OBLIGATIONS ALIMENTAIRES
MAINTENANCE OBLIGATIONS

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AVANT-PROJET DE CONVENTION SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE

PROJET DE RAPPORT EXPLICATIF

établi par Alegría Borrás et Jennifer Degeling

V E R S I O N P R O V I S O I R E

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HAGUE PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

DRAFT EXPLANATORY REPORT

drawn up by Alegría Borrás and Jennifer Degeling

P R O V I S I O N A L V E R S I O N

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Preliminary Document No 32 of August 2007
for the attention of the Twenty-First Session of November 2007

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I. Background

1. The formal mandate for negotiations on a new Convention on the international recovery of child support and other forms of family maintenance is to be found in the decision taken by the States represented at the Nineteenth Session of the Hague Conference on Private International Law. According to this mandate, the Session:

> *"a) Decides to include in the Agenda for the Twentieth Session the preparation of a new comprehensive convention on maintenance obligation which would build on the best features of the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation, and requests the Secretary General to continue the preliminary work and to convene a Special Commission for this purpose.*
>
> *b) Considers to be desirable the participation of non-Member States of the Conference, in particular signatory States to the* New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, *and requests that the Secretary General make his best efforts to obtain their participation in this work, and 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".*[1]

2. A Special Commission meeting was held in April 1999 to examine the practical operation of the four existing Hague Conventions (the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* (hereinafter "1956 Hague Maintenance Convention"[2]); the *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* (hereinafter "1958 Hague Maintenance Convention"[3]); the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* (hereinafter "1973 Hague Maintenance Convention (Enforcement)"[4]); and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter "1973 Hague Maintenance Convention (Applicable Law)"[5]) as well as the *New York Convention of 1956 on the Recovery Abroad of Maintenance* (hereinafter "1956 New York Convention"[6]).[7] A variety of problems were identified ranging from, on the one hand, a complete failure by certain States to fulfil their Convention obligations, particularly under the 1956 New York Convention, to, on the other hand, differences in interpretation and practice under the various Conventions. These differences related to such matters as the establishment of paternity, locating the defendant, approaches to the grant of legal aid and the payment of costs, the status of public authorities and of maintenance debtors under the 1956 New York Convention, enforcement of index-linked judgments, the question of the cumulative application of the Conventions and detailed matters such as mechanisms for transferring funds across international frontiers.

3. There was clearly disappointment at the 1999 Special Commission meeting that many of the problems identified appeared to have remained unresolved despite the attention that had already been drawn to them by the previous Special Commission of 1995. That earlier Special Commission had taken the view that there was no need to consider major reforms of the relevant Conventions. The emphasis was placed on

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[1] Final Act of the Nineteenth Session, 2002, shortly to be published in *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous Matters*.
[2] See list of abbreviations under para. 13 of this Report.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] See "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau, December 1999, and W. Duncan, "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", Prel. Doc. No 2 of January 1999 for the attention of the Special Commission (hereinafter Prel. Doc. No 2/1999).

improving practice under the existing Conventions.[8] This approach was advocated again during the 1999 Special Commission. There was a natural reluctance among delegates to consider further international instruments in an area in which so many instruments already exist. Apart from the four Hague Conventions and the 1956 New York Convention, there are various regional conventions and arrangements, including the Brussels Convention, the Brussels Regulation, the Lugano Convention, the Montevideo Convention and the system that operates among Commonwealth countries, as well as a proliferation of bilateral treaties and less formal agreements.

4. Despite this natural reluctance, the Special Commission of 1999 in the end came down in favour of a radical approach, namely that the Hague Conference should commence work on the elaboration of a new worldwide instrument. The reasons for this conclusion may be summarised as follows:

– disquiet at the chronic nature of many of the problems associated with some of the existing Conventions;

– a perception that the number of cases being processed through the international machinery was very small in comparison with real needs;

– a growing acceptance that the 1956 New York Convention, though an important advance in its day, had become somewhat obsolete, that the open texture of some of its provisions was contributing to inconsistent interpretation and practice, and that its operation had not been effectively monitored;

– an acceptance of the need to take account of the many changes that have occurred in national (especially child support) systems for determining and collecting maintenance payments, as well as the opportunities presented by advances in information technology;

– a realisation that the proliferation of instruments (multilateral, regional and bilateral), with their varying provisions and different degrees of formality, were complicating the tasks of national authorities, as well as legal advisers.

5. The recommendation to begin work on a new worldwide international instrument adopted by the 1999 Special Commission included the following directions:

> *"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."*

6. In carrying out the Decision of the Nineteenth Diplomatic Session, the Secretary General convened a Special Commission which met at The Hague from 5 to 16 May 2003, from 7 to 18 June 2004, from 4 to 15 April 2005, from 19 to 28 June 2006 and from 8 to 16 May 2007. This Special Commission authorised the drawing up of a preliminary draft Convention, which, accompanied by the present Report, will serve as a basis for the discussions at the Conference's Twenty-First Session which is to take place at The Hague from 5-23 November 2007. [add reference to States invited]

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[8] See "General Conclusions of the Special Commission of November 1995 on the operation of the Hague Conventions 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, Prel. Doc. No 10 of May 1996 for the attention of the Eighteenth Session (hereinafter Prel. Doc. No 10/1996).

7. Mr Fausto Pocar, expert from Italy, was elected as Chairman of the Special Commission and Ms Mária Kurucz, expert from Hungary, Mrs Mary Helen Carlson, expert from the United States, and Mr Jin Sun, expert from China, were elected as vice-Chairs. Mrs Alegría Borrás, expert from Spain, and Ms Jennifer Degeling, expert from Australia, were elected as Reporters. A Drafting Committee was constituted under the chairmanship of Mrs Jan M. Doogue,[9] expert from New Zealand. The work of the Special Commissions and of the Drafting Committee was greatly facilitated by the substantial preliminary documents[10] and remarks of Mr William Duncan, Deputy Secretary General, who was responsible for the scientific work of the Secretariat.

8. According to the mandate given by the Special Commission, the Drafting Committee not only met during the Special Commission, but also met from 27 to 30 October 2003, from 12 to 16 January 2004, from 19 to 22 October 2004, from 5 to 9 September 2005, 11 to 15 February 2006 and from 16 to 18 May 2007. Also two meetings by conference calls took place on 28 November and 7 December 2006.

9. A Working Group on applicable law, chaired by Andrea Bonomi (Switzerland) and a Working Group on Administrative Co-operation, convened by Mrs Mary Helen Carlson (United States of America), Ms Mária Kurucz (Hungary) and Mr Jorge Aguilar Castillo (Costa Rica) met several times in person and through conference calls. Also, a Committee on Forms, co-ordinated by the Permanent Bureau, worked in close co-operation with the Working Group on Administrative Co-operation and some meetings and conference calls took place.

10. The Conference's Twenty-First Diplomatic Session entrusted the drafting of the Convention to its second Commission which held …… sittings. Participating in the negotiations, in addition to the delegates of the sixty-six Members of the Conference represented at the Twenty-First Session, observers from …….. other States as well as from …… intergovernmental organisations and ……. non-governmental organisations also took part.

11. It has to be remembered that, for this Convention, it is the first time that, in the final act of the Diplomatic Session[11] in which the agreement to start the drafting of the Convention was adopted, Spanish is mentioned. Notwithstanding, this does not mean a new position for Spanish in the Hague Conference.[12]

12. This report deals with the preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance which was drawn up by the Drafting Committee under the authority of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance for the attention of the Twenty-First Session of November 2007.[13]

II. Abbreviations and references

13. To facilitate and simplify the reference to the different Conventions and instruments throughout this Report, the following abbreviations are used. A short description of the Convention is also included.

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[9] This Committee was made up, in addition to its chairman, by the reporters, as members *ex officio* and the members of the Permanent Bureau, as well as the following experts: Ms Denise Gervais (Canada), Mary Helen Carlson (United States of America), Namira Negm (Egypt), Mária Kurucz (Hungary), Stefania Bariatti (Italy), María Elena Mansilla y Mejía (Mexico), Katja Lenzing (European Commission) and Cecilia Fresnado de Aguirre (Inter-American Children's Initiative) and Messrs Jin Sun (China), Lixiao Tian (China), Robert Keith (United States of America), Jérôme Déroulez (France) Edouard de Leiris (France), Paul Beaumont (United Kingdom), Antoine Buchet (European Commission) and Miloš Haťapka (European Commission).

[10] A full list of the preliminary documents is set out in Annex 1. See, in particular, W. Duncan, "Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 3 of April 2003 drawn up for the attention of the Special Commission of May 2003 (hereinafter Prel. Doc. No 3/2003).

[11] See footnote 6.

[12] In the Special Commission of June 2004 Chile, Argentina and Mexico asked for the incorporation of Spanish as language of the Convention. For Chile, language could be an inconvenience for the exercise of access to justice, which is a human right.

[13] "Revised preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 29 of June 2007 drawn up for the attention of the Twenty-First Session of November 2007.

- **1956 New York Convention** – *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. It is the first Convention in which a system of co-operation of authorities is established. It is not a Convention on enforcement and it can be applied in combination with the 1958 Hague Maintenance Convention or with the 1973 Hague Maintenance Convention (Enforcement) (see Annex 1 of Prel. Doc. No 3/2003[14]).

- **UN Convention on the Rights of the Child** – *New York Convention of 20 November 1989 on the Rights of the Child*. Article 2 of the Convention establishes that the parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. Article 27 refers specifically to maintenance obligations.

- **1956 Hague Maintenance Convention** – *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children*. A great majority of States Party in this Convention are also Parties in the 1973 Hague Maintenance Convention (Applicable Law).

- **1958 Hague Maintenance Convention** – *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*. A great majority of States party in this Convention are also parties in the 1973 Hague Maintenance Convention (Enforcement).– **1973 Hague Maintenance Convention (Applicable Law)** – *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*. According to Article 1, the 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*". The law designated by the Convention (Art. 3) "*shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a Contracting State*".

- **1973 Hague Maintenance Convention (Enforcement)** – *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. Article 1 of the Convention defines the scope of application as does the Hague Convention of the same date on applicable law. The advantage of having two Conventions and not only one is that some States can be Contracting States for one of them and not for the other.

- **Verwilghen Report** – Explanatory Report on the 1973 Hague Maintenance Conventions, by Michel Verwilghen (1975).

- **1980 Hague Child Abduction Convention** – *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.* The experience from the operation of the provisions of this Convention concerning administrative co-operation and the functions of Central Authorities provided a basis on which similar provisions were developed in the new Convention.

- **1993 Hague Intercountry Adoption Convention** – *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. As with the 1980 Convention, the experience from the operation of the provisions of this Convention concerning administrative co-operation and the functions of Central Authorities provided a basis on which similar provisions were developed in the new Convention.

- **1996 Hague Child Protection Convention** – *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, sub-paragraph *e)* excludes "maintenance obligations" from the scope of application of the Convention, an exclusion that is considered as necessary, taking into account the existence of other Hague Conventions and the existing rules in Brussels and Lugano Conventions.[15]

[14] See footnote 10.
[15] Lagarde Report (children), para. 31.

- **Lagarde Report (children)** – Explanatory Report on the 1996 Hague Child Protection Convention by Paul Lagarde (1998).
- **2000 Hague Adults Convention** – *Hague Convention of 13 January 2000 on the International Protection of Adults*. Article 4, paragraph 1, sub-paragraph *a)* excludes "maintenance obligations" from the scope of the Convention, for the same reasons as the 1996 Hague Child Protection Convention.[16]
- **Lagarde Report (adults)** – Explanatory Report on the 2000 Hague Adults Convention (2003).
- **2005 Hague Choice of Court Convention** – *Hague Convention of 30 June 2005 on Choice of Court Agreements*.
- **Brussels Convention** – *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Brussels, Belgium, on 27 September 1968. The original Parties were the six original Member States of what was the European Economic Community. As new States have joined the European Union, as it is now called, they have become Parties to the Brussels Convention. It now applies only between the fourteen old European Union Member States and the Netherlands Antilles and French overseas territories. Maintenance obligations are included in the Convention and the Convention includes a special rule on jurisdiction (Art. 5, para. 2).
- **Lugano Convention** – *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Lugano, Switzerland, on 16 September 1988. It contains similar provisions to the Brussels Convention (it is also called the "Parallel" Convention). The Contracting States to the Lugano Convention are the 15 "old" European Union Member States and Iceland, Norway, Poland and Switzerland. The demarcation between the Brussels and Lugano Conventions is laid down in Article 54 B of the Lugano Convention. It is based on the principle that the Lugano Convention will not apply to relations among the European Union Member States, but will apply where one of the other countries mentioned above is involved. As in the Brussels Convention, maintenance obligations are included in the Lugano Convention. A new revised Lugano Convention will be concluded shortly. The text, as adopted in March 2007, maintains the same rule on maintenance obligations as the Convention of 1988.
- **Brussels I Regulation** – Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It applies among all the European Union except Denmark and replaces the Brussels Convention in the mutual relations between those States to which it applies. The Regulation includes the same rule as in the Brussels Convention. An agreement between the European Community and Denmark has been concluded to apply the provisions of the Brussels I Regulation to the relations of the European Community with Denmark on 19 October 2005, that entered into force on 1 July 2007.
- **Brussels II *bis* Regulation** – Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 on proceedings relating to divorce, legal separation and marriage annulment and those relating to parental responsibility over the children of both spouses on the occasion of matrimonial proceedings.
- **EEO Regulation** – Regulation 805/2004 creates a European Enforcement Order for uncontested claims, which means (Art. 5) that a judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognized and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition. The Regulation, just as the Brussels Regulation, also includes maintenance.

[16] Lagarde Report (adults), para. 32.

– **UIFSA** – The Uniform Interstate Family Support Act (USA) of 1996. Developed by the National Conference of Commissioners on Uniform State Laws to provide for a uniform reciprocal process of the establishment and enforcement of child support obligations, across state lines. Amended in 2001.

- **REIO** – Regional Economic Integration Organisation.

– **REMO** – The "Commonwealth" scheme for recognition and enforcement of maintenance orders including provisional orders is embraced by most of the States of the British 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.

– **Montevideo Convention** – Inter-American Convention on support obligations, adopted in Montevideo, on 15 July 1989. The States Parties in the Convention are Argentina, Belize, Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay and Uruguay (see Annex 2 of Prel. Doc. No 3/2003).[17]

– **"The Convention"** – This refers to the text of the revised preliminary draft Convention (in Prel. Doc. No 29[18]), officially known as the preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

III. General framework

14. The protection of children is one of the main concerns in international co-operation in general and in the Hague Conference on Private International Law in particular. And, in this context, maintenance is a fundamental element. It is true that problems of maintenance obligations can arise from other family relationships, parentage, marriage or affinity. But a great majority of claims related to maintenance obligations involve children.[19] In the period which followed the end of the Second World War three Conventions were concluded on maintenance obligations. Firstly, the 1956 New York Convention. Secondly, in the Hague Conference on Private International Law, the 1956 Hague Maintenance Convention and the 1958 Hague Maintenance Convention. And those Conventions were renewed and broadened by the 1973 Hague Maintenance Convention (Enforcement) and the 1973 Hague Maintenance Convention (Applicable Law).[20]

15. It is worth underlining how the Hague Conference, in recent times, has successfully adopted several Conventions on the protection of children and adults, which include notably modern rules on the co-operation of authorities and of the recognition and enforcement of decisions. These Conventions are the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "the 1980 Hague Child Abduction Convention"[21]), the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter "the 1993 Hague Intercountry Adoption Convention"[22]), 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* (hereinafter "the 1996 Hague Child Protection Convention"[23]) and the *Hague Convention 13 January 2000 on the International Protection of Adults* (hereinafter "the 2000 Hague Adults Convention"[24]). In the meantime, the *New York Convention of 1989 on the Rights of the*

[17] See footnote 10.
[18] See footnote 13.
[19] Without prejudice of the fact that the progressive aging of the population may give rise to a change in those terms.
[20] The Conventions and the Explanatory Report of Michael Verwilghen, *Actes et documents de la Douzième session* (1972), Tome IV, *Obligations alimentaires.* In para. 1 of the Report it is pointed out that "there are few examples in the annals of the legal discipline of subject matter which has been made the subject of so many attempts of unification". Available at < www.hcch.net > under "Publications" then "Explanatory Reports".
[21] See list of abbreviations under para. 13 of this Report.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

Child (hereinafter "the UN Convention on the Rights of the Child"[25]) also entered into force in a large number of States in the world. The current Convention on maintenance is in harmony with the principles in all of these Conventions and can be considered as a significant further step in the protection of children and adults.

IV. General layout of the preliminary draft Convention

16. The title of the preliminary draft Convention – *Convention on the International Recovery of Child Support and other Forms of Family Maintenance* – stresses the main objective of the Convention: to ensure that maintenance obligations are respected even though the creditor and debtor may be in different countries. And, to that end, child support is mentioned in the first place but, in the second place, other forms of family maintenance are also envisaged. In contrast to other Hague Conventions, in particular the 1996 Hague Child Protection Convention, the techniques which are envisaged (such as recognition and enforcement, co-operation) are not mentioned in the title. Besides being a more elegant title, it has the advantage of simplicity and of being distinct from the title of other Conventions on maintenance obligations.

17. The Preamble explains the main concerns and the thinking underlying the preparation of the Convention. A special mention is made of the UN Convention on the Rights of the Child.[26] According to Article 2 of that Convention, the parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. And the Preamble of the preliminary draft Convention specially mentions Article 3 of the UN Convention on the Rights of the Child, which establishes that the best interest of the child shall be a primary consideration, and Article 27, which states the following:

> *"1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*
>
> *2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.*
>
> *3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*
>
> *4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements".*

18. The Convention is divided into nine Chapters: Scope and definitions; Administrative co-operation; Applications through Central Authorities; Recognition and Enforcement; Enforcement by the requested State; Public bodies; General provisions; Final clauses.

19. Chapter I of the Convention (Scope and definitions) includes, firstly, the objects of the Convention. Secondly, Article 2 sets out the material scope of the Convention, discussed at length during the preparation of the Convention. Finally, Article 3 provides some definitions.

20. Chapter II (Administrative co-operation) contains provisions concerning Central Authorities, in particular, their designation, functions and costs. It also provides for requests for specific measures of assistance which are not applications.

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[25] *Ibid.*

[26] In force in 193 States (as of 19 April 2007).

21. Chapter III (Applications through Central Authorities) specifies the types of applications which must be available under the Convention. It also describes the required contents of the applications and the procedures to follow for the transmission, receipt and processing of applications. In addition, Chapter III contains key provisions which are intended to guarantee effective access to procedures under the Convention.

22. Chapter IV includes only one article, Article 15, related to the limit on proceedings.

23. Chapter V (Recognition and enforcement) deals with the recognition and enforcement of decisions, which means the intermediate formalities to which recognition and enforcement of a foreign decision are subject before enforcement *stricto sensu*, which is the subject of Chapter VI (Enforcement by the requested State). Chapter VII (Public bodies) clarifies that for the purpose of recognition and enforcement under Article 10(1), "creditor" includes a public body in certain circumstances.

24. Chapter VIII contains the general provisions, while Chapter IX contains the final provisions.

V. Direct rules of jurisdiction

25. The subject of direct rules of jurisdiction was discussed from the beginning of the negotiations[27] and took place at different moments thereafter. The discussions focussed on the questions of whether the inclusion of uniform rules would bring real and practical benefits to the international system, and whether it was realistic to expect that negotiations on the subject would produce agreement or consensus.[28] There are two important areas of divergence in relation to current approaches to jurisdiction. First, in the case of jurisdiction to make original maintenance decisions, there is the divergence between on the one hand those systems which accepted creditor's residence / domicile without more as a basis for exercising jurisdiction (typified by the Brussels / Lugano and Montevideo regimes), and on the other hand systems which insist upon some minimum nexus between the authority exercising jurisdiction and the debtor (typified by the system operating within the United States). Second, as described under Article 15, in the case of jurisdiction to modify an existing maintenance decision, there is the divergence between systems that adopt the general concept of "continuing jurisdiction" in the State where the original decision was made (see the United States model), and those which on the other hand accept that jurisdiction to modify an existing order may shift to the courts or authorities of another State, in particular one in which the creditor has established a new residence or domicile (see the regional systems mentioned above).

