practical working of the Convention. Review of the operation of the Convention can take more specific forms. Some Conventions, such as the *United Nations Convention on the Rights of the Child*,[221] contain reporting requirements under which Contracting States are required to submit to an international body (the Committee on the Rights of the Child) at regular intervals reports concerning the implementation and operation of the Convention in their own areas. In the case of the *United Nations Convention on the Rights of the Child*, this is followed by the issuing of a report, with recommendations, by the Committee on the Rights of the Child.

G) Handling specific complaints and blockages

163. Hague Conventions do not incorporate complaints mechanisms. If the Central Authority of one Contracting State is not happy with actions taken or not taken by another, it is generally left to the authorities concerned to work out these problems together. The 1980 Convention, for example, imposes on Central Authorities the obligation to take all appropriate measures, as far as possible, to eliminate any obstacles to the application of the Convention.[222] Under the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* Central Authorities are also responsible for ensuring that appropriate measures are taken to ensure that the provisions of the Convention are respected.[223] The Permanent Bureau is not given any formal role under the Conventions, though it is from time to time asked to use its good offices on an informal basis to address difficulties that are hampering effective co-operation between central or other competent authorities. The Permanent Bureau has, for example, from time to time helped to organise and facilitate meetings among Central Authorities or groups of Central Authorities to discuss particular operational difficulties.

H) Bilateralisation

164. To what extent, if at all, should one Contracting State to the new instrument be allowed to pick and choose with which other Contracting States it is prepared to enter into a treaty relationship? As a matter of theory, there exist a range of possibilities. At one extreme, the new instrument could automatically, and without limitations, become effective between each new Contracting State and all existing Contracting States. At the other extreme, each Contracting State could have the right to decide, in respect of each of the other Contracting States, with which of these States it is prepared to enter into binding relationships (total bilateralisation).

165. Several Hague Conventions, including the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, adopt a middle path (partial bilateralisation), whereby Member States qualify for automatic entry into the Convention club, while non-Member States are subject to the possibility that individual existing Contracting States may not do business with them. For example, under

[221] Adopted by the General Assembly of the United Nations on 20 November 1989, *See* Part II.

[222] Article 7(*i*).

[223] *See* Article 33.

the Hague Convention of 1973 all Member States of the Hague Conference at the time of the Conference's Twelfth Session (when the treaty was being negotiated) are entitled to ratify the Convention which enters into effect automatically among all such ratifying States. Other States may accede to the Convention, but the accession is effective only in relation to those Contracting States which have not raised an objection within a 12-month period.[224] The Hague Convention of 1980 makes the same distinction between States which were Member States of the Conference at the time of the negotiations and other States.[225] However, in this case a positive declaration is required before an accession becomes effective between the acceding State and any existing Contracting State.[226] The result in practice is that there may be some delay before an acceding State to the 1980 Convention enjoys relations with the full, or even a wide, range of other Contracting States.[227]

166. The system adopted under the 1980 Convention has advantages and disadvantages. One disadvantage is the frustration that a newly acceding State may experience while it waits for other Contracting States to address the matter of acceptance of its accession. One advantage is that the system gives existing Contracting States the opportunity to consider whether the newly acceding State has put into place the basic structures necessary to be able to undertake Convention obligations. However, it is clear that different States have different views about the value of the system operating under the 1980 Convention, and different policies towards the acceptance of accessions, some being cautious and others accepting new accessions readily.

167. For those States which are concerned to ensure that there is a fair exchange or a substantial equivalence in the provision of services offered by themselves and other States with whom they co-operate, a bilateralisation process does seem to offer a form of protection. However, question 33(i) of the 2002 Questionnaire which asked whether the new instrument should contain provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis, prompted mixed responses. Most respondents were either opposed to the idea or did not regard it as a priority issue. Some were strongly opposed, regarding such provisions as a retrograde step. Although question 33(i) was not asked in the context of possible bilateralisation, the responses do suggest that there may be considerable opposition to the idea of total bilateralisation.

168. In the view of the Permanent Bureau, it is better to begin negotiations by concentrating on the substantive provisions of the new instrument and on the task of building into the Convention itself the appropriate balances and mechanisms for ensuring that Contracting States take seriously their Convention obligations. It may be wise to leave a decision on complete, partial or no bilateralisation until towards the end of the negotiations.

I) The role and financing of the Permanent Bureau

169. International instruments of the kind being planned depend for their effective operation on a wide range of actors. The principal responsibility of course rests with the Contracting States themselves and their own central and other competent authorities. Judges, members of the legal and other relevant professions, non-governmental

[224] Article 31. *Cf.* the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, Article 44; and the 1996 Hague Convention, Article 58, where the time for objection is 6 months. In the case of the 1993 Convention, automatic entry to the club is also available to States which took part in the session during which the Convention was negotiated.