26. The experts considered a number of options, including the following:

a) That the attempt should be made to identify a common core of jurisdictional grounds on which there might be widespread agreement, beginning for example with defendant's forum and submission to the jurisdiction, and then adding a creditor's forum but subject to limitations necessary to satisfy the "due process" concerns of certain States.

b) That a common core of rules might be identified, including creditor's forum, on the basis that this principle is widely accepted, but this might be combined with some kind of opt-out provision for States unable to accept a pure creditor's forum.

c) That the search for uniform principles should be set aside, and concentration should be placed on developing an effective system of co-operation combined with indirect rules of jurisdiction for the purposes of recognition and enforcement of maintenance decisions or orders.

27. At the end of the first meeting of the Special Commission, further to a proposal supported by several experts, an informal working group on direct jurisdiction was

[27] A summary of these discussions can be read in "Report on the First meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5-16 May 2003)", Prel. Doc. No 5 of October 2003, drawn up by the Permanent Bureau, pp. 27-29, paras 86-89 (hereinafter Prel. Doc. No 5/2003).

[28] The discussion took place in the context of the description found in the Report, Prel. Doc. No 3/2003 (*supra* footnote 10), pp. 44-54, paras 103-134.

established[29] to proceed on an exchange of views on the subject.[30] However, since there was no consensus on this issue, the informal working group did not have any mandate to report to the Special Commission or the Drafting Committee.[31]

28. The agreements for and against including in the Convention direct rules of jurisdiction are summarised as follows in the "Report on the First meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5-16 May 2003)"[32] at paragraph 88:

> "*88. The following is a distillation of the arguments expressed during the Special Commission meeting for and against including in the new instrument uniform direct rules of jurisdiction, whether in respect of the exercise of original jurisdiction or in respect of modification jurisdiction.*
>
> *C. In favour of including direct rules of jurisdiction*
>
> *(a) A uniform agreed set of jurisdictional rules would promote the goals of clarity, foreseeability and simplicity.*
>
> *(b) Agreed jurisdictional standards will foster mutual confidence and provide a firm framework on which to build an effective system of administrative co-operation. Administrative authorities will find their work more difficult if they have to deal with foreign systems operating varying jurisdictional standards.*
>
> *(c) Uniform direct rules of jurisdiction provide a firm foundation for a system of recognition and enforcement of maintenance decisions, and make it easier to operate simple and rapid procedures for recognition and enforcement.*
>
> *(d) Uniform rules help to prevent duplication of litigation and the generation of multiple conflicting decisions. While this may not be a serious problem in relation to the exercise of original jurisdiction (especially where child support is concerned), it is a real problem in the context of jurisdiction to modify an existing order. It is difficult to devise rules which regulate modification jurisdiction without at the same time considering the grounds for exercising original jurisdiction.*
>
> *(e) There is likely to be broad agreement in respect of certain heads of jurisdiction, such as defendant's residence (however defined), or submission of the defendant to the jurisdiction. Also, the idea that the residence (however defined) of the creditor should found jurisdiction is very widely accepted.*
>
> *(f) Where there is a situation in which it appears that many or most States would be able to agree on common rules of direct jurisdiction, the opportunity to reflect this in the new instrument should not be lost. The position of a minority of States that cannot join the consensus could be accommodated by an opt-out clause of some sort.*
>
> *(g) If, as appears to be the case, the differences are small in terms of practice between those systems which do and those which do not without qualification accept a creditor's jurisdiction, it ought to be possible to formulate jurisdictional principles which capture the large area of common ground.*
>
> *(h) Uniform rules on jurisdiction in Hague Conventions provide a valuable model for reforms in national systems.*
>
> *D. Against the inclusion of rules of direct jurisdiction*

[29] Co-ordinated by Mr Matthias Heger, from Germany.
[30] See Prel. Doc. No 5/2003, *supra*, footnote 27, at para. 94.
[31] *Ibid*., at para. 147.
[32] *Ibid.*

(a) *The absence at the international level of agreed jurisdictional standards has not in practice been a serious cause of concern, and is not a source of the major shortcomings currently experienced within the international system. For many States, harmonisation of direct rules of jurisdiction excites little interest.*

(b) *Experience has shown that, where different approaches to jurisdiction operate in different systems, where both are supported by principle, and where both seem to work well in practice and give satisfaction within their respective contexts, it may be extremely difficult to reach consensus on a uniform approach.*

(c) *The perceived advantages of a uniform system are not such as to justify the energy and time that would need to be devoted to the search for consensus, which may in any case be futile and may prolong negotiations unnecessarily. There is a danger that attention will be distracted away from the real practical problems, in particular putting in place an efficient and responsive system of administrative co-operation.*

(d) *A system of recognition and enforcement can operate successfully on the basis of indirect rules of jurisdiction, without the need to agree uniform direct rules. See for example the* Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*.*

(e) *The problems of multiple decisions arising from the exercise of modification jurisdiction may be ameliorated by means other than the elaboration of direct rules of jurisdiction, including for example by provisions relating to recognition and enforcement.*

(f) *The establishment of rules of direct jurisdiction at the international level which will inevitably differ in some respects from the rules adopted in regional instruments, raises the complex problem of "disconnection",* i.e. *how to define the borderline between cases coming within the scope of the international and regional instruments respectively.*

(g) *Any disadvantages, in particular for the maintenance creditor, which may arise from the absence of uniform standards of jurisdiction, may be ameliorated by the introduction of an effective and efficient system of co-operation which maximizes the supports offered to the creditor regardless of the country in which the maintenance application is made."*

29. Over time, the balance of opinion among experts favoured leaving aside the general issue of uniform direct rules of jurisdiction. While many experts acknowledged the possible advantages of uniform rules, the preponderant view was that any practical benefits to be derived from uniform rules were far outweighed by the cost of embarking on a long, complex and possibly futile attempt to reach a consensus.[33]

VI. Information technology

30. The Preamble on the preliminary draft Convention states "that the States signatory to the present Convention are […] seeking to take advantage of advances in information technology and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities". In that respect the Convention will invite the use of electronic funds transfers (Art. 31) and will be geared towards the use of cross-border electronic case management and communications systems such as the iSupport software that has been presented on several occasions to the Special Commission during the course of its work.[34]

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[33] *Ibid.*, at para. 88.

[34] The iSupport system is described in Info. Doc. No 1 "Development of an International Electronic Case Management and Communication System in Support of the Future Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance" of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family

31. The system would assist the effective implementation of the Convention and lead to greater consistency in practice in the different countries. The system would help significantly to improve communications between Central Authorities and alleviate translation problems and costs as it could operate in different languages. Such a system could assist the daily operations of the Central Authorities established under the Convention and help to improve standards of case management. The system could also generate the required statistics as part of the means of monitoring the operation of the Convention. In addition to the management and monitoring of cases, the system could provide instructions to banks with regard to electronic transfer of funds and could send and receive secured online communications and applications under the Convention.

32. In order to pave the way to these important developments, the Drafting Committee has taken great care to develop a text that would allow the implementation of technologies without endangering due process principles. In this regard, the Drafting Committee benefited to a large extent from the work of the Forms Working Group that examined the practical issues surrounding electronic communication of Forms and other accompanying documents. The result is a text that avoids as much as possible the use of terms such as "signature" (where what is usually needed is a simple identification), "writing", "original", "sworn", and "certified". Furthermore, exchange of views with the UNCITRAL Secretariat in relation to "authentication" issues helped to inspire new provisions on the transmission of documents and related information. Language has been added to Articles 12(2), 13, 21 and 26, further to the mandate of the Special Commission, to ensure that the language of the Convention is media-neutral, without altering its substance and thereby making possible the swift transmission of documents by the most rapid means of communication available (*i.e.* technology-neutral).

33. The aim of the language under Articles 12(2), 13, 21 and 26, is to ensure in a first stage the swift transmission (whatever the medium employed) of applications, including accompanying documents, between Central Authorities while recognising the need for sometimes making available at a later stage (most often probably for evidence purposes), either at the request of the requested Central Authority (Art. 12(2)), or at the request of the competent authority of the State addressed (Art. 21(3)) or upon a challenge or an appeal by the defendant (Art. 21(3)), a complete copy certified by the competent authority in the State of origin of any document specified under Article 21(1) *a)*, *b)* and *d)*, [and 26(2)].[35]

VII. Article-by-article commentary

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 1 Object[36]

The object of the present Convention is to ensure the effective international recovery of child support and other forms of family maintenance in particular by –

34. The main objective of the Convention is to make internationally effective the recovery of maintenance and to the same end the Preamble underlines that the States

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Maintenance. It is highly inspired by the iChild software which is now being implemented around the world in many Central Authorities under the 1980 Child Abduction Convention.

[35] As a background to this language, the Drafting Committee took on board comments from the UNCITRAL Secretariat to the effect that at this point in time, very few judicial or administrative authorities deliver or accept electronic documents that meet in particular integrity, irrevocability and authentification requirements. Furthermore, where such electronic documents would be transmitted across borders, their in-chain secured electronic transmission through different intermediaries (*e.g.*, the transmission of a decision from a judicial authority in State A to a judicial authority in State B through the requesting and requested Central authorities of States A and B respectively) could either be: a) complex, as the final recipient of the document would need a technology to be able to verify through the chain of communication the authenticity, integrity and irrevocability of the document; or, b) not possible at all, where the two States involved could be using two different electronic communication standards (*e.g.*, Public Key Infrastructures (PKIs)).

[36] Following the most recent Conventions prepared in the Hague Conference (*Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary* (hereinafter "the 2006 Hague Securities Convention"), 2005 Hague Choice of Court Convention) a heading appears following the number of every article, thereby facilitating the readability and comprehension of the Convention.

are "*aware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive, and fair*" for the recovery of maintenance.

35. This Article includes a list of the principal elements in the Convention. The list is not exhaustive, but only enumerates the measures that "in particular" could be adopted, meaning that there may be other possible measures that the States can adopt to improve the way in which the recovery of maintenance is effective.

36. Nothing in this Article precludes "direct requests" for maintenance (Art. 16(5)), but they are not mentioned in the Article. The reason is that it would be misleading to suggest that provision for "direct requests" is a primary object of the Convention.[37] As to direct requests to competent authorities, see Article 34.

Paragraph *a)* establishing a comprehensive system of co-operation between the authorities of the Contracting States;

37. From the beginning of the preparation of the Convention there was a clear desire to establish strong co-operation between the authorities of the Member States, improving the system of the 1956 New York Convention. In this matter, the Hague Conference provides excellent examples with the 1980 Hague Child Abduction Convention and the 1993 Hague Intercountry Adoption Convention.

38. The rule in Article 1 *a)* is linked to the scope of the Convention (Art. 2). In fact, while the system of co-operation based on Central Authorities is established for the purpose of the international recovery of child support, its application to other forms of family maintenance may be limited according to the text of Article 2.

39. In previous drafts of the Convention a reference was made in paragraph *a)* to the fact that the system of the Convention includes the "establishment of parentage when required for such purpose", *i.e.*, where this is necessary for the effective recovery of maintenance. The arguments against this inclusion were that it is difficult in some systems for parentage to be established only for the purpose of maintenance and that the establishment of parentage is often a judicial matter. See the discussion in this Report on Article 6(2) *h)* and on Article 10(1) *c)*. The solution in these Articles makes the reference in Article 1 *a)* no longer necessary. The Convention is not prejudging the effects that the legislation of the State gives to the establishment of parentage. It is an open solution that allows that in every State this question may be solved by the internal law.

Paragraph *b)* making available applications for the establishment of maintenance decisions;

40. This paragraph is intended to underline the fact that the Convention establishes a system of applications for the establishment or recognition of maintenance decisions and for other procedures that could be useful for the effective collection of maintenance. The available applications are set out in Article 10.

Paragraph *c)* providing for the recognition and enforcement of maintenance decisions; and

41. The reference in Article 1 *c)* of the Convention to the recognition and enforcement of maintenance decisions, is to those provisions of the Convention which are designed to facilitate and to simplify the interim measures to which a foreign decision is submitted (what is known as *exequatur* for judgments) before enforcement under national law may take place.[38]

Paragraph *d)* requiring effective measures for the prompt enforcement of maintenance decisions.

42. The Convention is not limited to the traditional procedure of *exequatur*, but also seeks truly to facilitate the execution of the decision, thereby making it effective and this

[37] See "Observations of the Drafting Committee on the text of the preliminary draft Convention", Prel. Doc. No 26 drawn up for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 26/2007), p. 3, under Art. 1.
[38] See comments on Chapter V (Recognition and enforcement).

objective is underlined in paragraph *d)*. But the wording of this provision cannot go further, as specific measures are not required by the Convention. The precise enforcement measures necessary to meet the broad requirements of effectiveness and promptness are a matter for individual Contracting States.[39]

43. This provision may need to be amended if authentic instruments and private agreements are to be covered by the Convention.[40]

Article 2 Scope

44. Article 2 defines the material scope of the Convention in a positive way by stating to which cases it applies. The Article begins by describing the core maintenance obligations to which the whole of the Convention applies (para. 1), followed by the obligations to which the Convention, or parts of the Convention may be extended by declaration (para. 2), adding in paragraph 4, a rule for the application of the Convention to claims by a public body. Finally, the rule of paragraph 3 is in brackets, for the reasons explained below.

Paragraph 1 – This Convention shall apply to maintenance obligations arising from a parent-child relationship towards a child under the age of 21 [including claims for spousal support made in combination with claims for maintenance in respect of such a child] and, with the exception of Chapters II and III, to spousal support.

45. Paragraph 1 describes the core maintenance obligations to which the whole of the Convention applies and these are maintenance obligations arising from a parent-child relationship towards a child under the age of 21. There are no doubts on this point, accepted by all delegations. The effect of the reference to the age of 21 is different from that in other Conventions on the protection of children (1996 Hague Child Protection Convention or the UN Convention on the Rights of the Child) and in the 1973 Hague Maintenance Convention (Enforcement) and Article 1 of the 1973 Hague Maintenance Convention (Applicable Law). It does not mean that States are obliged to modify internal rules if the limit for according maintenance in respect of children is below 21. Nor does it mean that States are obliged to modify the age of majority. Paragraph 1 merely fixes the scope of application of the Convention. The only obligation under the Convention will be to recognise and enforce a foreign decision until this age.[41]

46. During the Special Commission meeting in June 2006, some concerns were expressed about the situation of spousal support under the Convention.

47. Firstly, there is the situation where a claim for spousal support is made in combination with the claim for maintenance in respect of such a child.[42] For the moment, this possibility is kept in brackets as at least for one delegation the Convention's mandatory scope should apply only to children. The words "in combination with" have to be understood as "related" or "linked" to child support, regardless of whether the spousal support is claimed together with the child support, because in some countries spousal support is applied for at the same time as child support but in others not.

48. Secondly, there is the question of the more general application of the Convention to spousal support. After long discussion, it was accepted that the Convention should apply to spousal support, but that the application of Chapters II and III would not be mandatory. That means that the system of administrative co-operation and assistance between the authorities of the Contracting States will not necessarily apply[43] for these cases, but that the system of recognition and enforcement will apply, as well as all the other rules included in the Convention.

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[39] See comments on Chapter VI (Enforcement by the requested State).
[40] See Art. 26.
[41] In this respect, see also comments on Chapter Art. 17(5), para. 502 of this Report.
[42] Report of Meeting No 14, p. 2.
[43] *I.e.* unless the two States concerned have made a declaration extending Chapters II and III to spousal support, in accordance with Art. 58.

Paragraph 2 – Any Contracting State may declare in accordance with Article 58 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

49. Although a broad majority of States were in favour of a large scope of application for the Convention, other States have constitutional problems, related to the internal distribution of competences, that prevent them from accepting the application of the Convention in general to maintenance obligations in respect of any of the specified family relationships or relationships based on affinity, other than maintenance obligations in respect of children.

50. This is why the draft of paragraph 2 includes a rule according to which the States "may" declare the extension of the application of the whole or of any part of the Convention to maintenance obligations in respect of any of those relationships. To this end, a declaration has to be made in accordance with Article 58.

51. Under this rule, such declarations will have reciprocal effect, in the sense that such declarations shall give rise to obligations between Contracting States "only in so far as their declarations cover the same maintenance obligations and parts of the Convention". This rule requires some explanations, as the situations may be different as a result of the different possibilities that are allowed under this provision. No problems arise in the case where the declarations of two Contracting States are exactly the same as to the relationship covered and as to the part of the Convention to be applied. But the situation is more complicated when the declarations are not the same or only one of the Contracting States has made a declaration covered by Article 2.

52. If a Contracting State has made a declaration extending the application of the whole Convention, for example, to a relationship based on affinity, a decision based on such a relationship need not be recognised in another Contracting State that has not made the same declaration. But the State making the declaration must not only accept the applications coming from a Contracting State that has made the same declaration, but may also accept applications coming from Contracting States that have not made such a declaration.

[Paragraph 3 – The provisions of this Convention shall apply to children regardless of the marital status of the parents.]

53. The 1973 Conventions made a reference to maintenance obligations towards "an infant who is not legitimate". In the current text, this has been substituted by "including a maintenance obligation in respect of a child regardless of the marital status of the parents", in line with modern terminology. But this phrase is still in brackets as a consequence of the problems which have arisen for certain countries where laws are based on or influenced by Shariah law.[44]

54. The Drafting Committee had no mandate to delete the words in paragraph 3. Given that no similar words appear in the 1996 Hague Child Protection Convention, it may well be possible to delete them. However, whether the words remain or not, it was the overwhelming view of the Special Commission that the benefits of the Convention should extend to all children without discrimination in line with Articles 2 and 27 of the UN Convention on the Rights of the Child.

Paragraph 4 – The Convention also applies to claims by a public body in respect of maintenance obligations covered by paragraphs 1, 2 [and 3].

55. According to paragraph 4, the Convention not only applies to cases between a maintenance creditor and a maintenance debtor, but also to cases where a public body is claiming the reimbursement of benefits provided in lieu of maintenance, as was also the case in paragraph 1(2) of the 1973 Hague Maintenance Convention (Enforcement).[45] This

[44] See also the debate around Art. 19 *a)* and comments under para. 510 of this Report.
[45] See comments to Art. 33 in this Report.

inclusion is especially useful in that it recognises the important subsidiary role which public bodies may have in ensuring support for maintenance creditors.[46]

56. The inclusion of this rule at the end of the Article serves to indicate that public bodies have the possibility to claim under the Convention for the same cases accepted under paragraphs 1 and 2. This means that if a Contracting State has made a declaration, for example, extending the application of the whole Convention to a maintenance obligation arising from a relationship based on affinity, a public body may, in respect of a State which has made the same declaration, make a claim in respect of such a maintenance obligation in accordance with the rules in Chapter VII. It should perhaps be clarified whether a Contracting State may, while extending the application of the Convention in this way, exclude the provisions of Chapter VII.

Article 3 Definitions

57. Article 3 includes some definitions for the purposes of the Convention. There was lengthy discussion as to whether a definition of "decision" was needed and, in the affirmative, if it should be placed in this Article or in Article 16, at the beginning of Chapter V (Recognition and enforcement). The reason was that this definition is only needed for Chapters V (Recognition and enforcement), VI (Enforcement by the requested State) and VII (Additional provisions relating to public bodies). Another possibility would have been to include the definition of "decision" in Article 3, pointing out that the definition is only for the purposes of Chapters V, VI and VII. The final solution has been to structure Article 16 of the Convention as a "scope-article" for Chapters V, VI and VII, specifying what is included, for the purposes of the Convention, under the term "decision".

58. A definition of "maintenance obligations" was not considered necessary. In favour of the inclusion of such a definition it was argued that it might be possible to refuse assistance for the recovery of arrears by arguing that they are not included in the scope of the Convention, even if the internal law allows this. But such a definition is not needed because Article 16(1) (definition of "decision")[47] makes clear that the recovery of arrears is covered by the Convention. In consequence, there was no need to repeat in Article 10(1) that an application for arrears is an available application.

59. There was prolonged discussion of whether definitions were needed of "habitual residence" or "residence". In the end it was decided that this was not necessary in Article 3. A partial definition of "residence" appears in Article 9, the only place in the Convention where "residence" is used as the connecting factor. For an explanation, see below under Article 9 of this Report.

60. As for "habitual residence" some suggestions have been made by delegations to include a definition in a positive sense[48] or in a negative one.[49] The main question was to ascertain if there are reasons for changing the term "habitual residence", which appears in the Hague Conventions on the protection of children, in particular, the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, to "residence". In the end, it was decided that "habitual residence" was still an appropriate connecting factor for the purposes of recognition and enforcement, and that no definition should appear in the Convention. For further explanation, see below at paragraph 476 of this Report under Article 17.

61. The possibility of including a definition of "requested State" and of "requesting State" has been proposed.[50] Doubts arose from the fact that in the recent *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter "the 2005 Hague Choice of

[46] In connection with this rule, see Art. 33.
[47] See comments to Art. 16, under para. 467 of this Report.
[48] See Work. Doc. No 68, from the European Community, in which "residence" includes habitual residence and domicile but shall exclude the short term presence and the proposal of the United States in Work. Doc. No 45.
[49] See Work. Doc. No 75 from the delegation of Switzerland, in which "residence" shall not include a short term [occasional] presence in the State concerned.
[50] See Work. Doc. No 45 from the United States of America.

Court Convention"[51]) it was decided not to have such definitions in the text of the Convention, but to include them in the Explanatory report, as this has been done in the Report drawn up by M. Dogauchi and T.C. Hartley on the 2005 Hague Choice of Court Convention.

62. The Special Commission has considered, but up to now avoided, a definition of "maintenance". In addition to periodic payments, maintenance may in different systems for example include capital (lump sum) payments or property transfers.[52] It has not been suggested that maintenance should be restricted to periodic payments. Indeed it appears to be accepted that any monetary or property order may constitute a maintenance order where its purpose is to enable the creditor to provide for himself or herself and where the needs and resources of the creditor and debtor are taken into account in determining what order is appropriate.[53] In the absence of a definition, this approach will be reflected in the Report on the new Convention.

For the purposes of this Convention –

Paragraph *a)* "creditor" means an individual to whom maintenance is owed or is alleged to be owed;

63. The first definition in paragraph *a)* of Article 3 is the definition of "creditor". In general, a creditor means the person who needs the maintenance and it can be a person to whom the maintenance has been awarded or the person who seeks a maintenance decision for the first time. It is helpful that the Convention clarifies this point, in order to avoid any assumption that it is only the person who is beneficiary of a decision who may be considered as a creditor, and not the person who is seeking maintenance for the first time.

64. Although paragraph *a)* does not refer to the position of public bodies, Article 33(1) makes it clear that, for the purposes of applications for recognition and enforcement under Article 10(1), "creditor" includes a "public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in lieu of maintenance".

Paragraph *b)* "debtor" means an individual who owes or who is alleged to owe maintenance;

65. In parallel with the definition of creditor, Article 3 *b)* contains a definition of a "debtor". The debtor is both a person who owes the maintenance and, to cover the case of a first claim for maintenance, is a person who is alleged to owe maintenance.

[Paragraph *c)* "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. This includes assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;]

66. The definition of "legal assistance" was discussed at length at the Special Commission meeting of May 2007, and the definition which now appears in Article 3 *c)* was developed by the Drafting Committee, using as a basis the proposal of Australia and New Zealand in Working Document No 119. It is in square brackets because the particular wording has yet to be considered in Plenary. The meaning of "legal assistance" in the particular contexts of Article 6(2) *a)* and Article 14 is explained in greater detail below, at paragraphs 128-133, 379-381 and 407-409. These explanations make it clear that the question whether specific elements – "such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings" – are or are not included will depend on the context.

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[51] See list of abbreviations under para. 13 of this Report.
[52] For further details, see Prel. Doc. No 3/2003, *supra* footnote 10, at paras 180-182.
[53] This broadly is the approach adopted by the European Court of Justice in defining maintenance in the context of the Brussels / Lugano system. See *De Cavel* v. *De Cavel* (No 2) [1980] ECR 731, and *Van den Boogaard* v. *Laamen*, C-220/95 (27 February 1997).

Paragraph *d)* "agreement in writing" means an agreement recorded in any medium the information contained in which is accessible so as to be usable for subsequent reference.

67. Additional language has been added to different articles of the Convention[54] further to the mandate of the Chair of the Special Commission meeting in June 2006 to the Drafting Committee to ensure that the language of the Convention is media-neutral and without altering the substance (*inter alia*, respecting due process principles and ensuring the swift transmission of documents by the most rapid means of communication available). As the additional language is media-neutral, it would still be adequate in the future, once advances in technology will allow worldwide in chain secured electronic communications. This requires the definition of "agreement in writing", which is included in paragraph *d)*, which has two characteristics. The first, the inclusion of any medium in which the agreement may be recorded. The second, the need to be accessible for subsequent reference.

[54] See Arts 12(2), 13, 21 and 26 and related comments in this Report.

CHAPTER II – ADMINISTRATIVE CO-OPERATION

68. The importance of effective and efficient administrative co-operation for the success of the Convention was recognised at all negotiation sessions during the Special Commission meetings. This is now reflected in the objects of the Convention in Article 1 *a)*.

69. In his report, "Towards a new Global Instrument on the International Recovery of Child Support and other forms of Family Maintenance"[55] William Duncan, Deputy Secretary General, concluded that administrative co-operation "will be an essential, and perhaps the most important, element in the new instrument on the international recovery of maintenance."[56] In discussions in the 2004 Special Commission meeting, a harmonized, or universally consistent, approach to co-operation that used the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* (henceforth the 1956 New York Convention) as a starting point was favoured. To achieve this goal, it became apparent that a clear and detailed list of the Central Authorities' functions would be essential, while maintaining a balance between specificity and flexibility in describing how those functions might be performed.

70. Experts were in agreement that the current system for the international recovery of child support and other forms of family maintenance is excessively complex and that provisions for administrative co-operation need to be overhauled and properly monitored.[57] Effective and efficient administrative co-operation is the corner-stone of this Convention for achieving a simple, low cost and rapid system for the international recovery of child support. The Duncan Report listed the objectives of a modern system of administrative co-operation. It should be: (a) capable of processing requests swiftly, (b) cost effective when comparing administrative costs against amounts of maintenance recovered; (c) flexible enough to allow co-operation between very different national systems; (d) efficient in avoiding unnecessary or complex formalities or procedures; (e) user-friendly, and (f) it should ensure that obligations imposed on Contracting States are not too burdensome.[58]

71. It is evident from other international instruments that maintenance cases to be dealt with according to this Convention will have two distinguishing features, compared with other types of Conventions: first, the exceptionally high volume of cases, and second, the long duration of maintenance cases. Cases involving child support are typically ongoing and drawn out for years. They can potentially be active for 18 years, the entire childhood of the child, and longer if tertiary study is undertaken. The changing circumstances of the parents and children in an 18-year period will undoubtedly lead to the need to modify the original support decision at least once at some point. Administrative and legal intervention and assistance will often be required. Add to these features the complexities thrown up by transborder legal and practical issues, the different requirements of administrative and judicial maintenance systems, as well as the possibility of different laws within one country applying to different family members, and it is evident that there is a need for effective international co-operation, at all stages of the process.

72. The Central Authority functions and application processes described in Chapters II and III of the Convention are intended to address the problems identified in Preliminary Document No 3,[59] namely structural problems, concerning the shortcomings of existing international instruments; organisational problems, concerning lack of co-operation between authorities; and problems of process, concerning inefficient or inadequate procedures for processing applications which cause delays.

73. Practical solutions to these shortcomings were also to be the focus of discussions by an informal Administrative Co-operation Working Group which was established following

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[55] Prel. Doc. No 3/2003.
[56] *Ibid*, p. 13.
[57] *Report on the First meeting of the Special Commission on the International Recovery of Child Support and other forms of Family Maintenance (5-16 May 2003)*, Prel. Doc. No 5/2003, para. 10.
[58] Prel. Doc. No 3/2003, para. 16.
[59] Paras 24-28.

the 2003 Special Commission meeting. The following year, the informal Working Group was given a mandate by the Special Commission to become a fully constituted Hague Special Commission Working Group on the Operational Aspects of Administrative Co-operation (the Administrative Co-operation Working Group). Four Co-convenors were appointed for the Working Group: Mary Helen Carlson (the United States of America), Mária Kurucz (Hungary), Jorge Aguilar Castillo (Costa Rica) and Jennifer Degeling (Australia). Approximately 60 individuals from 18 countries and organisations participated in the Administrative Co-operation Working Group,[60] whose membership was open to States and international organisations participating in the Special Commission.

74. The main goal of the Administrative Co-operation Working Group was "to improve administrative co-operation among those countries that handle international child support and other forms of family maintenance''.[61]

75. The establishment of the Administrative Co-operation Working Group was an innovation for Hague Conference negotiations. In addition, three Sub-Committees were established to consider particular aspects of administrative co-operation: Forms (co-chaired by Shireen Fisher (the United States of America) and Sheila Bird (Australia) who was later replaced by Zoe Cameron (Australia), Country Profiles (co-chaired by Danièle Ménard (Canada) and Elizabeth Matheson (the United States of America)), and Monitoring and Review (co-chaired by Mária Kurucz (Hungary) and initially Margot Bean, and later Ann Barkley (the United States of America)). The work of the Committees led to improvements in the text of the Convention, the development of forms for applications and related procedures, as well as the consideration, at an early stage, of the future requirements for post-Convention monitoring and review.

Article 4 Designation of Central Authorities

Paragraph 1 – A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority.

76. The designation of a Central Authority to discharge the duties that are imposed on it by a Convention is a feature of many modern Hague Conventions.[62] These authorities act as the focal point for international co-operation at the administrative level and are intended to play the primary role in the "comprehensive system of co-operation", one of the objects of the Convention referred to in Article 1.

77. Experience with other Hague Children's Conventions has highlighted the need for new Contracting States to ensure that their implementing measures (their laws, regulations or procedures) for the Convention provide adequate powers and resources for the Central Authority to "discharge the duties that are imposed by the Convention".[63] The term "Central Authority" is not defined. The concept is left open, having regard to differences of capacity and administrative structures of each Contracting State, and taking account of the peculiarities of different legal systems.[64]

78. The act of designating the Central Authority under paragraph 1 does not relieve a Contracting State of its obligations to provide the other important details in accordance with paragraph 3. The words of paragraphs 1 and 2 relating to designation are inspired by similar articles in recent Hague Conventions.[65] However the words as to timing of the

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[60] Prel. Doc. No 5/2003, paras 3 and 5.
[61] *Ibid*, paras 6-7.
[62] See for example, the Hague Conventions of 1980, 1993, 1996 and 2000. The 1956 New York Convention was also innovative in establishing Transmitting and Receiving Agencies to manage the flow of applications.
[63] See the 1980 Hague Child Abduction Convention *Guide to Good Practice: Part I - Central Authority Practice* in "Chapter II – Establishing and consolidating the Central Authority", published by Family Law Publishers for the Permanent Bureau, 2003, and available on the Hague Conference website: < www.hcch.net >.
[64] Suggestions on how, when, where and why a Central Authority may be established are made in the *Guide to Good Practice: Part I Central Authority Practice* referred to in footnote 70.
[65] Art. 6 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the 1980 Hague Child Abduction Convention), Art. 6 of the 1993 *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* (hereinafter the 1993 Hague Intercountry Adoption Convention), Art. 29 of the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter

designation in paragraph 3 – at the time when the instrument of ratification or accession is deposited – follow the model of Article 2 of the 1956 New York Convention.

Paragraph 2 – Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

79. The need for the possibility to appoint more than one Central authority is well understood from the practice of other Hague Conventions. Three categories of governmental arrangements are recognised in paragraph 2 as requiring the option of "more than one Central Authority": Federal States, States with more than one system of law or States having autonomous territorial units. The constitutional division of powers between federal, provincial or autonomous regional governments necessitates the flexibility to appoint multiple Central Authorities.

80. An important feature of this paragraph is to ensure that when multiple Central Authorities are appointed, the Contracting State designates the principal Central Authority to which communications may be sent. Such designation simplifies, clarifies and expedites the process of communication where one Contracting State has multiple Central Authorities. The principal Central Authority to which general communications may be addressed is usually located in a federal or national government office. General communications, such as those from the Permanent Bureau, or another Contracting State, are to be distinguished from applications or requests for assistance, which in some countries are handled at the provincial or regional level. Where there is any doubt, applications can always be sent to the principal Central Authority.

81. While Contracting States are "free to appoint more than one Central Authority", if they do so, they must specify the territorial or personal extent of the functions of each of the appointed Central Authorities. The appropriate time for making this specification is at the time of designating the Central Authority when the instrument of ratification or accession is deposited. The details are to be communicated to the Permanent Bureau in accordance with paragraph 3.

82. States which may extend the operation of the Convention to some of their autonomous territorial units but not to others will need to notify the Permanent Bureau whether communications or applications should be sent directly to the Central Authorities of those territorial units to which the Convention is extended.

Paragraph 3 – The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited. Contracting States shall promptly inform the Permanent Bureau of any changes.

83. Paragraph 3 emphasises the importance of accurate and current information about the name and contact details of Central Authorities, which are necessary for speedy and efficient communications and effective co-operation between authorities. A Contracting State with multiple Central Authorities must inform the Permanent Bureau of the division of functions between these Central Authorities.

84. Paragraph 3 makes the Permanent Bureau the recipient or repositary of information about Central Authority contact details and functions, which are published on the Hague Conference website.[66] It is essential that these be kept up to date, in order to facilitate communications between Contracting States. The responsibility for providing the correct and current information about the Central Authority, and for notifying the Permanent

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the 1996 Hague Child Protection Convention), and Art. 28 of the 2000 *Hague Convention on International Protection of Adults* (hereinafter the 2000 Hague Adults Convention).

[66] < www.hcch.net >.

Bureau of any changes in those details, rests with each Contracting State. In practice, the Central Authority is usually best placed to provide this information.

85. Paragraph 3 imposes an obligation on Contracting States to inform the Permanent Bureau of the Central Authority designations and functions at the time of depositing the instrument of ratification or accession. The timing of the designation is most important. Experience with other Hague Children's Conventions has shown that if it is not done at the time of ratification or accession, there is a risk that a Contracting State will not have a functioning Central Authority in operation when the Convention enters into force for that State. The obligation as to timing was suggested in the Report of the Monitoring and Review Sub-committee in Preliminary Document No 19. It was accepted by delegates at the 2006 Special Commission that the obligation in Article 4(1) to designate the Central Authority needed to be reinforced by the obligation to communicate to the Permanent Bureau, at the time of ratification or accession, the information about Central Authority contact details and functions.

Article 5 General functions of Central Authorities

86. The division of functions in Articles 5 and 6 involves a balance between, on the one hand, the need to define with precision certain Central Authority functions and, on the other hand, the wish to have some flexibility for Contracting States in relation to other functions. This flexibility allows account to be taken of the limitations imposed by the resources and powers given to the Central Authority; at the same time it envisages the possibility of a gradual improvement of services provided by the Central Authority.

87. Article 5 lays down what must be done by Central Authorities in a general sense to achieve the objects of, and ensure compliance with the Convention. Article 5 contains general functions which are imposed directly on Central Authorities, and cannot be performed by or delegated to other bodies. Article 6(1) states what must be done by Central Authorities or other bodies in individual maintenance cases. Article 6(1) contains mandatory functions concerning transmission of applications and the institution of proceedings which may be performed by the Central Authority or by public or other bodies. It is important to emphasise that these functions (in Art. 6(1)) are not discretionary and must be performed comprehensively. They are not functions for which it is sufficient that "all appropriate measures" could be taken. Article 6(2) lists specific mandatory functions which must be performed by Central Authorities or other bodies in individual cases, to the extent permitted by their powers and resources and their internal law.

88. The obligations in Articles 5 and 6 apply to all child support cases. They do not apply to spousal support, such cases being excluded by Article 2(1) from the operation of Chapters II and III. However, Articles 5 and 6 could apply to spousal and other forms of family maintenance if a Contracting State makes an appropriate declaration under Article 58 and referred to in Article 2(2).

Central Authorities shall –

Paragraph *a)* – co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

89. The use of the word "shall" in the chapeau to Article 5 emphasises the mandatory nature of the functions in this Article. Paragraph *a)* requires both international and intra-national co-operation, that is, co-operation between the Central Authorities of Contracting States, as well as the promotion or encouragement of co-operation between authorities within each State. The nature of co-operation envisaged by the words of this paragraph is not specified and may be anything that achieves the purposes of the Convention. Co-operation in relation to the functions in Articles 5, 6 and 7 will be particularly important.

90. The obligation to "co-operate with each other and promote co-operation" in paragraph *a)* highlights the need for and importance of co-operation as a basic positive principle that underpins the regular communications between Central Authorities

concerning the implementation of the Convention generally, or assistance for individual cases.

91. The Central Authority must take an active role to "promote co-operation" amongst the authorities in its State. This obligation implies that the Central Authority must ensure that the competent authorities in its State are informed about the operation of the Convention and their respective roles in it, and how co-operation between them can be fostered or improved.

92. Paragraph *a)* replicates the provisions of Article 30 of the 1996 Hague Child Protection Convention and Article 29 of the 2000 Hague Adults Convention. It is also similar to Article 7 of the 1980 Hague Child Abduction Convention and Article 7 of the 1993 Hague Intercountry Adoption Convention.

Paragraph *b)* – provide information to the Permanent Bureau as to the laws and procedures concerning maintenance obligations in their States;

93. The obligation in paragraph *b)* emphasises the importance for the Convention of the collection of information about the laws and procedures concerning maintenance obligations in each State, and having that information centrally available, for example, on the Hague Conference website. To maintain the value and reliability of this resource, it is important to ensure that the information provided to the Permanent Bureau is always current, and this remains the responsibility of each Central Authority.

94. The information required by paragraph *b)* about laws and procedures is not the same information required by Article 4(3) concerning contact details and functions of authorities. To make the information referred to in paragraph *b)* more concise and accessible, and to present the information in a uniform way, a model Country Profile Form was developed by the Country Profiles Sub-committee of the Administrative Co-operation Working Group.[67] Part III of the Country Profile Form refers to the information required under paragraph *b)* and under Article 51.

95. Experience with other maintenance conventions has shown that a lack of knowledge and understanding of the laws, procedures and administrative requirements in a requested country may lead to pointless applications, delays, or even loss of financial support if, for example, incorrect or inadequate documentation is sent, or documentation is sent to the wrong place, or deadlines for providing information for court hearings, are not met.

96. Experience with other Hague Children's Conventions has shown that knowledge and understanding of other countries' administrative and legal processes and requirements help to build the mutual trust and confidence that lead to better co-operation and more effective implementation of the Convention.

97. Article 5 *b)* may need to be deleted if Article 51 is accepted. Article 51 provides for more specific and detailed information relevant to the operation of Chapter II and III, as well as other parts of the Convention. In addition, Article 51 imposes the obligation to provide the information on the Contracting State, rather than on Central Authorities as in Article 5 *b)*.

Paragraph *c)* – seek as far as possible solutions to difficulties which arise in the application of the Convention.

98. Paragraph *c)* makes clear that Central Authorities must assist, as far as possible, in finding solutions for difficulties arising in the application of any part of the Convention. The formulation "seek solutions" is taken from the Brussels Regulation 1347/2000.[68] It has the advantage of stating positively the obligation to do everything possible to ensure the effective working of the Convention, compared to the negatively stated obligation implied in "eliminating obstacles", the words of a previous draft that were drawn from a

[67] See Prel. Doc. No 31-B/2007. Previous versions of the Country Profile are in Work. Doc. No 5 as well as Prel. Doc. No 15 which also contains a report of the Country Profiles Sub-committee concerning its work in 2004-05 to develop the model form.
[68] Referred to in Work. Doc. No 7 concerning Art. 7.

number of existing conventions, including Article 7 *i)* of the 1980 Hague Child Abduction Convention and Article 7 of the 1993 Hague Intercountry Adoption Convention.

99. The words "in particular, Chapters II and III" were omitted after the words "in the application of the Convention" from the October 2005 draft text[69] as being unnecessarily restrictive. Chapter II (Administrative co-operation) and Chapter III (Applications through Central Authorities) are the two areas for which Central Authorities will have primary responsibility, and therefore they are best placed to assist in identifying and resolving difficulties arising from the application of those parts of the Convention, but their responsibilities should not be seen as being confined to those areas.

100. The word "any" was omitted before "difficulties" in recognition of the fact that its meaning could be misinterpreted and it could create too onerous an obligation for Central Authorities. Only some difficulties could be addressed by Central Authorities, not "any" or "all" difficulties. Other difficulties would have to be addressed by Contracting States. The phrase "as far as possible" also places some limits on the extent of the obligation on Central Authorities to seek solutions. The obligation can only be carried out in accordance with the powers of the Central Authorities.

101. Examples of the difficulties arising in the application of the Convention which Central Authorities could assist in resolving include: identifying legal or procedural problems within their own systems and proposing solutions to the appropriate authority; resolving problems within or between Central Authorities; resolving communication or liaison problems between national agencies or competent authorities; promoting more consistent application of the Convention through information sessions for judges, lawyers, administrators and others in the operation of the Convention.