[225] Article 37.

[226] Article 38.

[227] *See* the chart of accessions and acceptances of accessions to the 1980 Convention at <http://www.hcch.net/e/conventions/menu28e.html>.

organisations, academics and researchers, and, not least, the users of the services provided by the new Convention will all, if the experience with other Hague Conventions is replicated, have an important role in shaping the Convention's future. The Hague Conference on Private International Law itself, through its Permanent Bureau, may also have an important role to play. The role would be one of treaty administration, information gathering and dissemination, the facilitation and co-ordination of efforts to ensure effective implementation, including review of the practical operation of the Convention, and the provision of other services when requested by Member States of the Hague Conference.

170. One of the problems that the Permanent Bureau will face concerns the financing of its post-Convention services. The development of these services in respect of existing Hague Conventions has been organic in nature, and budgeting has been largely *ad hoc*. The supplementary budget of the Hague Conference, which is now fixed annually, is devoted primarily to the funding of these post-Convention services. Whether it is sensible, in respect of the new instrument on maintenance obligations, to rely in this way on voluntary contributions of Member States of the Conference to support activities which many will regard as essential, will need to be discussed. It also needs to be asked whether this burden should fall on Member States of the Conference only, or on all the Contracting States who will benefit from the services provided.

J) Checklist of issues to be considered

171. This very brief description of practices operating under various other Hague Conventions prompts a checklist of questions in relation to the new instrument on maintenance obligations –

- what should be the "point of entry requirements" and which of these should be set out in the new instrument itself? In particular, what information, in addition to contact information of relevant authorities, should be provided concerning procedures applicable and facilities available to foreign applicants?
- what provisions should be made to support States in achieving effective implementation of the new Convention?
- how should monitoring be conducted? In particular, should Contracting States be required to supply statistical and other information concerning the operation of the Convention, or indeed to supply periodically a general report on the operation of the Convention?
- what measures should be taken to promote consistent interpretation and practice under the new instrument?
- how should review of the operation of the Convention be conducted? Should there be regular Special Commissions to review the practical operation of the Convention? Should there be a procedure for conducting more State specific reviews?
- on whom should the new instrument place the responsibility for handling specific complaints concerning the operation of the Convention and for addressing systemic problems?
- should the Convention contain provisions permitting bilateralisation, and if so should this apply to all States or only in relation to States who have not been involved in the negotiations leading to the adoption of the Convention?
- to what extent should the Permanent Bureau be given responsibilities under the above heads and how will its involvement be financed? Should the role of the Permanent Bureau in providing post-Convention services be written into the instrument itself?

CHAPTER VII SOME QUESTIONS OF SCOPE

A) Scope ratione personae

172. The two Hague Conventions of 1958 and 1973 on the recognition and enforcement of maintenance decisions differ in scope *ratione personae*. The 1958 Convention is confined to obligations in respect of children, while the 1973 Convention applies to any maintenance obligations arising from a family relationship, parentage, marriage or affinity.[228] However, the scope *ratione personae* of the 1973 Conventions may be limited by reservations.[229] Many such reservations have in fact been made which in their practical effect restrict recognition and enforcement largely to maintenance decisions in respect either of children under a certain age or those made pursuant to a divorce or legal separation. The position on scope *ratione personae* and on reservations thereto is similar under the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.[230]

173. The responses to question 2 of the 2002 Questionnaire, which asked about eligibility to benefit from a maintenance decision under national law, revealed a core of common ground among States but also significant differences at the margins. In all responding States, children and spouses or ex-spouses are entitled to benefit from a maintenance decision. In Finland, step-children and foster children are not entitled to maintenance. Conversely, in Estonia, step-parents and foster parents are entitled to receive maintenance under certain conditions. In France, with regard to adopted children, a distinction is made between full and simple adoption. In the latter case, it is the child's original family who may be obliged to provide maintenance, while in the case of full adoption it is the adoptive parents who may have the obligation. In some States guardians or others with legal custody of a child are entitled to receive maintenance on behalf of a child. In France, even where the paternity has not been established, a man may be obliged to maintain a child. In the Czech Republic, Germany, Japan, Slovakia and Switzerland, an unmarried parent is entitled to support from the other parent for a limited period of time after the child's birth. In several States, including Austria, Canada, Chile, the Czech Republic, Estonia, France, Germany, Luxembourg, Malta, Panama, Slovakia and Switzerland, parents are entitled to benefit from maintenance obligations placed upon their children. In Chile, Estonia, France, Germany, Luxembourg, Malta, Panama, Slovakia and Switzerland, grandparents and / or grandchildren are able to benefit from maintenance obligations. Additionally, in some jurisdictions, other ascendant or descendent relatives may be entitled to maintenance. There is an obligation to maintain in-laws in France and Luxembourg. Siblings can benefit from a maintenance obligation in Chile, Japan and Malta. In an increasing number of jurisdictions same-sex or heterosexual couples in registered or domestic partnerships may

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[228] Article 1.