Article 6 Specific functions of Central Authorities

102. Article 6 is an important mechanism to give practical effect to Article 27 of the UN Convention on the Rights of the Child, referred to in the Preamble of the Convention. Article 27 states that an adequate standard of living is a right of the child and indicates where the responsibility for the financial support of children should lie – with parents, or other responsible persons.

103. There are notable differences in the obligations created by Articles 5 and 6(1) and Article 6(2). However, in each Article the obligations are mandatory. In Article 5 the obligations are of a general nature and are imposed directly on Central Authorities. In Article 6(1), the obligations are specific, but may be performed by Central Authorities or by other bodies. In Article 6(2) the obligations are less specific, and allow Central Authorities or bodies more discretion as to how the functions will be performed. Nevertheless, the obligation remains to do everything possible within the powers and resources of the Central Authority to provide the assistance requested. Progressively, Central Authorities may acquire more powers and resources to offer more assistance.[70]

104. Article 6 was one of the most extensively debated articles during the negotiations. This arose principally from the different interpretations attributed to the provision, as well as concerns that Central Authorities should not be expected to act beyond their powers and resources, or be unreasonably burdened with too many functions. At the same time, there was support in Special Commission debates for maintaining a broad range of administrative functions for Central Authorities in child support cases.

105. The functions listed in Article 6 are administrative functions, and the obligations they impose relate to administrative co-operation (with the possible exception of Article 6(1) *b)* – if the Central Authority has the power to "institute proceedings"). Article 6 is not intended to impose any unrealistic "judicial" functions on Central Authorities (see the explanation below for Articles 6(2) *c)* and *g)* of this Report). However, if the carrying out of a function in Article 6 would be improved by applying for judicial intervention, and if the Central Authority has the power to take such a step, this

[69] Prel. Doc. No 16.
[70] See footnote 102.

may be a great benefit to both the child or creditor, and to the requesting State, for example, to locate a debtor or identify his assets.

106. The choice of flexible verbs in Article 6 ("facilitate", "encourage", "help"), as well as the use of the term "all appropriate measures", is deliberate. The language in Article 6 allows Contracting States some flexibility in organising (through Central Authorities or other bodies) the performance of these functions in order to fulfil their responsibilities to the extent possible.

107. Some experts believed that the term "facilitate", used in relation to a number of Article 6 functions, lacked clarity and that it would be preferable to use more concrete terms in order to clearly define the basic functions of Central Authorities. However such an approach ignores the wide divergence in the powers, resources and capabilities of Central Authorities to perform the functions in question.

Paragraph 1 – Central Authorities shall provide assistance in relation to applications under Chapter III. In particular they shall –

108. In the 2005 Special Commission, delegates supported the proposal in Working Document No 46 to move the mandatory functions of transmitting and receiving applications and initiating or facilitating proceedings from the former Article 5 (in Prel. Doc. No 13[71]) to Article 6(1). The purpose of the change was to give Contracting States the freedom to decide by which bodies these responsibilities should be carried out within their State, including the possibility that these tasks might be performed by bodies other than the Central Authorities. At the same time, it was important to preserve the precise nature of the functions as in Article 5. The revised structure of Article 6(1) achieve this purpose in combination with Article 6(3).

109. The chapeau of paragraph 1 imposes two distinct obligations. The first is a direct obligation on Central Authorities to provide assistance with any of the categories of applications in Article 10 and any other procedures described in Chapter III. The second obligation relates to the important functions which are particularised or listed in paragraph 1, and assistance with these functions must be provided. The phrase "in particular" means that the assistance mentioned in Article 6(1) includes, but is not restricted to, transmitting and receiving applications, or initiating or facilitating legal proceedings.

110. The list of functions in Article 6(1) is therefore not exhaustive. As a result of discussions in the 2005 Special Commission, Article 6(1) has become open-ended and Article 6(2) has become a closed list of functions. The "assistance" that must be provided under Article 6(1) in relation to Chapter III applications is not defined. Thus it is conceivable that a requesting State might seek assistance of a kind not mentioned anywhere in the Convention, provided it is in relation to a Chapter III application. Whether the assistance can be provided is always a matter for the requested State to decide. By comparison, the removal of the words "in particular" that appeared in paragraph 2 in the January 2005 draft in Preliminary Document No 13 has made that list (in Art. 6(2)) finite, or closed.

111. Article 6 should be read in conjunction with Article 9 (Application through Central Authorities). It is intended that assistance from Central Authorities under Article 6 be restricted to those cases where requests (in Art. 7) or applications (in Art. 10) are made through Central Authorities. Although it was agreed that a person should not be prevented from applying directly to a court or competent authority under Chapter V for recognition and enforcement of a decision (Art. 15(5)) or under Chapter VIII for other procedures (Art. 34), that person should not be automatically entitled to the assistance of Central Authorities that is mandated in Articles 5, 6 and 7.

Sub-paragraph *a)* – transmit and receive such applications;

112. The transmission and receipt of applications is a specific and firm requirement in sub-paragraph *a)*; it is a primary function of Central Authorities. This is not an obligation

[71] "Working draft of a Convention on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 13 of January 2005 drawn up for the attention of the Special Commission of April 2005 (hereinafter Prel. Doc. No 13/2005).

for which a Central Authority can take "all appropriate measures". The obligation must be carried out comprehensively and the Central Authority must have sufficient powers and resources to do so. This function may be performed by a Central Authority or a public body or other body in accordance with Article 6(3).

113. As stated in paragraph 108 above, the functions in Article 6(1) were moved from an earlier draft of Article 5, because States needed the flexibility to decide themselves how and by whom these functions would be performed. In some States these functions were already being performed effectively by public or other bodies. In such circumstances, it would be counter-productive to the objects of the Convention to require that these functions be performed directly by a Central Authority. However, an important safeguard was added (in Art. 6(3)), ensuring that where these functions were performed by "other bodies", such bodies would be "subject to the supervision of the competent authorities of the State".

Sub-paragraph *b)* – initiate, or facilitate the institution of, proceedings in respect of such applications.

114. Sub-paragraph *b)* is inspired by Article 7 *f)* of the 1980 Hague Child Abduction Convention. In that Convention the phrase "judicial or administrative" is inserted before "proceedings". The provision has not caused any problems of interpretation in that Convention.

115. In some States, the Central Authority itself has the power to commence the legal proceedings ("initiate"). In States whose authorities do not have this power, the Central Authority or designated authority or body must take steps to ensure that legal proceedings are initiated ("facilitate").

116. When the Central Authority "facilitates" a function it means the Central Authority helps to bring it about or to make it happen by taking whatever steps are necessary, but does not usually perform the function itself. Some other person or body performs the function, usually upon the request of the Central Authority. This will usually mean that help is provided to obtain legal representation for the foreign applicant to institute the proceedings. See also the discussion on the meaning of "facilitate" above at paragraph 106 (in relation to Art. 6). The term "facilitate" is also used in Article 6(2) *a)*, *e)*, *f)*, *g)*, *i)* and *j)*.

117. The phrase "initiate or facilitate the institution of proceedings" creates the obligation on the Central Authority or designated body to act upon the applications received, subject to the procedural requirements of Article 12. In a court-based system, if an amicable solution has not been reached under Article 6(2) *d)*, judicial proceedings may have to be instituted. The Central Authority may facilitate this process by requesting the appropriate body or person to initiate the proceedings. In an administrative system, the procedure for making the decision must be commenced. Unlike Article 6(2) *a)* below, which imposes a general obligation to provide legal assistance "where the circumstances so require", the obligation here is specifically to institute whatever proceedings are necessary, whether judicial or administrative, for the particular application in question.

118. Paragraph *b)* should be read in conjunction with Article 14 (Effective access to procedures). Paragraph *b)* should also be read in conjunction with Article 37 which refers to the circumstances in which a power of attorney may be sought from an applicant. At the 2006 Special Commission meeting, Working Document No 83 proposed certain rules to be included in Article 6 concerning the applicant's power of attorney to the requested Central Authority. However, the legal relationship between the applicant and the requested State is a matter for the national law of that State.

Paragraph 2 – In relation to such applications they shall take all appropriate measures –

119. The obligation in Article 6(2) is an obligation in relation to Chapter III applications to take "all appropriate measures" to provide the kinds of assistance listed in sub-paragraphs *a)* to *j)*. It obliges Contracting States to do what is possible within their State. This will be determined by available resources, legal or constitutional restraints, and the manner in which different functions are distributed within the State. It is

expected that only a small number of the listed functions would be requested for any one case. There is no expectation that Central Authorities themselves must perform these functions, as paragraph 3 makes clear.

120. It is not possible to provide absolute clarity about the nature and extent of the functions in paragraph 2. Some experts supported the widest possible interpretation of the phrase "all appropriate measures". Any steps which achieve the objects of the Convention could be included in that interpretation. Every Contracting State has a different national system of laws and procedures that must be accommodated in this international instrument. There must be some flexibility for Contracting States and Central Authorities to decide how the obligations in paragraph 2 can be fulfilled, at the present time and in the future. Article 51(1) *b)* requires Contracting States to provide to the Permanent Bureau a description of the measures it will take to meet the obligations under Article 6(2).

121. Some experts considered the obligations in paragraph 2 were "soft" obligations, even "optional". This is a misunderstanding of the obligation. The word "shall" means there is a strong obligation to "take all appropriate measures". There is flexibility in how an obligation may be carried out, but not whether it is or is not carried out.

122. The phrase "all appropriate measures" is taken from Article 7(2) of the 1980 Hague Child Abduction Convention. A similar phrase "all appropriate steps" is used in Articles 30 and 31 of the 1996 Hague Child Protection Convention. The phrase "all appropriate measures" has been clearly understood in the 1980 Convention to mean any measures that a Central Authority could take to achieve the required result, depending on its own powers and resources, and providing those measures are permitted by the national laws of the Contracting State. This interpretation has not caused any difficulties for Contracting States. On the contrary, practice under the 1980 Hague Child Abduction Convention has improved significantly over time as Contracting States acquired a greater capacity to do certain functions. Such improvements have often been in response to good practices established in other States. The formula has been a flexible one, requiring states to do everything within their powers and resources, allowing them to gradually expand their capacity to carry out these functions, thereby putting into practice the principle of "progressive implementation".[72]

123. By virtue of the flexible language employed in paragraph 2, any Central Authority should, at a minimum, be able to fulfil these obligations by referral of the applicant to another authority, or by advising the applicant of steps he or she needs to take. As a matter of good practice, a Contracting State, at the time of ratification or accession, should ensure its Central Authority or designated bodies have sufficient powers and resources to perform their functions.

124. However, if any of the types of assistance listed in sub-paragraphs *a)-j)* cannot be provided by a Central Authority or other bodies because of a lack of powers and resources, or because such measures contravene the national law, then as long as the applicant is not denied effective access to procedures under Article 14, it is understood that the Central Authority is unable, at that time, to provide that assistance.

125. The phrase "the most effective measures available" was proposed as an alternative to "all appropriate measures". The former appears to be more limiting or restrictive than "all appropriate measures". First, the measures must be "effective", and second, they must be "available". This implies that there should be some guarantee of success through an existing procedure, otherwise the measure will not or need not be taken. Only the most effective measures need be taken. In practice, various measures might have to be taken and only some may be effective. Some Central Authorities could rely on the phrase to opt out of providing any assistance at all, by claiming that there are no effective measures available. They would be pre-judging what might or might not be effective. By comparison, "all appropriate measures" appears to be stronger and more expansive. All measures, if appropriate, shall be taken; Central Authorities can be more proactive in finding appropriate ways to assist. "All appropriate measures" lends itself more

[72] "Progressive implementation" is a key operating principle in the 1980 Hague Child Abduction Convention *Guide to Good Practice: Part I Central Authority Practice*, referred to at footnote 70.

effectively to the principle of "progressive implementation" of the Convention. At the 2006 Special Commission, there was more support for retaining the phrase "all appropriate measures" and no strong objection to it.

Sub-paragraph *a)* – where the circumstances require, to provide or facilitate the provision of legal assistance;

126. Sub-paragraph *a)* aims to address concerns expressed in the 1999 Special Commission that some countries had not ratified the 1973 Hague Maintenance Convention (Enforcement) because of the absence of adequate provisions on legal aid. Furthermore, "without greater harmony in this matter [of a more uniform approach to the provision of legal aid], the efficacy of any re-shaping of the international system of recovery would be diminished."[73]

127. The obligation imposed by sub-paragraph *a)* will not arise in every case. This is clear from the opening words "where the circumstances so require". When the circumstances do so require, the Central Authority or designated body must take steps to ensure that legal assistance is provided. If the Central Authority itself does not provide the service, it must take steps or all appropriate measures to help to obtain it or to ensure that this service is provided by another body or person, to the extent permitted by the laws and procedures in the requested State. This obligation is given additional emphasis by the obligation in Article 14 to provide effective access to procedures. The meaning of "facilitate" is explained under Article 6(1) *b)*.

128. The term "legal assistance" is defined in Article 3 *c)*. It is intended to be an all-encompassing term that may include any kind of legal help, advice or representation that will "enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State". Previous drafts of the Convention text made a distinction between legal advice, legal representation and legal assistance. However, due to the need to accommodate differences in the legal and administrative systems of States, as well as differences in resources, it was agreed in the 2005 Special Commission that the general term "legal assistance" would be preferable, allowing different countries to provide the service according to their structure and resources. As mentioned in paragraph 66 of this Report, the term was discussed again in 2007 and the definition was expanded to give it greater clarity. The revised definition also makes a clearer connection with the overarching obligation in Article 14 to provided effective access to procedures, however that may be achieved.

129. The term "legal assistance" includes "legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". "Legal assistance" of a general nature provided by a Central Authority could be: assistance in preparing an application or obtaining documents; assistance to the applicant in responding to requests from the requested country for more legal information; liaising with the applicant's legal representative in the requested country; exemption from court fees; access to mediation services. There are often legal issues arising in a case that are too complex for an administrative officer to resolve and the assistance of a lawyer is needed. The assistance envisaged under Article 12(1) may also include legal assistance, depending on the circumstances. A private attorney appointed to represent the applicant could also provide legal assistance.

130. Provision of "legal assistance" may include helping to obtain "legal representation". This could mean having a lawyer, attorney or solicitor in the requested country to represent the applicant in and out of court; in legal proceedings or negotiations with the other party; or to provide legal advice specifically in relation to the conduct of the applicant's case in the requested country. In some countries, "legal representation" by the Central Authority will mean legal representation of the claim, not the applicant, and the implications of this should be explained in accordance with Article 51(1) *b)*.

131. The obligation in Article 6(2) should not be interpreted as requiring a Central Authority to find legal representation for an applicant within his or her own country. That is a function of the national legal aid system.

[73] Report and Conclusions of the 1999 Special Commission, December 1999. See footnote 12.

132. Provision of "legal assistance" may include help to obtain "legal advice". This could be legal advice from the Central Authority or legal advice from a private attorney. If the Central Authority is the service provider and is located in a government ministry or department, the Central Authority is unlikely to give private "legal advice" to individuals. "Legal advice" given by the requested or requesting Central Authority in the context of Article 6 is intended to be of a general nature, but which a Central Authority may be best placed to give. For example, advice on how the child support laws operate in that country; advice on how the Convention is implemented nationally or internationally; advice on whether the Convention is the most effective instrument to use in a particular case; advice on whether an amicable solution proposed under Article 6(2) *d)* is acceptable in a particular case. These are matters on which a Central Authority lawyer is likely to have particular knowledge and expertise. Legal advice should not be given by a person who does not have appropriate qualifications and training.

133. Private legal advice of the privileged and protected nature given in an attorney-client relationship could certainly be given by another body (such as a legal aid body) or a private attorney (appointed to represent the applicant) when help is provided to obtain legal representation.

134. The text of sub-paragraph *a)* is drawn from Article 7 *g)* of the 1980 Hague Child Abduction Convention. The interpretation of this provision in the 1980 Convention has not been to impose directly on the Central Authority the responsibility to provide free legal representation or free legal aid. Examples of its implementation in child abduction cases, from a minimum to a maximum level, include: providing a list of lawyers in the requested country; assisting an applicant with an application for legal aid; representing the applicant's claim in legal proceedings. The provision has not caused any problems of interpretation in that Convention.

Sub-paragraph *b)* – to help locate the debtor or the creditor;

135. Assistance in locating debtors or creditors may be needed in two situations: first, either following receipt of an application under Chapter III, when it is known or assumed that the debtor or creditor is in the requested country; or second, before sending an application, it is necessary to establish if the debtor or creditor is in the requested country (see Art. 7(1)). Such assistance is already provided by a number of countries.

136. The majority of requests will presumably be to locate the debtor. However, assistance in locating a creditor may be needed when the creditor is the respondent to an application by the debtor for modification of a decision in accordance with Article 10(2). To provide for this situation, the words "or the creditor" were added to Article 6(2) *b)* by the Drafting Committee in their meeting of September 2006.

137. When a Chapter III application is received, and the debtor's or creditor's whereabouts is not known, the requested Central Authority must do everything possible to locate the debtor or creditor. Whether or not the Central Authority has access to databases of information is irrelevant. The Central Authority knows, in its own country, whether public records such as telephone lists or population registers with personal contact details can be searched, and if not, which public bodies store information about a person's address.

138. The obligation to help locate the debtor or creditor may be subject to the national privacy laws. If the information about the debtor's or creditor's location may not be released because of privacy laws, the requested Central Authority will need to consider what steps could to be taken to obtain the information needed to locate the debtor or creditor. It must be emphasised that the information referred to here is obtained for the purpose of legal or administrative proceedings in the requested State, and not for disclosure to the other parent or the requesting Central Authority. Protection of personal information, obtained for the purposes of this Convention, is guaranteed by Articles 35, 36 and 37. In its implementing measures, a Contracting State will need to balance a child's right to financial support against an adult's right to privacy. However, the UN Convention on the Rights of the Child implies that the child's right should take precedence.

139. The second situation referred to above – establishing if the debtor or creditor is in the requested country before sending an application – is covered by a specific measures request under Article 7. Some countries already confirm that a debtor resides in the country, before advising a requesting Central Authority to send a formal application. For example, in one country, when requested to assist in locating a debtor, the Central Authority would take steps to confirm that the debtor resided in the territory, but would not disclose the debtor's address or other personal information. Upon notification that the debtor is present in that territory, the Central Authority in the requesting state would make a formal application for child support.

140. This example also usefully illustrates the benefits of seeking limited assistance through a request for specific measures in Article 7. It guarantees that the applicant or the requesting country does not spend time and money on preparing an application and paying for translations if the respondent is not in the country addressed.

141. A comparable provision in the 1980 Hague Child Abduction Convention obliges Central Authorities, either directly or through an intermediary, to take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained.[74] This provision has not caused any difficulties in the operation of the 1980 Convention. What is noticeable in child abduction cases is the different level of resources in different countries. Some countries have very sophisticated locate services where abducting parents may be traced through information on government databases, or court orders may be sought to direct other bodies such as banks to disclose certain information.[75] Other countries may not be able to obtain any police assistance if an address for the abducted child is not provided by the requesting country. Just as in a child abduction case it is of fundamental importance to help locate the missing child, so in child support case it is of fundamental importance to help locate the debtor.

Sub-paragraph *c)* – to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

142. The obligation in sub-paragraph *c)* is for the Central Authority to help obtain relevant information about the income and financial circumstances of the debtor or the creditor. Any information sought must be relevant to the purpose of the recovery of maintenance. The words "if necessary" give added emphasis to this principle and were included following a proposal in Working Document No 82. For example, information about the debtor may be needed for the establishment of a judicial or administrative decision in the creditor's country of residence, to be followed by a request for recognition and enforcement in the debtor's jurisdiction. In some countries, the income of the debtor is only one of the relevant details needed to assess the amount of the debtor's obligation to pay maintenance, and information about other financial circumstances will be necessary. The Central Authority might fulfil this obligation by contacting the debtor to request the information voluntarily. Or it may refer the request to another body to perform the function. Or it may refer the request to the Public Prosecutor / State Attorney's Office / Legal Aid Board if legal proceedings are necessary to obtain the information. Information about the creditor's financial circumstances may be requested if a decision is to be established in the debtor's jurisdiction, or if the debtor seeks modification of a decision.

143. The assistance provided for in sub-paragraph *c)* may also be sought in order to establish if it is worth pursuing a claim for maintenance. In that case a specific measures request would be made in accordance with Article 7(1). For example, it is preferable to know in advance if a debtor is receiving welfare or unemployment payments, as it is likely that the debtor would not be ordered to pay maintenance. In such a case, it may not be worth the cost of preparing and translating an application.

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[74] Art. 7 *a)*.

[75] For example, a bank was ordered by a court to disclose the locations where a credit card had been used by an abducting parent, as a way of enabling the police to trace the movements of the parent and eventually to locate the child. In the USA, the Federal Parent Locator Service was developed for domestic purposes but is also available in international cases.

144. If an application to locate assets under sub-paragraph *c)* is successful, the requesting country may then seek assistance under sub-paragraph *i)* (a provisional territorial measure) to freeze the debtor's assets in the requested country, if for example, recognition and enforcement of a maintenance decision is pending in the latter country. Applications under sub-paragraphs *c)* and *i)* could be made simultaneously.

145. The information referred to in sub-paragraph *c)* has in some cases been sought by means of a letter of request, for example, under Article 7 of the 1956 New York Convention, or under the 1970 Hague Evidence Convention. Both these avenues involve a lengthy and more complicated process, which would defeat the aims of speed and simplicity in the present Convention. In paragraph *g)* below, a parallel system of requesting evidence under this Convention is mentioned, to overcome the delays inherent in the existing traditional procedures.

146. Similar concerns about privacy and protection of information mentioned in sub-paragraph *b)* in relation to locating the debtor were expressed about sub-paragraph *c)* in Special Commission debates. Some experts stated that the obligation in sub-paragraph *c)* contravened their principles of banking law and protection of personal information. Other experts stated that such information could only be obtained by a judicial process. One country resolved the issue by amending its legislation to exempt from its privacy and data protection laws any such requests if made in accordance with the Convention.

147. It is emphasised that sub-paragraph *c)* does not impose an obligation on the Central Authority itself to gather the evidence and does not permit Central Authorities to exercise powers which can only be exercised by judicial authorities. But each Contracting State or Central Authority must take steps to help obtain the information.

Sub-paragraph *d)* – to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

148. The primary obligation on Central Authorities in sub-paragraph *d)* is to "encourage amicable solutions" for the payment of child support. This obligation requires the Central Authority to actively promote or encourage the use of methods or procedures which achieve amicable solutions. Voluntary compliance is a desirable outcome in child support cases. It results in fewer demands on the Central Authority for enforcement measures, and avoids the costs and delays involved in judicial proceedings.

149. An important principle concerning the function in sub-paragraph *d)* is that efforts to encourage the voluntary payment of maintenance should not impede the effective access to procedures within the meaning of Article 14.

150. Mediation, conciliation and similar processes were included in the list of Central Authority functions to encourage the consideration of other practical and lasting solutions, especially in intractable cases, that did not involve judicial or legal proceedings. An important condition on the use of mediation, conciliation and similar processes is created by the use of the words "where suitable". For example, if a creditor's opposition to contact or visitation between the debtor and his children results in the debtor defaulting on maintenance payments, this situation could be assisted by mediation. It is generally accepted that while voluntary arrangements can be the most effective solution in some cases, not all cases will be suited to a voluntary resolution or the use of mediation.

151. It is acknowledged that mediation and conciliation may present some logistical difficulties in the context of international child support. Although the possibility of bringing parties together may be remote, the use of audio-visual technology could be explored.

152. The minimum requirements in this function would be to obtain advice about mediation facilities for the parties. Other possibilities include enlisting the aid of an external mediator in an intractable case, or referring the parties to an international mediation service. Sub-paragraph *d)* in no way obliges the Central Authority personnel to conduct or be responsible for the mediation. One Central Authority reported a very high

success rate with a project aimed at getting defaulting debtors to pay child support. Debtors were contacted directly by specially trained personnel to discuss ways of paying both the ongoing maintenance amount and reducing the arrears debt.[76]

153. The word "encourage" was used instead of "facilitate" as some experts believed the latter word may have created an obligation that could not be met in some countries. As voluntary payments and amicable solutions could in some cases amount to the same end result, and could be achieved by mediation, conciliation and similar processes, the two concepts were combined in one provision, when in the previous draft text (in Prel. Doc. No 13/2005) they were separate.

Sub-paragraph *e)* – to facilitate the ongoing enforcement of maintenance decisions including any arrears;

154. The word "facilitate" is used in Article 6(1) *b)* and 6(2) *a)*, *e)*, *f)*, *g)*, *i)* and *j)*. Its meaning is explained above at paragraph 116 (under Art. 6(1) *b)*).

155. The operation of sub-paragraph *e)* will not arise in every case, but is recommended for problem cases of repeat "defaulters". The Convention seeks ways to avoid requiring a creditor to submit frequent applications for enforcement. "Ongoing enforcement" implies a resumption of enforcement measures or efforts should the debtor default on the maintenance payments.

156. The obligation imposed by sub-paragraph *e)* might also be met by providing advice or assistance to a creditor when a debtor defaults regularly on payments; providing closer supervision of problem cases in the Central Authority; removing the debtor's option of voluntary payment and instituting wage withholding. Arrears are included in this provision for two reasons. First, it emphasises that a maintenance decision may be either a decision for arrears only, or a decision for ongoing maintenance and an arrears component. Second, the existence or accrual of arrears means the debtor has already defaulted on the maintenance payments and enforcement is or may be a problem in the particular case.

157. The earlier drafts of this provision referred to "ongoing monitoring and enforcement". The reference to "monitoring" was deleted as it implied to some experts an impossible burden on Central Authorities to monitor and review every case, whether or not enforcement problems arose. The words "which are entitled to recognition" were not added after "maintenance decisions" because the obligation as stated in sub-paragraph *e)* assumes recognition and enforcement has already occurred, but the debtor has defaulted on payment.

158. The Special Commission discussions on this issue highlighted the differences between court-based and administrative systems of child support collection and enforcement. Some experts strongly supported the obligation in sub-paragraph *e)* in the belief that effective control of the enforcement process was crucial for ensuring the recovery of maintenance. Some experts from States with court-based systems believed this obligation would be impossible to meet, and problems with collection or enforcement of maintenance would only be brought to the attention of authorities by creditors.

159. Experts from administrative systems, on the other hand, explained that they tended to have computerised case management systems which allowed faster, more efficient review of case records. Where maintenance payments were being collected and distributed by the administrative authority, any occurrences of non-payment would be apparent immediately through the computerised system. In one country, a notice of non-payment is generated automatically and sent to the debtor as soon as the payment is not received on the due date. A record of recurring non-payments can be created to assist decision-making on appropriate enforcement measures. On-going enforcement can also be easier in administrative systems where a range of enforcement measures, of increasing severity, are available to be implemented administratively, and without the delays common to some court-based systems.

[76] Australian Child Support Agency, "Assessment and Collection of Child Support in International Cases". Info. Doc. for 2003 Special Commission.

Sub-paragraph *f)* – to facilitate the collection and expeditious transfer of maintenance payments;

160. Sub-paragraph *f)* is intended to address existing problems of inefficient methods of collecting and transmitting payments by debtors, resulting in reduced payments to creditors after bank charges and currency conversion fees have been deducted. Inefficiencies also result in delays for creditors receiving payments, even if debtors make regular payments.

161. Electronic banking is now the norm in many countries, and the Convention recognises and encourages the benefits that new technology can bring to expedite maintenance payments to dependent children and parents. Article 31 encourages the use of the most cost-effective and efficient methods to transfer funds.

162. The different methods of electronic transfer of funds and their relative advantages and disadvantages were examined in Preliminary Document No 9, "Transfer of funds and use of information technology in relation to the International Recovery of Child Support and other forms of Family Maintenance".[77]

163. It was claimed this provision is weakened without a reference to collection, as well as transfer of payments.[78] If collection methods are not effective, there will be no funds to transfer, regardless of how expeditious the transfer procedures may be. Enforcement measures for effective collection are mentioned in Article 30(2) and include wage withholding, withholding of tax refunds or pension payments.

Sub-paragraph *g)* – to facilitate the obtaining of documentary or other evidence;

164. The wording of sub-paragraph *g)* has its origins in Article 7 of the 1956 New York Convention. Sub-paragraph *g)* is intended to supplement sub-paragraph *c)* on obtaining information on the income, financial circumstances and assets of the parties. It refers to any information or evidence needed for the recovery of maintenance that does not come within sub-paragraph *c)* or Article 11.

165. The operation of sub-paragraph *g)* may arise, for example, when a creditor who has an existing court order for maintenance needs to obtain an increase in maintenance. If modification of the order has to be sought in the debtor's jurisdiction (for example, because the original order was made there), an application may be submitted under Article 10(1) *e)*. Then the requested Central Authority may require additional evidence for the legal proceedings, such as the cost of living, from the requesting State, and this may be requested under sub-paragraph *g)*. If modification of the order has to be sought in the creditor's jurisdiction, she may request the assistance of her Central Authority to obtain evidence from the debtor's jurisdiction, such as average wage rates or cost of living data, to put before the court in the creditor's jurisdiction. This latter request would be a request for special measures "concerning the recovery of maintenance pending in the requesting State" as permitted by Article 7(2).

166. Opinions expressed during negotiations concerning the obligations of Central Authorities in relation to the obtaining of evidence were divided. Some experts wanted a new procedure in this Convention for obtaining evidence that was rapid and efficient and met the objects of the Convention. Others supported reliance on the traditional channels in the 1956 New York Convention and the 1970 Hague Evidence Convention. As the example above shows, the term "evidence" should be interpreted broadly. It could be any data that is publicly available in the requested State or it could be a document obtainable upon request, or it could be evidence that can only be obtained through a judicial process.

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[77] P. Lortie, "Transfer of funds and use of information technology in relation to the International Recovery of Child Support and other forms of Family Maintenance", Prel. Doc. No 9 of April 2004 drawn up for the attention of the Special Commission of June 2004 (hereinafter Prel. Doc. No 9/2004).

[78] Work. Doc. No 46.

167. A less formal procedure suggested for this Convention for obtaining evidence would operate in parallel to the Hague Conventions on Evidence and Service[79]. This parallel system would only operate for applications and requests under this Convention in order to avoid recourse to other instruments, and provide a quicker process that that provided by the other Conventions. If the procedure in the Hague Evidence and Service Conventions remained the only procedure or the most appropriate procedure available in the requested country, the Maintenance Central Authority could facilitate or help with the use of the these Conventions.

168. For countries which are parties to the Hague Evidence and Service Conventions, and which do not intend to offer a more streamlined procedure under this Convention, no new obligations are imposed on Central Authorities. Requests for Taking of Evidence and Service of Process will continue to be referred to the Central Authority for those Conventions.

169. Concerns were expressed by some delegations about possible conflicts arising with existing Conventions and the operation of sub-paragraphs *g)* and *j)*. Provisions in Articles 44, 45 and 46 dealing with the co-ordination of instruments is intended to address these concerns.

170. The obligation implied by the term "facilitate" is discussed in paragraph 116 (under Art. 6(1) *b)*).

Sub-paragraph *h)* – to provide assistance in establishing parentage where necessary for the recovery of maintenance;

171. The prevailing view during the Special Commission negotiations was that administrative co-operation for assistance with the establishment of parentage was essential to the recovery of maintenance. This was also the majority view from those States which responded to the 2002 Questionnaire.[80] In many countries the establishment of parentage has become so inextricably linked to the establishment of child support that it was felt that its omission from the new Convention would be a retrograde step and a failure to live up to the objective of developing a forward looking instrument. Sub-paragraph *h)* emphasises the necessary connection: that the establishment of parentage must be for the purpose of recovery of maintenance.

172. Some experts were apprehensive that the Central Authority was expected to undertake the genetic testing. The Convention does not in any way oblige the Central Authority to undertake the genetic testing, but instead to provide assistance to the applicant to have the necessary genetic testing procedures performed.

173. Assistance on the question of parentage may be sought under sub-paragraph *h)* in relation to an application under Article 10(1) *c)* or a request under Article 7. When an application is submitted under Article 10(1) *c)*, a Central Authority's obligation under sub-paragraph *h)* will be to take "all appropriate measures" to "provide assistance in establishing parentage".

174. When a request for specific measures to establish parentage is submitted under Article 7(1), assistance under Article 6(2) *h)* must be offered if such measures "are necessary to assist a potential applicant [in making an application under Article 10 or][81] in determining whether such an application should be initiated."

175. In order not to disadvantage a creditor who seeks to establish a maintenance decision in her own jurisdiction and first needs assistance to establish parentage, Article 7(2) provides for such assistance in "a case having an international element concerning the recovery of maintenance pending in the requesting State". When a request is submitted under Article 7(2), the Central Authority "may take specific measures". There is no mandatory obligation to assist and the extent or nature of the assistance is not defined. It is left to each Contracting State to decide on these matters.

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[79] *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (hereinafter the 1965 Hague Service Convention).
[80] Prel. Doc. No 4/2003, para. 61.
[81] See Prel. Doc. No 26/2007 under Art. 7(1): "The addition of the bracketed language might be necessary if reference to Article 6(2) *i)* and *j)* is retained."

176. In the context of sub-paragraph *h)*, "providing assistance" could mean, at a minimum, providing contact details of the laboratories qualified to undertake genetic testing in the requested country, or providing advice to the creditor or the requesting Central Authority about national laws or referring the creditor to the proper authorities. At a higher level of service, it could mean providing assistance in obtaining relevant documents in relation to the establishment of parentage by presumption, acting on a request to contact the putative father to obtain a voluntary acknowledgement of paternity, initiating judicial proceedings for the establishment of parentage, or assisting with arrangements for a voluntary DNA test of the presumed parent.[82]

177. National laws and procedures vary considerably on this question. In some countries, the establishment of parentage is for the "purpose of recovery of maintenance". In other countries, determination of parentage for the "limited purpose" of child support would be impossible due to the "*erga omnes*" effect ("for all purposes") of any such determination. Preliminary Document No 4, "Parentage and International Child Support – Responses to the 2002 Questionnaire and an Analysis of the Issues – April 2003",[83] gives an overview of the different domestic systems for the establishment of parentage,[84] as well as national variations in both procedures and costs.[85] It also examines in detail the possible areas of administrative co-operation.[86] In some countries genetic testing can only be ordered by judicial authorities and would require an international letter of request. Some experts believed the use of international instruments such as the 1970 Hague Evidence Convention was preferable to letters of request, but this would only assist those countries that are party to that Convention. Some States accept an application under the 1956 New York Convention.[87] In other countries, it may be a combination of judicial or administrative processes.[88] Some Central Authorities are willing to contact the debtor to request his voluntary participation in parentage testing. Preliminary Document No 4 indicates that legal aid for genetic testing was available in most countries and the testing was free to those entitled to legal aid if testing occurs in the course of legal proceedings.

178. In the 2005 draft of the Convention,[89] a request for assistance in the establishment of parentage was permitted as a specific measures request under the former Article 7(1). In the 2005 Special Commission, it became clear that there was agreement that the only circumstances in which a request for establishment of parentage would be justified under this Convention was in connection with an application to establish a maintenance decision, and so establishment of parentage became incorporated with Article 10(1) *c)*.

179. Some experts supported retaining in Article 7(1) a provision for the establishment of parentage as a separate specific measures request on the grounds that the establishment of parentage may not lead to the establishment of a maintenance decision as envisaged by Article 10(1) *c)*, but may be followed by the voluntary payment of child support.

180. Other experts opposed the provision of any assistance for the establishment of parentage by Central Authorities on the grounds that this is a private legal matter in their countries which is generally initiated by the claimant and the public authorities of the State would not be able to do this in her place.

[Sub-paragraph *i)* – to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;]

181. A provisional measure referred to in sub-paragraph *i)* might be sought in the State to which an application for the recovery of maintenance has been made, or in another

[82] Prel. Doc. No 5/2003, para. 115.
[83] Drawn up by Philippe Lortie, First Secretary, April 2003.
[84] Paras 3-21.
[85] Paras 13, 23 and 24.
[86] Paras 43 and 44.
[87] Prel. Doc. No 5/2003, para. 112.
[88] See for example, Work. Doc. No 8, which sets out process for establishing parentage in Quebec and Canada.
[89] Prel. Doc. No. 13/2005.

Contracting State in which assets of the debtor are located. Provisional measures include measures to prevent the dissipation of assets, or measures to prevent the debtor leaving the jurisdiction to avoid legal proceedings. It is anticipated that the freezing of the debtor's assets (pending outcome of any legal proceedings) may be the measure most frequently requested under this provision.

182. The measures requested under sub-paragraph *i)* must be both "provisional" meaning interim or temporary, and "territorial in nature", meaning that their effect must be confined to the territory of the requested State (the State which takes the measures). Provisional measures are, by their nature, of limited duration. They should, therefore, be obtainable by the most expeditious procedures, if necessary in an undefended (*ex parte*) hearing. Frequently in maintenance cases speed is of the essence to secure assets located abroad.

183. The measure must also be "necessary" to "secure the outcome of a pending maintenance application". This requirement implies that the Requesting State must justify the request by showing that the measures are indeed necessary for the recovery of maintenance. A maintenance application must be "pending" at the time when assistance under sub-paragraph *i)* is sought. This implies either that an application under Article 10 has already been made to the requested Central Authority, or that there is an internal maintenance application pending in the requesting State.

184. The provisional measures taken in the requested State are intended to help the creditor obtain a successful result ("secure the outcome") in a "pending maintenance application". The words of sub-paragraph *i)* leave open the possibility that a maintenance application could be purely domestic in nature or it could be an international case.[90] Assistance may be sought in relation to current applications under Article 10. A typical situation might begin with a creditor seeking recognition and enforcement of a maintenance decision in the debtor's jurisdiction, where it is known the debtor has assets. In order that enforcement of the order actually results in the recovery of maintenance, the creditor needs to be sure the debtor will not spend, hide or move the assets to avoid his maintenance liability. Sub-paragraph *i)* will assist the creditor to achieve this aim. A specific measures request may also be made under Article 7(1) for provisional territorial measures, when there is no Article 10 application pending for the international recovery of maintenance.

185. Paragraph *i)* is inspired by Article 15(1) of the Inter-American Convention of 15 July 1989 on Support Obligations (the Montevideo Convention).

186. This provision is still in square brackets as some experts required further explanation of the meaning and effect of the provision.

Sub-paragraph *j)* – to facilitate service of documents.

187. At the 2005 Special Commission, some experts supported the proposal in Working Document No 46 to insert a sub-paragraph for the purpose of facilitating service of documents. However, others were opposed on the basis that it was not a Central Authority function and required specialised procedures.

188. The reasons for retaining a provision in this Convention to facilitate service of documents are similar to the reasons given in relation to sub-paragraph *g)* in support of a parallel system of obtaining documentary or other evidence. If another Convention, especially one whose procedures are known to be slow, has to be relied upon for service of documents relating to an application made under this Convention, the objects of this Convention (for the speedy, simple and cost effective recovery of maintenance) will be defeated. Furthermore, not all countries are a Party to the 1965 Hague Service Convention.

189. A further benefit of this provision is that all the documents or requests in relation to a particular maintenance case will pass through one Central Authority in each country.

[90] See the discussion in P. Lortie, "Application of an Instrument on the International Recovery of Child Support and other Forms of Family Maintenance Irrespective of the International or Internal Character of the Maintenance Claim", Prel. Doc. No 11 of May 2004 drawn up for the attention of the Special Commission of June 2004.

Monitoring the progress of applications will be more effective if fewer authorities are involved in the process and procedures under other conventions are not required.

190. The obligation on a Central Authority in sub-paragraph *j)* is to "facilitate" the service of documents. The Central Authority itself is not required to have the documents served; it must help to have the documents served on the respondent in accordance with legal requirements. For example, the Central Authority might send the documents to a private process server, or to the Public Prosecutor (to arrange service) or to the public body which arranges service under the 1965 Hague Service Convention. The comments in relation to sub-paragraph *g)* above concerning the Hague Evidence and Service Conventions are relevant to sub-paragraph *j)*.

Paragraph 3 – The functions of the Central Authority under this Article may, to the extent permitted under the law of that State, be performed by public bodies, or other bodies subject to the supervision of the competent authorities of that State. The designation of any such public bodies or other bodies as well as their contact details and the extent of their functions shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

191. The inclusion of paragraph 3 became necessary after important mandatory functions, which were originally placed in Article 5 were moved to Article 6(1).[91] The purpose of this change was to give greater flexibility to States to decide how mandatory functions will be most effectively performed in their State. Article 6(3) provides that the Central Authority functions listed in Article 6 may be carried out by public bodies and other bodies if the national law permits, but where other (non-public) bodies are appointed to perform functions, they must be supervised by a competent authority.