[229] *Article 26*

"Any Contracting State may, in accordance with Article 34, reserve the right not to recognise or enforce –

(1) a decision or settlement insofar as it relates to a period of time after a maintenance creditor attains the age of twenty-one years or marries, except when the creditor is or was the spouse of the maintenance debtor;

(2) a decision or settlement in respect of maintenance obligations

a) between persons related collaterally;

b) between persons related by affinity;

(3) a decision or settlement unless it provides for the periodical payment of maintenance.

A Contracting State which has made a reservation shall not be entitled to claim the application of this Convention to such decisions or settlements as are excluded by its reservation."

[230] *See* Article 1 and Article 14.

benefit from maintenance obligations. In the Netherlands, a same-sex couple may also incur maintenance obligations through marriage. Rules concerning maintenance obligations between cohabitees who have not in any way formalised their relationship differ, though in most States, maintenance obligations do not as a general rule extend to non-married couples.

174. Despite these many differences between the laws operating in national systems, major difficulties do not appear to have occurred in practice among parties to the 1973 Hague Conventions. The robust formula in Article 1, which refers to maintenance obligations arising from a family relationship, parentage, marriage or affinity (combined with liberal reservation regimes) seems to have stood the test of time. Problems obviously can potentially arise where one Contracting State is asked to enforce a maintenance decision which arises from a relationship which is not recognised in the State addressed, for example, a registered same-sex partnership. In such cases, the option is open to refuse recognition or enforcement on the basis that this would be manifestly incompatible with the public policy of the State addressed.[231]

175. The Montevideo Convention takes a more focused approach to scope *ratione personae*. the Convention applies "to child support obligations owed because of the child's minority and to spousal support obligations arising from the matrimonial relationship between spouses or former spouses".[232] Moreover, a State may make a declaration restricting the scope of the Convention to child support obligations.[233] On the other hand, a Contracting State has the option to declare that the Convention will apply to support obligations in favour of other creditors, and may indicate the degree of kinship or other legal relationship required by its law for a person to be a support creditor or debtor.[234] It should be recalled also that the Montevideo Convention contains alternative applicable law principles to be applied to the definition of "support creditor and debtor" which lean strongly in favour of the creditor.[235]

176. In addition to the rule defining support obligations (Article 1) and the applicable law rule (Article 6), the Montevideo Convention contains a substantive principle concerning the definition of a child for the purpose of the Convention –

> *"Article 2*
>
> *For the purposes of this Convention, a child shall be any person below the age of eighteen years. However, the benefits of this Convention shall also apply to those who, having attained that age, continue to be entitled to support under the applicable law prescribed by Articles 6 and 7."*

177. The formula used by the United States in its bilateral arrangements is also more focused than that in the Hague Conventions of 1973. It refers to obligations arising from marriage or parentage, including a maintenance obligation towards a child born out of wedlock. The proviso is attached that a maintenance obligation towards a spouse or former spouse, where there are no minor children, will be enforced in the United States under the relevant agreement only in those states and other jurisdictions of the United States that elect to do so.

178. The examples provided above suggest that various approaches to the definition of scope *ratione personae* could be employed in the new instrument, some of them in combination, as follows –

- ?? a general definition of maintenance obligations, whether wide or narrow;
- ?? a general definition of a child for the purpose of the instrument;

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[231] Article 5(1).

[232] Article 1(2).

[233] Article 1(3).

[234] Article 3.

[235] Article 6 and see above at paragraph 68.

- ?? the possibility for Contracting States to add by declaration to the categories of creditors covered by the instrument;
- ?? the possibility for Contracting States to restrict the scope of the Convention by declaration or reservation;
- ?? the inclusion of an applicable law rule governing further the definition of a creditor or a debtor for the purposes of the Convention;
- ?? the inclusion of the public policy exception to avoid an obligation on a State to recognise and enforce maintenance decisions in respect of certain categories of debtors or creditors.