192. The second part of paragraph 3 makes the Contracting State responsible for informing the Permanent Bureau of the designation or appointment of public or other bodies, and their contact details, as well as any changes to those details.

193. Flexibility in the Convention text was needed to accommodate all national systems, but concerns were expressed that "other bodies" will need to be closely supervised. For example, the privacy of information about individuals must be safeguarded, and if that information is being handled by "other bodies", the individuals concerned and Contracting States need reassurance that proper safeguards are in place.

194. Some experts believed there was a need for absolute clarity in the division of all the responsibilities between Central Authorities, public bodies and other bodies. However, this is not possible if the Convention is to remain flexible and able to accommodate the needs of the varied legal and administrative systems of all the Contracting States. For example, a Central Authority without access to a registry of addresses to locate a debtor could turn to an agency that did have such access. Such co-operation between national agencies or institutions would constitute "taking all appropriate measures" under the Convention, without necessarily implying a true delegation of responsibilities. It would also comply with the obligation in Article 5 *a)* to promote co-operation between competent authorities within the State. Only bodies which are appointed or delegated in a formal sense to perform functions need to be designated under paragraph 3. Bodies or agencies which merely assist a Central Authority to perform its functions, as in the preceding example, should not be designated under paragraph 3.

Paragraph 4 – Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State.

195. Paragraph 4 was inserted to provide clarity about the limits of the requested Central Authorities' powers, and to overcome concerns of some experts at the Special Commission in 2005 that Articles 6 and 7 may appear to impose obligations on Central Authorities that could only be carried out in their countries by judicial authorities.

[91] After discussion at the 2005 Special Commission.

196. Paragraph 4 was agreed upon following a proposal in Working Document No 52. The proposal also included a reference to gathering of evidence by a Letter of Request according to the law of the requested State. This is a judicial function in many countries, but the specific principle was not included in the text as it was considered to be encompassed by the general terms of paragraph 4 as stated here.

Article 7 Requests for specific measures

197. A request for specific measures is a request for limited assistance rather than an application of the kind referred to in Article 10 (Available applications). The request will be made preliminary to, or in the absence of, a formal Chapter III application. Hence it is placed in Chapter II rather than Chapter III. As the assistance to be offered in Article 7 is entirely discretionary, no specific procedures or forms are prescribed for specific measures or requests. One might expect that they would not have the same degree of formality as a Chapter III application.

198. It is useful to recall that an application for limited assistance had been included in Article 10 in early drafts of the Convention.[92] However, concerns were expressed that it could be too burdensome on Central Authorities to be obliged to provide this type of assistance. As a compromise, and to give a treaty basis to this form of limited assistance for those countries wishing and able to provide it, the "application for limited assistance" in Chapter III became the "request for specific measures" in Chapter II. Furthermore, as a discretionary service, no unmanageable obligations are imposed on Central Authorities, and there could be great benefits generated from having a wider range of services available under Article 7(1). Hence a reference to Articles 6(2) *g)*, *h)*, *i)* and *j)* has been added to Article 7(1) but consensus has not been reached on their inclusion.

199. There are at least three possible situations in which a request for specific measures could be made by a Central Authority: (i) a request that is preliminary to an application for the establishment, modification or enforcement of a maintenance decision, for example, a request for assistance made to a Central Authority to verify whether a debtor resides in the State to which the requesting Central Authority wishes to make a maintenance application; (ii) where establishment, modification or enforcement of a maintenance decision is being undertaken in the requesting country and help from the requested country is needed for the proceedings, for example, a request for assistance made to another State to help locate a debtor's assets; and (iii) a request for assistance in the context of a purely internal maintenance matter in which, for whatever reason, there was a need for assistance from another State, for example, in relation to the establishment of parentage or identification of assets abroad. The situation referred to in (iii) is covered by Article 7(2) which is still between square brackets, the plenary not yet having agreed to this provision. It is likely that the most common request for specific measures would relate to Article 6(2) *b)* and location of the debtor. This has the potential to be a significant cost-saving measure. Many Central Authorities and the creditors they are assisting will want to ascertain that a debtor is in fact residing in a particular country before expending time, effort and money in preparing and translating a Chapter III application. Requests under Articles 6(2) *c)* to obtain details of the debtor's income might also be made regularly. Such information will help decide in the early stages if it is worth pursuing a claim.

200. A request under Article 7 must be made through a Central Authority. Paragraph 1 states: "A Central Authority may make a request […] to another Central Authority", and paragraph 2 states "A Central Authority may […] on the request of another Central Authority". This requirement is necessary because Article 9 (Applications through Central Authority) does not apply to Article 7 and it is not the intention to allow applicants to apply direct to a requested State for specific measures.

201. Many experts believed that the type of assistance envisaged by Article 7 was essential to the development of a new and comprehensive system of co-operation in matters relating to the recovery of maintenance. This type of assistance, particularly to

[92] See Art. 11(1) *h)* in Prel. Doc. No 7/2004.

help locate a debtor, was already offered by some countries under the 1956 New York Convention.

202. The part of the chapeau of Article 6(1) which states, "Central Authorities shall provide assistance in relation to applications under Chapter III" does not apply to an Article 7 specific measure request because it is not a Chapter III application. If an application has been made under Article 10, a Central Authority would rely on assistance under Article 6(2) which is mandatory, and not on assistance through specific measures under Article 7.

203. Where a specific measures request for assistance, such as locating a debtor's assets, requires the initiation of legal proceedings or similar judicial action, it is a matter for the requested authority to decide if it is able to take those particular steps. If not, the Central Authority may be able to offer other administrative assistance or advice on how to achieve the purpose of the request. Article 7 in no way compels a Central Authority to take any action for which it lacks the powers and resources.

204. Working Document No 44 described how "requests for specific measures work in the current environment of international co-operation for recovery of maintenance abroad." Working Document No 44 described specific measures as being "limited (often one-time, non-recurring) and can allow a Requested State to provide a Requesting State with assistance in order to enhance the ability of the Requesting State to process its own cases. Specific measures can also be an important step towards an application for recognition and enforcement. There are different specific measures that are used as tools for working cases successfully. One State has found that the provision of specific measures, such as performing "quick locate" (of a person and / or assets), serving process, and identifying and seizing assets across state lines, holds much promise in terms of saving time and enhancing productivity. Another State has determined that specific measures such as discovering the location of the debtor and gaining assistance to obtain income information are essential to successful administrative co-operation. Yet another State has found that through taking specific measures to locate the debtor, time and money can be saved, streamlining the process."

205. The issue of costs for specific measures is dealt with in Article 8(2). How such costs are treated is a matter for the requested State. They could also be the subject of bilateral or reciprocity agreements between States under Article 45(2).

206. The language of Article 7 is forward looking. Countries that already have the ability to meet this obligation at a high level are not restricted in the range of services they may provide. Other countries may still meet their obligations with a reduced level of services, but with the passage of time, if resources improve and laws change, there could be the progressive implementation of a better service.

207. Article 7 must not be misused for "fishing expeditions" or pre-trial discovery. Charging for the service may prevent or limit any misuse. The request for specific measures may only be used in child support cases. In accordance with Article 2 (Scope), spousal support is excluded from the operation of Chapters II and III. Other forms of family maintenance may also be excluded, unless there is a declaration to the contrary (see Art. 2(2)).

208. In earlier drafts (Prel. Doc. No 13), a request for specific measures (or limited assistance as it was then called) had to be "well-founded" and could be made in relation to any function under Article 6. The term "well-founded" was considered to be too subjective as no criteria were included to assist a Central Authority to make the necessary judgment. Furthermore, the extension of the provision to any function in Article 6 was considered to be too broad an imposition on Central Authorities. The operation of the provision was narrowed to make it more acceptable to the majority of experts. One expert noted that these specific measures referred to in Article 7 can already be accomplished on a voluntary basis under the 1956 New York Convention.

Paragraph 1 – A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2) *b)*, *c)*, [g), h), *i)* and *j)*] when no application under Article 10 is

pending. The requested Central Authority shall take such measures if satisfied that they are necessary to assist a potential applicant [in making an application under Article 10 or][93] in determining whether such an application should be initiated.

209. The requirements of the specific measures request which apply to the requesting Central Authority are set out in the first sentence of Article 7(1). The request will be for "appropriate specific measures", it must be supported by reasons, it can only be made in relation to one or more of the functions specified in Article 6(2) *b)*, *c)*, [*g)*, *h)*, *i)* and *j)*], and no Article 10 application needs to have been made or be in preparation. The second sentence of paragraph 1 describes the required response of the requested Central Authority. It must be satisfied, from the reasons given, that the specific measures requested are necessary, to assist in [making or] deciding to make, an Article 10 application. For example, if a creditor seeks assistance in locating a debtor, the creditor should provide sound reasons for believing that the debtor resides in the requested State. The extent of assistance to be provided is whatever may be "appropriate" measures in the requested State. It is for the requested Central Authority to decide what measures are "appropriate" in the circumstances. The Central Authority therefore has discretion to refuse assistance when it is not "satisfied". However, when the Central Authority is "satisfied" it is bound to take appropriate measures. An appropriate measure in Article 7 could be the referral of the request by the requested Central Authority to an appropriate authority. For simplicity the request could be presented in the same format as an Article 10 application, but this is not mandatory.

210. The second sentence of paragraph 1 imposes a necessary connection between the specific measure and the possibility of an application under Article 10. This sentence was added after discussions at the 2005 Special Commission when some delegates felt there needed to be limits imposed on the scope of requests for specific measures. In particular, there was concern about the use of this Article for purposes other than the recovery of maintenance. There was also the desire for specific words to be added to limit such requests to reflect the purposes of this Convention.

211. The second sentence makes clear that the information obtained by the specific measure is intended to assist a person [to make an Article 10 application or] to decide if an Article 10 application should or could be made. There is no compulsion on the person to make such an application following receipt of the information.

212. Hence, upon receipt of a request for specific measures, if satisfied of the connection to a possible Article 10 application, a Central Authority is expected to take appropriate measures and provide a level of assistance and co-operation that is appropriate for that particular request and is in accordance not only with its own powers and resources, but also with its national laws. For example, the request could be for information about the debtor's income that will allow the requesting State to make a maintenance decision that is later to be recognised and enforced in the requested State. For such cases, the language in square brackets in the second sentence would need to be retained.

[Paragraph 2 – A Central Authority may also take specific measures on the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting State.]

213. The pending case to which paragraph 2 refers is an internal case concerning the recovery of maintenance in the requesting State, and for which there was a need for assistance from another State. Article 7(2) is limited to internal cases having an international element and concerning "recovery of maintenance". The words "concerning the recovery of maintenance" were added after negotiations in 2005 to make clear that the scope of this provision was restricted to those cases so described, and not simply to "any" internal case.

[93] Prel. Doc. No 26/2007, p. 3 contains the following under Art. 7(1): "The addition of the bracketed language might be necessary if reference to Art. 6(2) *g)*, *h)*, *i)* and *j)* is retained."

214. Although it was understood that if a request is made to a Central Authority in another Contracting State, there exists already an "international element" in the case, the words "having an international element" were added by the Drafting Committee in its meeting of September 2006 to give greater certainty to the conditions for making a specific measures request concerning an international case.

215. The obligation created by the word "may" in paragraph 2 is a discretionary obligation and not a direct obligation of the kind imposed by the word "'shall" in paragraph 1. The reason for this is that the specific measures referred to in paragraph 2 could be any of the measures in Article 6(2) and are not restricted to those mentioned in Article 7(1).

216. Paragraph 2 could apply even if both the debtor and creditor lived in the requesting State. There are circumstances where information or measures in the requested State, such as the location of assets or evidence from a foreign witness, are needed for legal proceedings in the requesting State. For example, paragraph 2 would permit a specific measures request for provisional territorial measures referred to in Article 6(2) *i)* to be made for a purely internal maintenance claim, but if assets cannot first be secured in the requested state (or another State), it may be pointless for a creditor to proceed with the internal application. As there is a well-established and co-operative network of Central Authorities that can provide administrative assistance, it is logical to use that network even for a purely internal matter, provided it does not create an unacceptable burden on the requested Central Authority.[94]

217. This provision is currently in square brackets and has not been finally agreed upon in negotiations. It would be unfortunate if it were omitted from a Convention whose primary aim is to improve the recovery of maintenance for children. A case, in which international assistance can be provided for a domestic case, through a Central Authority network established under this Convention, resulting in maintenance for a child, should not be outside the scope of this Convention.

218. If a service or function listed in Article 6 is provided in response to a request under Article 7 (when no application is pending), Article 14 does not apply and requests do not attract the same benefits as Chapter III applications, such as effective access to procedures and cost-free services. However, only exceptional costs or expenses for Article 7 requests may be charged for under Article 8(2).

Article 8 Central Authority costs

219. The general principle of Article 8 is that there should be no costs imposed for services provided by the Central Authority. The general principle of cost-free administrative services for applicants and Central Authorities was well supported, and consistent with the Convention's aims for a simple, low cost and rapid procedure.[95] This principle was considered to be particularly important with regard to maintenance for children. It was also considered important to ensure that access to the benefits and services of the Convention was not denied to applicants because of their limited financial circumstances. A number of other important principles underpin Articles 8, as well as Article 14: (a) the need to provide effective access to services and procedures provided under the Convention; (b) ensuring that the burdens and benefits of the Convention are not disproportionate; (c) ensuring a certain level of reciprocity among Contracting States which would contribute to mutual confidence and respect which are necessary for a successful Convention; and (d) the recovery of maintenance should take precedence over the payment of legal and other costs.

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[94] See also Prel. Doc. No 11, "Application of an Instrument on the International Recovery of Child Support and other Forms of Family Maintenance Irrespective of the International or Internal Character of the Maintenance Claim", drawn up by Philippe Lortie, First Secretary, May 2004.

[95] These principles were proposed in Prel. Doc. No 10, "Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and other Forms of Family Maintenance, including Legal Aid and Assistance", drawn up by William Duncan, Deputy Secretary General, with the assistance of Caroline Harnois, May 2004, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance at paras 41-44 (hereinafter Prel. Doc. No 10/2004).

220. The subject of Article 8 is administrative costs of Central Authorities. Legal costs are dealt with in Articles 14(6) – Option 1, 14(5) – Option 2, 16(1) and 40. Article 14 Option 1 or 2 may refer to both types. Article 42 refers to translation costs (an administrative cost). Articles 8, 14, 16(1), 40 and 42 are inter-related and should be read in conjunction with the each other.

Paragraph 1 – Each Central Authority shall bear its own costs in applying this Convention.

221. It is a basic principle that each Central Authority bears its own costs in applying the Convention. This provision derives from Article 26 of the 1980 Hague Child Abduction Convention and Article 38 of the 1996 Hague Child Protection Convention. The possibility is left open for States to enter into bilateral or regional arrangements under Article 45(2) to provide other cost free services on a reciprocal basis.

222. The formulation in paragraph 1 clarifies that a Central Authority may not charge another Central Authority for services and must bear its own costs. It does not limit the possibility of a Central Authority imposing charges on any other person or body apart from the applicant referred to in paragraph 2.

Paragraph 2 – Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention save for exceptional costs or expenses arising from a request for a specific measure under Article 7.

223. Paragraph 2 applies to the Central Authority in both the requesting and requested State. The "applicant" is a person or public body making an application under Article 10. When the applicant is a public body, the same principle of cost-free services applies. There was no support in the negotiations for making any distinction under Article 8(2), in relation to Central Authority services, between individual applicants and public bodies as applicants seeking reimbursement for welfare support payments made to creditors or children. It was considered undesirable to penalise a State by imposing charges simply because that State has provided maintenance to children in advance of recovery from the debtor. However, it should be remembered that a decision has yet to be made whether public bodies may apply for anything other than recognition and enforcement of an existing decision. (See Articles 2(4) and 33.)

224. Although paragraph 2 states that there shall be no charge to the applicant for services provided by the Central Authority, there may be other persons who could be charged for Central Authority services, or ordered by a court to pay costs. For example, a debtor who unsuccessfully opposed the legal proceedings, or the debtor's employer who refused to implement a wage withholding order, could be required to pay administrative costs. Article 40 could refer to the recovery of administrative or legal costs. During negotiations, there was some support for imposing charges for Central Authority services on a debtor. It was said this could encourage the debtor to pay maintenance voluntarily if faced with the prospect of paying other costs.

225. The general principle in paragraph 2 applies to the services or functions of Central Authorities listed in Articles 5, 6, 7 and 12. The specific reference to "their services" in Article 8(2) clarifies that Central Authorities cannot charge for their services but it is possible that a service that has to be provided by a body other than a Central Authority might be charged for. However, a body referred to in Article 6(3) must not charge for services if it is performing functions as the Central Authority.

226. In earlier drafts of the Convention,[96] there was an exception to the general principle set out in Article 8 according to which a charge could have been imposed for additional services or higher level services unless they would interfere with the obligation under Article 14 to provide effective access to procedures.

227. However, that provision was substituted at the 2006 Special Commission by a simpler provision, now in Article 8(2), which exempts the applicant from any administrative charges, while allowing for some charges in relation to requests for specific measures under Article 7. Experts agreed that to allow for the possibility of

[96] Prel. Doc. No 16/2005.

charging for additional or higher level services could have the unintended consequence that some Central Authorities may do less or offer only the minimum services for free while charging for the maximum number of services.[97] It was also recognised that it would be a failure of the Convention if the costs of the procedure prevented a creditor from making a legitimate claim for maintenance.

228. The principle of effective access to procedures set out in Article 14 is thus an overriding principle. An applicant must not be denied effective access to procedures because charges may have to be imposed for some services.

229. If the applicant cannot afford to pay the charges, the requested State must assist the applicant to have effective access to procedures, for example, by assisting the applicant to make an application for legal aid in the requested State if the applicant is eligible to apply and if the legal aid would cover the services in question.

230. The relationship between Articles 6, 8 and 14 needs further explanation. Article 14 (Effective access to procedures) only relates to applications under Chapter III. If a service or function listed in Article 6 is provided or performed by a Central Authority in response to an application under Article 10, the service must be provided free of charge (Art. 8(2)); but if a service is provided by a body that is not the Central Authority and is not performing the functions of the Central Authority, the service may be charged for, provided effective access to procedures is guaranteed. The procedures referred to may be administrative or legal.

231. The experts at the 2005 Special Commission were reminded that the ultimate goal of the Convention is to obtain child support for children, not to provide services. A creditor who gets no child support even if all services are provided free will consider that the Convention has failed in its purpose.

232. In summary, charges may not be imposed: (i) for Central Authority services, on an applicant who makes an application under Article 10 – this may be a creditor, a debtor or a public body (Art. 8(2)); (ii) on a Central Authority (Art. 8(1)).

233. A specific exception to the general rule is that an applicant may be charged for translation costs under Article 42.

234. Charges may be imposed on: (i) an applicant receiving a service provided by a body other than a Central Authority; (ii) a person for whom a request under Article 7 is made, if the costs or expenses are "exceptional".

235. Charges may be imposed by: (i) a body which is providing a service that is not a Central Authority function; (ii) a Central Authority which is providing a service under Article 7 which gives rise to "exceptional" costs or expenses.

236. In the context of paragraph 2, "exceptional costs or expenses" are those which are unusual, out of the ordinary or making an exception to a general rule. The words of Article 8(2) that the Central Authority "may" not impose any charge "save for exceptional costs or expenses" means that the Central Authority has a discretion whether or not it will impose charges in such cases. It is not compelled to impose those charges (as it was when the word "shall" was used instead of "may").

[97] Prel. Doc. No 23 of June 2006 "Comments on the tentative Draft Convention on the International Recovery of Child support and Other Forms of Family Maintenance", received by the Permanent Bureau, for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance, p. 23 (hereinafter, Prel. Doc. No 23/2006).

CHAPTER III – APPLICATIONS THROUGH CENTRAL AUTHORITIES

237. The title of Chapter III and of Article 9 are intended to remove any ambiguity about applications and procedures. Any application made in accordance with Chapter III must be made to and transmitted through the Central Authorities. The applicant must reside in the Requesting State and must apply to the Central Authority of that State. The application must be in the form required by Article 11, and in accordance with the procedures in Article 12.

238. A person who makes an application under Chapter III is entitled to seek the full range of Central Authority services that are listed in Chapter II. These services are only available if an application is made under Chapter III.[98]

Article 9 Application through Central Authorities

An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

239. To make an application in accordance with Article 9, the applicant must apply to the Central Authority in the Contracting State in which he or she resides. Article 9 contains a definition of residence for the purpose of this provision only. The "residence" of the applicant must be more than "mere presence". On the other hand, "habitual residence" is not required; the intention behind the use of simple "residence" is to provide easier access to the Central Authorities and to ensure that it is as easy as possible to apply for the international recovery of child support. A child requires financial support wherever he or she may be living and should not have to satisfy a strict residency test in order to apply for or receive it.

240. The question arises whether an applicant may make an application under Chapter III directly to the Central Authority of another Contracting State. This might occur, for example, where a creditor, who has obtained a decision in the country where he / she resides, and then moves to live in another country, applies directly to the Central Authority in the originating country to have the order enforced. It was agreed that while a Central Authority might, if its internal law permits, accept such an application, this would not be regarded as an application made under Chapter III. The unilateral action of the applicant will not create obligations of co-operation under the Convention between the two countries concerned.

241. It was proposed in Working Document No 83 that Article 9 should regulate the legal relationship between the applicant and the Central Authority by making a power of attorney mandatory. There was some support but no consensus. Some delegates agreed that the relationship could be clarified by requiring a power of attorney. Others stated that the Central Authority may represent neither the applicant nor the requesting State, but be regarded as fulfilling the obligations of the Convention for its own State. The applicant in such case could not direct the Central Authority how to act in the proceedings. It was felt that it would be wrong to impose on all Contracting States a uniform model of how the Central Authority relates to an applicant. Now, Article 39 permits a requested Central Authority to ask for a power of attorney if it acts as legal representative of the applicant.

Article 10 Available applications

242. Article 10 establishes the scope of the Convention in terms of available applications. Where appropriate, different types of application may be made in combination or in the alternative.

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[98] The Convention does not interfere with the rights of any person to apply, outside of this Convention, to another country, for any procedure or remedy available under the law of the other country. See Art. 34.

243. The range of applications in Article 10 reflects the recommendations of the 1999 Special Commission that the Convention should be "comprehensive in nature, building on the best features of the existing Conventions",[99] including for example, the establishment and modification of maintenance decisions as provided for in the 1956 New York Convention.

244. A separate application for recovery of arrears was included in earlier drafts of the Article 10 at Article 10(1) *g)*. At the 2006 Special Commission, the Drafting Committee put Article 10(1) *g)* "recovery of arrears" in square brackets on its own initiative. It was explained by the Chair of the Drafting Committee that recovery of arrears will always be a question of recognition and enforcement of an existing order under which arrears have accrued. Therefore sub-paragraph *g)* was redundant and has now been deleted. The recovery of arrears is provided for in Article 6(2) *e)* concerning ongoing enforcement, and in Article 16(1), where an obligation to pay arrears is explicitly included within the scope of a maintenance decision.

Paragraph 1 – The following categories of application shall be available to a creditor in a requesting State seeking to recover maintenance under this Convention –

245. The opening phrase of the chapeau of Article 10(1) was inserted following discussions at the 2006 Special Commission. The words "The following categories of application shall be available to a creditor" are intended to remove any doubt or ambiguity that a Contracting State must make available to a creditor all the applications listed in Article 10(1). The applications will be determined in accordance with Article 10(3). The applications in paragraph 1 may be subject to the jurisdictional limitations in paragraph 3.

246. Article 10(1) applies exclusively to the creditor. Although the definition of "creditor" in Article 3 refers only to an "individual", Article 33(1) provides that for the purposes of applications for recognition and enforcement of a decision in Article 10(1), a creditor may also be a public body. The chapeau describes the threshold criteria to be met by the creditor when seeking the assistance of a Central Authority under Article 10(1): the applicant must be in the requesting State; the applicant must be the creditor (or a person acting for the creditor) who is seeking to recover maintenance in another Contracting State (the requested State); and the application must be one of the applications described in Articles 10(1) *a)* to *f)*. The application must be made through the Central Authorities in accordance with Article 9.

247. The creditor must be in the requesting State in order to make an application. The choice of the words "in the requesting State" ensured that Article 10 applied equally to individual creditors and to public bodies, and removed the need to define "requesting State" in Article 3 as the place where the applicant has his or her residence and from where the application is made. The term "requesting State" was considered to be self-defining.

248. The words "under this Convention" clarify that the Convention does not exclude the possibility of other procedures being available under internal law (see Article 34).

Sub-paragraph *a)* – recognition or recognition and enforcement of a decision;

249. An application for recognition only, or recognition and enforcement of a maintenance decision, may be made. A decision to which Articles 10(1) *a)* and *b)* apply is a decision as described in Article 16. It may also be a part of a decision as described in Article 18.[100]

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[99] Report and Conclusions of the Special Commission on Maintenance Obligations of April 1999, drawn up by the Permanent Bureau in December 1999, para. 46.

[100] An application for the recognition and enforcement of a maintenance decision may be made under Chapter III, through a Central Authority. Alternatively, a direct application for the recognition and enforcement of a maintenance decision is available in accordance with Arts 16(5) and 34, but this is not a Chapter III application. Central Authority assistance cannot be sought as Chapter II does not apply to such applications. See explanation for Arts 16 and 34.

250. For the purposes of processing an application for recognition or recognition and enforcement of a decision, the question may arise whether the maintenance decision is made by a judicial authority or an administrative authority. If the decision meets the requirements of Article 16, and it is enforceable in the country of origin and is made by the legal authority competent to make such decisions in that Contracting State, it must be recognised and / or enforced, provided the bases for recognition and enforcement in Article 17 are met and the grounds for refusal in Article 19 are not raised.

251. Although the phrase in sub-paragraph *a)* that a decision be "made in a Contracting State" was removed after debate in the 2006 Special Commission, a decision for which recognition, or recognition and enforcement under the Convention is sought, must in accordance with Article 17(1), be a decision made in a Contracting State. However, it need not be a decision of the requesting State. For example, a creditor who was living in country X and obtained a maintenance order there, moves to country Y. The debtor has moved to country Z. Countries X, Y and Z are all Contracting States. The creditor living in country Y can request recognition, or recognition and enforcement in country Z of the decision made in country X.

252. Whether, and if so, how the same rule would apply if the originating jurisdiction is a non-Contracting State was discussed in the Special Commissions in 2005 and 2006. It was agreed that only a decision made in a Contracting State is entitled to recognition and enforcement under Chapter V in the requested State (see Art. 17(1)). On the other hand, Article 10(1) *a)* will allow the transmission of a decision made in a non-Contracting State for recognition and enforcement under the law of the requested State.

253. A particular situation where it has not always been clear in the past where the order is made, concerns provisional orders of the British Commonwealth jurisdictions. The common practice has been that provisional orders are usually made in the creditor's jurisdiction, but have no force and effect until confirmed (with or without modification) by the State addressed, usually the debtor's jurisdiction. Article 27 gives effect to a proposal in Working Document No 81 made by the Commonwealth Secretariat, to resolve the confusion about provisional orders.

254. For the purposes of Article 10(1) *a)*, the Forms Working Group has developed an Application Form for Recognition or Recognition and Enforcement of a decision.[101] The form would be processed in accordance with Article 20 and would be accompanied by the documents listed in Article 21. The form has not yet been approved by the Special Commission as a recommended or mandatory form.

Sub-paragraph *b)* – enforcement of a decision made or recognised in the requested State;

255. An application to enforce a decision made in the requested State is a request to a Contracting State to enforce its own decision. This could be a common request when a debtor resides in the originating jurisdiction and defaults on payment, but a creditor no longer resides (or never resided) in that jurisdiction.

256. The words "or recognised" in sub-paragraph *b)* would also permit an application for the enforcement of a decision already recognised in the requested State, even if it was made in a non-Contracting State. The words "or recognised" in sub-paragraph *b)* will also cover situations such as those where an earlier application to recognise a decision was made when enforcement was not a problem, or where a decision has previously been recognised in the requested State under some other procedure, and not this Convention.

257. The words "or recognised" were added in response to the proposal in Working Document No 47.

Sub-paragraph *c)* – establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage;

[101] "Report of the Forms Working Group – Recommended Forms", Prel. Doc. No 31-B of July 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 31-B/2007), Annex A.

258. Sub-paragraph *c)* permits the creditor to make an application to establish a maintenance decision when no decision exists in any other State. If parentage must be determined before the maintenance decision can be established, that is authorised by sub-paragraph *c)*. An application form for establishment of a maintenance decision[102] has been prepared by the Forms Working Group (see under Art. 11).

259. The establishment of a maintenance decision is already authorised under the 1956 New York Convention. During the negotiations, there were strong arguments in favour of ensuring that "establishment" applications were available under the Convention. Working Document No 47 presented such argument, and stated that "If this Convention does not include the processing of these types of applications as mandatory obligations, then we will be left with a Convention that is limited to recognition and enforcement of existing decisions. That would be a significant step backwards and would severely limit the usefulness of the new Convention." An application under sub-paragraph *c)* is subject to paragraph 3, so that jurisdictional rules of the forum may limit the circumstances in which an application for establishment might be made, and the forum's rules of procedure and substance will govern the proceedings.

260. Many systems allow for the creditor to apply for establishment in the debtor's jurisdiction, and for good reasons. It should be faster and more efficient, as there will be no international requirements to meet for service of process or notification of the respondent and no need for procedures for the recognition and enforcement of foreign judgments. There will be a more accurate assessment of the debtor's ability to pay and a creditor may get more child support; more assets may be available; and further applications for modification are less likely. In addition, authorities in the debtor's jurisdiction may be able to enforce their own decision more quickly and more effectively.

261. The operation of the second part of sub-paragraph *c)* concerning parentage may arise in a situation where a creditor applies for the establishment of a maintenance decision in the debtor's jurisdiction, but the application cannot proceed without proof of parentage. A separate application for the establishment of parentage is not available under the Convention. It can only be requested in connection with a request to establish a maintenance decision. This is the intention of sub-paragraph *c)*. Article 10(1) *c)* was a compromise between those experts who considered it crucial for the Convention to provide assistance to establish parentage and wanted a separate application for establishment of parentage (as appeared in the draft Convention in Prel. Doc. No 13 of January 2005), and those who wanted parentage issues excluded completely from the Convention. Reasons given by some experts for opposing inclusion were that establishing parentage for the restricted purposes of maintenance was against public policy in their jurisdictions, or that the *erga omnes* effect of a decision on parentage prevailed in their jurisdiction, meaning that if parentage is established, it is established for all purposes not just maintenance.

262. The combined effect of sub-paragraph *c)*, read in conjunction with paragraph 3 is that it is a matter for the law of each State to determine the circumstances in which its authorities have jurisdiction to determine parentage and the effect (whether *erga omnes*, or for the purpose of maintenance only) of such determination.

263. The necessary connection between the establishment of a maintenance decision and parentage in sub-paragraph *c)* does not in any way limit the assistance that may be offered under Article 6(2) *h)*. This latter article affirms that in relation to an application under sub-paragraph *c)*, "all appropriate measures" must be taken, according to the national law and "subject to the jurisdictional rules" as mentioned in paragraph 3.

264. The existing rules on the law applicable to the establishment of parentage are variable. They may be: the law of the forum, or the law of the country of domicile or of nationality – of the child or of all the parties, the law applicable to the maintenance decision, or the law of the country of the child's birth.[103]

[102] Prel. Doc. No 31-B/2007, Annex C.
[103] Prel. Doc. No 4/2003, paras 25-33.

265. It should be emphasised that when a requesting state sends an application for recovery of maintenance including establishment of parentage, the Central Authority is not required to and should not send any biological evidence with the initial application. Any necessary evidence will be sought after the application has been accepted.

266. The Convention does not resolve the issue of costs for parentage testing. Each Contracting State should indicate in its Country Profile or in information provided under Articles 5 *b)* or 51 if and how such charges will be imposed in relation to Articles 6(2) *h)* and 10(1) *c)*. However, charges may be imposed for exceptional costs or expenses associated with a request in accordance with Article 7 for parentage testing.

267. The Convention does not create a uniform procedure for the establishment of a decision. Articles 10(1) *c)* and *d)* only refer to available applications. The procedures for dealing with these applications are left to the internal law. The Convention does however create a uniform procedure for recognition and enforcement of a decision in Chapter V.

***Sub-paragraph d)* – establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 17 or on the grounds specified in Article 19 *b)* or *e)*;**

268. An application can be made by a creditor under sub-paragraph *d)* to establish a new maintenance decision when a decision already exists but which cannot or will not be recognised or enforced in the requested state. This rule is confined to cases where the bases for not recognising or enforcing a decision are a lack of jurisdiction under Article 17 or either of the grounds specified in Article 19 *b)* or *e)* have been established.

269. Sub-paragraph *d)* is necessary to alleviate potential injustices, such as the actual case described by an expert where a creditor in country A had a maintenance order from country B which was refused recognition and enforcement in country C, the country of the debtor's residence. Country C also refused an application under the 1956 New York Convention to establish a new decision because a maintenance decision already existed in country B, even though that decision was refused recognition. Moreover, this is not a situation to which the *res judicata* rule applies. If a foreign decision cannot be recognised, the legal effect is that the decision does not exist for the requested State and a new decision can be established. Another example arises when an order for a percentage amount of salary as child support cannot be recognised and enforced because, according to some countries' laws, it is too vague. Fresh proceedings may be necessary to make a new decision with a specific amount.

270. There was strong support in Special Commission discussions and overwhelming support in the 2002 Questionnaire[104] for a rule in the Convention allowing establishment of a decision in the circumstances of sub-paragraph *d)*. It may also be argued that existence of this principle is implicit in Article 17(4).

271. The question arises whether an application under sub-paragraph *d)* can be sent before requesting or obtaining a decision on recognition and enforcement, when it is known in advance that recognition and enforcement will be refused (because the basis of recognition in Article 17 cannot be met). For example, when a decision is obtained on the basis of creditor's jurisdiction, and it is known that such a decision cannot be recognised in the requested country, should time be wasted by going through the formalities to obtain a refusal of recognition? The use of the words "is not possible" imply that there is no obligation in the Convention to first apply for recognition before applying for establishment, when it is known that recognition will be refused. However, the procedure for establishment would usually take longer than the procedure for recognition and enforcement. To avoid losing time, the applicant could submit an application to establish a decision, as well as an application for recognition of the decision, in case the requested country is able to find some other basis for recognition apart from creditor's jurisdiction. However, translation and other costs for two applications could be prohibitive for a creditor.

[104] Noted in Prel. Doc. No 3/2003, p. 16.

Sub-paragraph *e)* – modification of a decision made in the requested State;

272. The issues surrounding modification of a decision were examined in Preliminary Document No 3,[105] and it was 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."[106] The issues were summarised again in the report on the 2003 Special Commission meeting in Preliminary Document No 5.[107]

273. The need for a rule on modification arises from the uncertainty caused by divergent practices, or the problems caused by the existence of multiple conflicting decisions, as well as excessive delays, either with existing co-operation arrangements or with using separate conventions for maintenance, for service of process and for taking of evidence. The existence of procedures for obtaining evidence or serving documents using administrative co-operation in Article 6(2) *g)* and *j)* may assist in minimising delays.

274. Having regard to the existing rule in the 1956 New York Convention, the 2004 Special Commission meeting strongly supported a rule on modification in the Convention and accepted that administrative co-operation is essential for the process. The importance of administrative co-operation to minimise unfairness or inconvenience to either party is emphasised.[108]

275. Sub-paragraph *e)* provides for an application by the creditor to the originating jurisdiction to modify its own decision. The great advantage of modification in the originating country is that that there is only one order in existence, but the person seeking modification (the creditor in this case) will usually need to be assisted or legally represented in the requested State. The physical presence of the applicant in the jurisdiction should not, as a general rule, be required for the legal proceedings.

276. The basis or bases on which modification is allowed is governed by the law of the requested State. Some relevant principles were identified in Preliminary Document No 3.[109] When the creditor seeks modification, it will usually be for an increase in maintenance. The usual rule is that modification is permitted if there has been a material change of circumstances of either the creditor or debtor.

277. The phrase "to the extent permissible under the law of that State" was used in previous drafts in relation to applications in Article 10(1) *e)* and *f)* and (2) *a)* and *b)*. This phrase was deleted as it implied to some experts that it was optional, rather than mandatory for Contracting States to make the applications in question available.

278. The possible difficulties in relation to Commonwealth provisional orders, when a creditor seeks modification of a decision made in a requested State, should not arise in modification cases if the proposed text in Article 27 is accepted. Further, the status of a decision modified by a provisional order under the so-called Commonwealth reciprocal arrangements will be clarified through the rule proposed in Article 27.

Sub-paragraph *f)* – modification of a decision made in a State other than the requested State;

279. Although modification in the originating jurisdiction may be the preferred rule for the majority of cases, the Convention needs flexibility to deal with those cases in which it is necessary or appropriate for the creditor to seek modification in a State other than the originating jurisdiction. Modification in these circumstances is permitted by sub-paragraph *f)*. The decision to be modified could have been made in a Contracting State or a non-Contracting State, but whether it can be modified depends on the law of the requested State. The application must be determined in accordance with Article 10(3).

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[105] Prel. Doc. No 3/2003, Chapter IV, pp. 44-54.
[106] Prel. Doc. No 3/2003, para. 132.
[107] Paras 90-94.
[108] *Ibid.*, paras 92-93.
[109] *Ibid.*, p. 53.

280. If the creditor applies under sub-paragraph *f)* for modification of a decision made in a State other than the requested State, the reason may be that the creditor has moved from the originating jurisdiction, or the creditor remains in the originating jurisdiction and seeks to modify in the debtor's jurisdiction. Alternatively, both parties could have left the originating jurisdiction, and the creditor seeks modification in the debtor's jurisdiction. In any event, the original decision to be modified would need to be entitled to recognition in the requested State if modification is to occur.

Paragraph 2 – The following categories[110] of application shall be available to a debtor in a requesting State against whom there is an existing maintenance decision

281. Paragraph 2 refers to the debtor, the person "against whom there is an existing maintenance decision". The chapeau sets out the threshold criteria to be met by the debtor when seeking the assistance of a Central Authority under paragraph 2: the applicant must be in a Contracting State (the requesting State); the applicant must be the debtor against whom there is an existing maintenance decision; the application must be for modification of that decision. The application must also comply with the rules in Article 15 (Limit on proceedings) which limits the circumstances in which modification by a debtor may be sought. The opening phrase of the chapeau of Article 10(2) was inserted following discussions at the 2006 Special Commission. The words "The following categories of application shall be available to a debtor" remove any doubt or ambiguity that a Contracting State must make available to a debtor all the applications listed in Article 10(2).

282. An application under Article 10(2) is subject to Article 10(3), according to which it is left to the law of the requested State to determine whether, in the particular circumstances, jurisdictional requirements are satisfied, as well as the extent to which modification is possible. The applications in Articles 10(2) *a)* and *b)* are Chapter III applications. They are therefore subject to the general obligation to provide assistance in Article 6 and to provide effective access to procedures in Article 13. It was considered important to give debtors access to services of Central Authorities to help them comply with their maintenance responsibilities in accordance with their ability to pay. Assistance to debtors to modify a decision has the potential to reduce enforcement problems, and consequently, to reduce the burden on Central Authorities. Furthermore, the 1956 New York Convention provides for assistance to both debtors and creditors, and it was agreed that the new Hague Convention should not offer less.

283. There is considerable divergence in existing State practice on this issue, as some countries do not assist debtors and believe there is a conflict of interest in assisting both creditors and debtors. Those experts most concerned about a conflict of interest considered that, for example, when the Central Authority "represented" the creditor for recognition and enforcement proceedings, and then had to "represent" the debtor for modification proceedings, this amounted to a conflict of interest. However, it was said by others that the Central Authority attorney or official does not represent the applicant but the State, in order to fulfil the State's convention obligations. Therefore no conflict of interest should arise by "representing" or assisting both the debtors and creditors.

284. At the 2006 Special Commission, experts considered whether paragraph 2 should provide for the establishment or recognition and enforcement of a maintenance decision by a debtor. Such applications are permitted in some countries, and may assist a debtor to formalise or regularise payments or bring some certainty to his financial situation. Such applications are not prohibited by the Convention.

Sub-paragraph *a)* – modification of a decision made in the requested State;

285. Sub-paragraph *a)* provides for an application by the debtor, to the requested State as the originating jurisdiction, to modify its own order. If the debtor applies for modification of the decision, he is more likely to pay maintenance voluntarily.