179. It has to be said that it is not easy to see how some of these approaches can, without confusion, operate in combination. For example, the mixture of substantive principles with an applicable law rule in the Montevideo Convention suggests the possibility of contradictions, unless it is accepted that the Convention's substantive principles take priority.

B) The meaning of "maintenance"[236]

180. Responses to question 1 of the 2002 Questionnaire illustrate the variety of forms which maintenance decisions may take under different national laws. Child support generally takes the form of periodic payments. In certain States, such as Austria, Estonia, Luxembourg, Norway and Panama, child maintenance is in fact confined to periodical payments. In other States, including Australia, the Czech Republic and Denmark, orders relating to child maintenance are always by way of periodical payments, although parties can agree to the use of lump sum payments. In Chile, the court can decide that maintenance obligations may be discharged in whole or in part by payment in kind. Payment in kind is also possible in Malta, certain jurisdictions of Canada, and certain states of the United States of America. In many States lump sum payments and / or property transfers are also available to discharge child maintenance obligations. In France, Germany, Slovakia, Sweden, Switzerland and some jurisdictions within Canada and the United States of America, such measures are not commonly used and may be limited to particular circumstances. Conversely, in China (Hong Kong Special Administrative Region), Finland, Japan and Malta, there are less limitations on the use of lump sum payments and / or property transfers. In the United Kingdom there are two systems for dealing with child maintenance obligations, the Child Support Agency and the courts. The Child Support Agency is an administrative body and is only entitled to stipulate periodical payments. The courts can additionally require payment by means of a lump sum and / or a transfer or property.

181. As with child support, periodical payments are the most common means of discharging maintenance obligations in respect of spouses, former spouses and other

[236] The Explanatory Report on the Conventions on Maintenance Obligations (1972) by Michel Verwilghen refers (at paragraph 18) to the absence of a formal definition in the 1973 Hague Conventions of the terms "maintenance obligations" and "maintenance". Further explanation is given in the Special Commission Report at paragraph 10 –

"*The draft Conventions do not contain any* definition *of the term 'maintenance obligation', nor of the word 'maintenance'. The Experts recalled that their colleagues meeting in 1956 under the auspices either of the Hague Conference or of the United Nations Organisation when confronted with the difficulty of drafting such definitions, had attempted in vain to arrive at a satisfactory text.*

Having regard to the context in which it is used, the concept of maintenance obligation *should be understood in its widest sense, but within the limits expressly stipulated by the draftsmen; the term thus refers in this context to the legal tie by virtue of which a person may compel another or several persons to provide him with maintenance. As regard the term 'maintenance', it is used by every legislation among the Member States of the Conference but its meaning sometimes varies to a noticeable extent. Here again, the draft Conventions do not provide any definition. The Applicable-Law Draft provides that one should refer to the law applicable under the provisions of the Convention to ascertain what is meant by 'maintenance'. These precisions will undoubtedly not suffice radically to remove any doubts. The Experts were aware of this, but they were unanimous in leaving it to the court in every particular case to characterize the legal situation*."

family members. In some States, maintenance obligations not relating to children are viewed with more flexibility. Lump sum payments and property transfers are more common. Indeed, in Austria and Norway, where child maintenance is confined to periodical payments, spousal maintenance may take the form of a lump sum payment and / or property transfer. In Luxembourg, the only exception to the use of periodical payments is the possibility of ordering a lump sum from the estate of a deceased spouse for the purpose of maintaining the surviving spouse. In Germany, in relation to post-marital maintenance, it is possible for the maintenance creditor to demand a lump sum payment provided that the maintenance debtor will not be unfairly burdened by this demand.

182. The definition of maintenance has been the subject of judicial decisions under the Brussels and Lugano systems. Under Article 1 of the original Brussels Convention, rights in property arising out of a matrimonial relationship are excluded from the scope of the Convention, while matters relating to maintenance are within the Convention and indeed subject to special rules.[237] The dividing line between maintenance and matrimonial property claims has been examined by the European Court of Justice. The difference between the two, in a case for example where a lump sum or transfer of property has been ordered, depends on the objective pursued by the authority making the order. Where such an order is made in favour of a spouse, and where it is designed to enable that spouse to provide for himself or herself and where the needs and resources of each spouse are taken into account in determining the amount, the decision will be regarded as one concerning maintenance. If, on the other hand, the award is solely concerned with the re-adjustment of property between the spouses, it will be regarded as being concerned with rights in property arising out of a matrimonial relationship.[238] In short, it is the purpose of the order rather than its form which determines whether it is a maintenance order. Whether it is necessary or appropriate for the new instrument to contain a definition of maintenance along similar lines should perhaps be given some consideration.

C) Other questions concerning scope

183. Other questions concerning the scope of the new instrument, some of which have already been referred to, include –

- whether the new instrument should, like the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, contain provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;[239]
- whether the new instrument should deal with the recovery of arrears;
- whether the new instrument should deal with obligations arising from a binding maintenance agreement; and
- whether wrongful conduct, such as the unlawful removal or retention of a child (*i.e.* abduction) in another jurisdiction, should disqualify an otherwise qualified claimant from enjoying the benefits of the new instrument.

[237] Article 5(2). *See* above at paragraph 108.

[238] *See De Cavel* v. *De Cavel* (No 2) [1980] *ECR* 731, and *Van den Boogaard* v. *Laumen*, C-220/95 decided 27 February 1997.

[239] *See* the responses to question 33(l) of the Questionnaire. Responses to this question were largely in favour of inclusion. A view was expressed that foreign public bodies should have sufficient means to vindicate their rights by their own means, and a concern was expressed about making legal aid available to public bodies.

CHAPTER VIII CONCLUSIONS

184. The project to establish a new global instrument on the international recovery of child support and other forms of family maintenance has the potential to benefit many thousands of dependent persons, children and adults, in countries all around the world. It may also indirectly assist national exchequers by reducing dependency on state welfare payments.

185. The work carried out in previous Special Commissions has shown that there are many respects in which the international system for the recovery of maintenance, based as it is on a configuration of multilateral, regional and bilateral arrangements, needs to be improved. It is excessively complex; provisions for administrative co-operation need to be overhauled and properly monitored; for a variety of reasons, including lack of cost effectiveness, the international system is under utilised and needs to be made accessible to a much wider range of maintenance and child support recipients; the system does not make enough use of the savings in cost and time made possible by the new information technologies; and it does not take into account many important developments that have occurred in national systems, particularly child support systems, which are designed to improve the efficiency with which liability is established and payments are calculated and then enforced.

186. The mandate for the forthcoming negotiations states that the new instrument should be comprehensive in nature. This does not necessarily mean that it should try to resolve every problem. To do this would be impossible and to attempt to do it would be unwise. This Report has at various points suggested that a pragmatic approach should be taken which places concentration on those matters which, from practical experience, are known to be of central importance in establishing an effective international system. Some priorities will need to be established at a fairly early stage in the negotiations. It is already clear that the utmost priority should be attached to establishing an effective system of co-operation between Contracting States, and that another important area is that of recognition and enforcement of maintenance decisions. But some difficult choices will have to be made. For example, it will have to be decided whether the considerable work that would be involved in a general review of applicable law principles would be justified at this stage in the negotiations.

187. The Report has placed some emphasis on the universality of the new instrument. It should be one which is capable of widespread ratification. As always, problems will arise of reconciling the diversity in national systems with the need to establish an effective common system. Experience with the negotiation of other Conventions at The Hague (the Intercountry Adoption Convention of 1993 being a good example) suggests that, where there is agreement on common goals, differences among national systems can generally be reconciled or accommodated. It might be suggested that a primary goal is the establishment of an international system of maintenance / child support recovery which is fair, efficient and effective. Where significant national differences exist, as they do for example in respect of certain rules of jurisdiction, the approach should perhaps be, not to try to achieve uniformity at all costs, but to find practical solutions which will promote the fundamental goal of the Convention. Often the solution will be found within the provisions for co-operation between Contracting States which will form the core of the new instrument.

188. What is needed is an instrument which provides clarity and coherence at the international level. Its structure and provisions should be readily understandable within a multitude of different legal systems and by a variety of professionals – judges, administrators, lawyers and others – who will have the responsibility of implementation at the national level. Excessive detail within the instrument itself will not help to achieve this, and wise decisions will need to be made concerning matters which may be better left for

mention in the Explanatory Report which will accompany the Convention, or for further development through recommendations or guides to good practice as experience of the operation of the new instrument develops. At the same time, on certain matters and especially in the area of administrative co-operation, where at present there exist wide divergences in practice, there will be a need for precision if misunderstanding is to be avoided.

189. Achieving an instrument which is clear and coherent will be only the beginning of a continuing process. Experience with other Hague Conventions which set out systems of administrative or judicial co-operation has demonstrated the importance of continuing "post-Convention" work to ensure widespread ratification, effective and consistent implementation at national level, monitoring and review of the operation of the instrument, and more generally work to build up the networks and the mutual confidence on which the successful operation of the Convention will depend. Thought will need to be given as to how best provisions and structures to support this "post-Convention" work may be built into the instrument itself.