[110] Prel. Doc. No 26/2007 notes that "Consideration should be given to the inclusion of an application by the debtor for recognition or for establishment of a decision."

286. The creditor may or may not be in the originating jurisdiction. If the originating jurisdiction modifies the decision, it may at some stage become necessary to request recognition and enforcement of the modified decision in the debtor's jurisdiction should the debtor cease to pay maintenance voluntarily.

287. The general principles regarding modification, explained under Articles 10(1) *e)* and *f)*, are also relevant to Article 10(2) *a)* and *b).*

Sub-paragraph *b)* – modification of a decision made in a State other than the requested State.

288. The circumstances in which a debtor may apply for modification of a maintenance decision are limited by Article 15. Nevertheless, there may be circumstances in which a debtor applies for modification of a decision made in a State other than the Requested State. For example, the original decision is made in the debtor's jurisdiction (country A) while the creditor is in country B. The debtor moves to country B, but the creditor moves back to country A. There is nothing in Article 15 to prevent the debtor applying for modification in country B.

289. In another example, country A is the originating jurisdiction and the creditor resides there. The creditor then moves to country C. The debtor could apply for modification in country C.

Paragraph 3 – Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1 *c)* to *f)* and 2, shall be subject to the jurisdictional rules applicable in the requested State.[111]

290. A requested State will apply its law in determining the applications in Articles 10(1) and (2). It is understood that the "law of the requested State" includes the conflict of laws rules. However, if the Protocol on Applicable Law is adopted, States which accept the Protocol will be bound to follow its rules. Furthermore, the applications in Articles 10(1) *c)-f)* and (2) will be subject to the jurisdictional rules of the requested State. Thus, it is possible that in certain circumstances one of the applications in Article 10(1) *c)-f)* will not be available. For example, if an application is made under Article 10(1) *c)* for the establishment of a maintenance decision in relation to a student child aged 21, the requested State is not bound to admit the application if it does not have jurisdiction to establish a maintenance decision for a child over the age of 18.

291. It is not the aim of the Convention to harmonise the law of international maintenance. However, it is the intention of Article 10 to create an obligation to ensure the same categories of applications are available in every Contracting State. In Article 10, the combined effect of paragraphs 1, 2 and 3 is that all the categories of applications listed in paragraphs 1 and 2 must be made available by each Contracting State.

Article 11 Application contents

292. Article 11 is intended to address the concerns about information and documentation identified in the Report and Conclusions of the 1999 Special Commission,[112] in particular, that receiving agencies often experience difficulties in obtaining a complete dossier, while transmitting agencies often do not know precisely what is required by the receiving agency.

293. The challenge in developing an application process for the Convention was described in Preliminary Document No 3 as being "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

[111] Footnote in Convention text states: "One delegation expressed concern in relation to this paragraph."
[112] Para. 14, and noted in Prel. Doc. No 3/2003, p. 21.

documentary requirements to a necessary minimum; and, how to bring some degree of uniformity or consistency in the documentary requirements of different States."[113]

294. There are many advantages in using model forms, whether mandatory or recommended. Model or standard forms help develop uniform procedures, they foster predictability and certainty for applicants and authorities that will lead to a faster and cheaper service, they reduce translation costs, they allow Central Authorities to communicate more easily with each other on individual cases, and they meet the aims of the Convention for a simple, rapid and low cost procedure. In addition, "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."[114] These advantages were emphasised and enlarged upon by the Forms Working Group in its reports to the Special Commission in 2005 and 2006.[115]

295. A Forms Sub-committee (now the Forms Working Group) was first established by the Administrative Co-operation Working Group (ACWG) in November 2004[116] to prepare draft forms in order to assist the discussion by the Special Commission of Article 10 (Available Applications), Article 11 – Option 1 (Application contents – if no mandatory forms exist) Article 11 – Option 2 (Application contents – if mandatory forms exist) and the former Article 18(3) (now Art. 20), (Procedure on an Application for Recognition and Enforcement). Two application forms were developed for the purpose of Article 10: an Application for Recognition and Enforcement of a decision made in a Contracting State (Art. 10(1) *a)*); and an Application for Establishment of a Decision for Child Support in the Requested State that could be used either where there is no existing decision (Art. 10(1) *c)*) or where recognition and enforcement of a decision is not possible or is refused (Art. 10(1) *d)*). Both Applications have their own Acknowledgment – Progress Report Forms in which specific follow-ups have been identified, as necessary. The application forms for recognition and enforcement were developed to reflect the documentary requirements of Article 21.

296. Although the forms were based on the information requirements in the Convention, some delegates believed the draft Establishment Form was too complex and required detailed information that was unnecessary for the requirements of their State. However, it was emphasised that not every part of the form needs to be completed in every case. Only those questions necessary for the particular type of application being made, and the requirements of the Requested State, would need to be completed.

297. The link was also made between the Country Profiles form (developed by the ACWG Country Profiles Sub-committee), the provision of information about laws, procedures and services required by Article 51, and the use of the forms. The information in Country Profiles could be used to provide the mandatory information (Art. 51(2)) as well as explain which parts of the forms were essential and which were optional for each country. Amendment of the Country Profile will be in accordance with Article 49.

298. The forms were also developed with a view to their use in an electronic environment, including the media-neutral character of the Convention text.

299. Some experts supported the recommendation of the Forms Working Group that the forms be mandatory and emphasised the benefits of using uniform application forms. However, other experts were concerned that if the forms were mandatory this could pose constitutional difficulties for their States particularly if later amendments to the forms were required. Mandatory forms which become a part of the Convention will, if necessary, be amended in accordance with Article 49.

300. A compromise was reached whereby a mandatory cover letter (the Transmittal Form) with only basic information would be used to accompany a recommended (rather than a mandatory) form which contained the detailed information needed to support the

[113] Prel. Doc. No 3/2003, para. 41.
[114] Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999, para. 18.
[115] Prel. Doc. No 15/2005, p. 18 and Prel. Doc. No 17/2006.
[116] In 2005, the Sub-committee on Forms was made an independent Working Group at the Special Commission 2005.

application to the competent judicial or administrative authority (the decision making body) in the requested State. It was acknowledged that the recommended forms would become widely used if Contracting States wanted their applications to be processed quickly. Information or applications presented in other non-standard ways would take longer to process.

301. The Forms Working Group suggested that the Convention also needed to protect any personal information provided in or with applications or requests. To achieve this purpose, Article 35 (Protection of personal information), Article 36 (Confidentiality) and Article 37 (Non-disclosure of information) were drafted. Article 37 was redrafted to ensure that its protections extended to any information about any person (not just the applicant), provided it is gathered for the purpose of the Convention.

302. In Article 11, references to application contents or forms only apply to Article 10 applications, and not to Article 7 requests. As the form of a request is not prescribed, there is nothing in the Convention to prevent a request being submitted in the same format as an application. The information in the request should attract the same protections as Chapter III applications.

Option 1 (if no mandatory forms exist)

303. If forms are not mandatory but recommended, the basic items of information to be included in an application must be listed in the Convention. The chapeau of Article 11(1) states that there will be minimum requirements. Any additional information that will assist the requested authorities or expedite the progress of the application could also be included. The particular information requirements of a Contracting State must be specified by a declaration referred to in Article 11(1) *g)*.

Paragraph 1 – All applications under Article 10 shall as a minimum include –

Sub-paragraph *a)* – the nature of the application or applications;

304. The application should specify to which category of application an Article 10 application belongs: the establishment, modification, or recognition and / or enforcement of a maintenance decision. An application for the establishment of a maintenance decision may require the establishment of parentage as a preliminary step.

Sub-paragraph *b)* – the name and contact details, including the address, and date of birth of the applicant;

305. The name and address of the applicant are essential basic items of information in any application. The contact details (such as telephone number and email address) of the applicant are requested for the purpose of contacting the applicant quickly and cheaply (for example, in order to obtain additional information or to provide progress reports). The Forms Working Group in Preliminary Document 15 notes that the Convention "does not prevent the Central Authority of the Requested State to contact directly the creditor / applicant in the requesting State in order to collect additional information if necessary as is done in practice in a good number of States. If this would be allowed, the Special Commission may want to consider providing some mechanisms in the Working Draft to ensure that the Central Authority of the requesting State is kept informed of these contacts."[117]

306. The date of birth of the applicant is included for consistency with the Transmittal Form annexed to the Convention. The date of birth of the applicant was recommended for inclusion to ensure the accurate identification of the parties, and to prevent any possible confusion between two people of the same name.

307. The address of the applicant should not be disclosed to the respondent in some circumstances where "to do so could jeopardise the health, safety or liberty" of the applicant. The Transmittal Form and the draft application forms contain a confidentiality and personal information protection notice which reflects the terms of Articles 35, 36 and 37. Article 37 emphasises the importance of non-disclosure of personal information if the health, safety or liberty of a party or child would be jeopardised.

[117] P. 19 at para. 12.

Sub-paragraph *c)* – the name and, if known, address and date of birth of the respondent;

308. The Forms Working Group, in developing the mandatory Transmittal Form (referred to in Art. 12(2)), recommended having the same personal details for applicants and respondents. Any information is valuable if it helps locate the respondent more quickly. Working Document No 47 proposed the addition of an "official identification number" to that provision. As some countries do not have such numbers, it was agreed that such information could be specified by declaration referred to in Article 11(1) *g)*.

309. The accurate details of the name, address and date of birth of the respondent are particularly important for those Contracting States that are able to check electronic registers or databases to locate debtors.

Sub-paragraph *d)* – the name and the date of birth of any person for whom maintenance is sought;

310. When the person or persons for whom maintenance is sought is not the creditor, the respondent and the competent authorities must know for whom the claim is being made. In relation to child support, the names and dates of birth of the children in question would be provided.

Sub-paragraph *e)* – the grounds upon which the application is based;

311. It was considered that a requirement to specify the grounds on which the application was based would expedite the processing of applications. It may also assist the Central Authority personnel to identify if any additional information or documents are required as evidence of those grounds, and whether the grounds claimed are consistent with the application submitted.

312. The grounds upon which an application is based will depend on the nature of the application and the nature of the relationship between the debtor and the person for whom maintenance is sought. For example, the grounds for an obligation to pay child support may arise from an existing maintenance decision, or by operation of law (such as parental responsibility arising from parentage).

Sub-paragraph *f)* – in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;

313. This provision was recommended by the Forms Working Group to expedite the transfer of child support payments. It is an obligation of the Central Authority to take appropriate measures to "facilitate the collection and expeditious transfer of maintenance payments" (Art. 6(2) *f)*) and for Contracting States to promote "the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance" (Art. 31).

Sub-paragraph *g)* – save in an application made under Article 10(1) *a)*, any information or document specified by declaration under Article 58 by the requested State.

314. For any application other than an application for recognition, or recognition and enforcement of a maintenance decision made under Article 10)1) *a)*, a Contracting State may specify by declaration in accordance with Article 58 the additional information or documents required by its Central Authority to process the application, or by its judicial or administrative authorities to conduct the necessary proceedings.

315. In an application for recognition, or recognition and enforcement of a maintenance decision made under Article 10(1) *a)*, only the information or documents referred to in Article 21 may be requested.

316. Another specific limitation on requests for information or documents concerns a power of attorney. According to Article 39, a requested State "may require a power of attorney from the applicant only if it acts as legal representative in judicial proceedings or before other authorities."

[Sub-paragraph *h)* – the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the

application.]

317. Sub-paragraph *h)* was added at the suggestion of the Forms Working Group. It provides for the name and contact details of the person or unit from the Central Authority of the requesting State who is responsible for processing the application and whose details are necessary for follow-up purposes under Article 12(3), (4), (5), (8) and (9).

318. The purpose of this provision is to improve and expedite communications between Central Authorities. It balances the obligation on the requested Central Authority in Article 12(3) to provide similar details. Sub-paragraph *h)* is in square brackets as it has not been discussed.

Paragraph 2 – As appropriate, and to the extent known, the application shall in addition in particular include –

319. Paragraph 2 requires the inclusion of certain additional information with the application. This is evident from the use of the word "shall". However, unlike paragraph 1, there are some limitations on the obligation. The information must only be provided "as appropriate" and "to the extent known".

Sub-paragraph *a)* – the financial circumstances of the creditor;

320. The application must, if appropriate and if known, include information about the financial circumstances of the creditor. Financial circumstances information includes income and assets, including real or personal property. It will be relevant to the financial circumstances of the creditor to state his or her occupation, whether or not he or she is employed, whether he or she has an obligation to support any other child or person (not the subject of this application), the costs of the child's schooling or medical care, and whether or not the creditor has a new partner who contributes to the family's income.

321. These matters and others are covered by the Financial Circumstances Form which was developed by the Forms Working Group.[118] The form may appear complex but it is important to emphasise that not every part needs to be completed in every case.

Sub-paragraph *b)* – the financial circumstances of the debtor including the name and address of the employer of the debtor and the nature and location of the assets of the debtor;

322. The same matters mentioned in relation to sub-paragraph *a)* concerning financial circumstances, also apply to this provision about the debtor. In addition, details of the name and address of the debtor's employer are required. These are necessary for several reasons: a wage-withholding order may have to be made and served on the employer; details of the debtor's income may be needed; or the employer's address may be necessary to locate the debtor.

323. Information about the assets of the debtor should also be provided "as appropriate, and to the extent known". This information is often based on the knowledge or conjecture of the applicant creditor. Legal proceedings may be necessary (in the requested State, in the requesting State, or in another Contracting State) to confirm the existence of assets or to locate them.

Sub-paragraph c*)* – any other information that may assist with the location of the respondent.

324. Sub-paragraph *c)* may apply to the creditor or debtor, depending on who is the "respondent". Additional information that would help locate the respondent should be provided if there is a possibility that the personal information provided under paragraphs 1 *b)* or *c)* will not be sufficient for the purposes of locating the respondent.

Paragraph 3 – The application shall be accompanied by any necessary supporting information or documentation including documentation concerning the entitlement of the applicant to legal assistance. In the case of applications under Article 10(1) *a)*, the application shall be accompanied only by the documents listed under Article 21.

[118] Prel. Doc. No 31-B/2007, Annex E.

325. Whereas paragraph 1 states the essential minimum requirements of an application and paragraph 2 states the essential additional requirements as appropriate, the first sentence of paragraph 3 permits a requesting and requested State to include or require any additional "necessary supporting information or documentation", for applications other than those made under Article 10(1) *a)*. According to the present text,[119] when legal assistance is sought, the documentation supporting the applicant's entitlement to legal assistance in the requesting State must be provided. The document in question could be a letter or statement from the authority which grants legal aid in the requesting State, and declaring that the applicant, if he or she were to apply, would be granted legal assistance in that State. Particular reference is made to this type of documentation as it is likely to be important for the majority of cases. These words were included on the recommendation of the Forms Working Group. The Financial Circumstances Form devised by the Forms Working Group could, if necessary, be used to support a claim by the applicant for legal assistance, but it is not sufficient, by itself, to establish the applicant's entitlement to legal assistance. It is to be noted that the contents of the form are in conformity with the requirements of the *Hague Convention of 25 October 1980 on International Access to Justice* (hereinafter "1980 Hague Access to Justice Convention").

326. The phrase "any necessary supporting information or documentation" might also include any information or document that substantiates the nature of the claim or provides evidence of the grounds in Article 11(1) *e)*. There may be some overlap with Article 11(1) *g)*, except that documents specified by declaration will usually be required in every case, or certain categories of case, whereas "necessary supporting information or documentation" may only be applicable in a particular case. Article 11(3) therefore allows a requested State to require certain necessary information in a particular case, even if that type of information is not required in all cases and has not been specified by declaration referred to in Article 11(1) *g)*.

327. The first sentence of paragraph 3 does not apply to applications for recognition, or recognition and enforcement of a maintenance decision under Article 10(1) *a)*, as specific documentary requirements are prescribed in Article 21. Furthermore, the question of entitlement to legal assistance should not arise in an application under Article 10(1) *a)*. The procedure on an application for recognition and enforcement is prescribed by Article 20 and legal assistance should not be necessary unless the decision concerning recognition and enforcement is challenged or appealed. The documents required by Article 21 are: the maintenance decision or an abstract of it; a certificate of enforceability; evidence that the respondent was given notice of the proceedings or an opportunity to be heard; a statement of arrears; where necessary, evidence of automatic adjustment by indexation; where necessary, documentation concerning the entitlement of the applicant to legal assistance. No other information may be required by the requested state in relation to an application for recognition, or recognition and enforcement of a maintenance decision.

Paragraph 4 – An application under Article 10 may be made in the form recommended and published by the Hague Conference on Private International Law.

328. The draft forms devised by the Forms Working Group are collected in Preliminary Document No 31-B. The development of the recommended forms is referred to above at paragraphs 295-297. The words of Article 11(4) are drawn from Article 13(3) of the 2005 Hague Choice of Court Convention.[120] It still has to be decided how the model forms shall be published. The possibilities include (a) as a Recommendation, (b) as an attachment or Annex of the Convention, or (c) in the Explanatory Report.

Option 2 (if mandatory forms exist)

[119] Art. 11(3) was not revisited after changes were made to Art. 14. It is possible that there is no some inconsistency between the two. Art. 14 requires the provision of free legal assistance where necessary to obtain effective access to procedures. Does the applicant still need to justify his / her "entitlement" to legal assistance, as required by Art. 11(3)?

[120] 2005 Hague Choice of Court Convention; and see also Art. 5 of the 1980 Hague Access to Justice Convention.

Applications under Article 10 shall be in accordance with the forms annexed to this Convention and shall be accompanied by any necessary documents, without prejudice, save in relation to an application under Article 10(1) *a)*, to the right of the requested State to require further information or documents in appropriate cases.

329. If mandatory forms are used, it is not necessary to itemise in the Convention the details that will be required in an application when all such items of information are apparent in the mandatory form. However, the requested State must have the flexibility to request any further information that is necessary to expedite the application. That is provided for in the "without prejudice" clause which is drawn from Articles 5 and 28 of the 1980 Hague Access to Justice Convention.

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

330. The conclusion of the 1999 Special Commission that the Convention should improve on earlier instruments to achieve maximum efficiency was strongly supported in later meetings. In particular, advances could be made by establishing a clear procedural framework for the application process including time limits by which particular steps should be taken, bearing in mind the Convention's aims of a rapid, simple and low cost procedure. A lack of clarity in procedures was identified as one of the major concerns with other instruments, to be addressed by the Convention.[121] Another major concern with existing instruments was delays in processing applications for the recovery of maintenance and in enforcing decisions. The range of causes contributing to delays is described in Preliminary Document No 3.[122]

331. Article 12 states the basic requirements for effective and efficient case management and emphasises the requirement for speed at every stage of the process – 'timely' in paragraph 5 *b)*, 'quickly' in paragraph 6, 'rapid' in paragraph 7 and 'promptly' in paragraph 8. Time limits are introduced in Article 12 to minimise delays: six weeks for an acknowledgement of receipt of the application and response to initial steps (Art. 12(3)) and 3 months for a status report (Art. 12(4)).

332. The procedure and time limits in Article 12 apply to applications and cases under Chapter III. The term "cases" in the heading of Article 12 refers to the applications after they are "in process". This is evident from the context in which it is used in paragraphs 5 and 6. There is no direct requirement that specific measures requests in Article 7 be treated in the same way as applications under Article 10. It will be a matter for each Contracting State whether requests and applications will be treated similarly or subject to the same time limits.

Paragraph 1 – The Central Authority of the requesting State shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.

Paragraph 1 is inspired by Article 6 of the 1980 Hague Access to Justice Convention.

333. To implement paragraph 1 there will be a reliance on Country Profiles and on the obligations created by Article 5 *b)*, Article 11(1) *g)* of Option 1 and Article 51 to provide information about each country's laws and procedures to know what its information and documentation requirements will be. There may, of course, be additional information required for a particular case, and in addition to the references in Articles 11(2) *c)* and 11(3), Article 12(3) also envisages the possibility of requests for further information following receipt of an application.

334. The obligations imposed on Central Authorities by paragraph 1 are made mandatory by the words "shall assist". In general terms, it could be said that the obligation is to assist the applicant to prepare the best possible application. The obligations may include: to assist the applicant to prepare or compile a complete

[121] Prel. Doc. No 3/2003, p. 20.
[122] P. 17.

application with all necessary information and documents; and, to discover from available sources or by enquiry to the requested Central Authority, the information and documentation requirements of the requested country. This does not mean that the Central Authority must prepare the application for the applicant. However, paragraph 1 recognises that a Central Authority will usually develop some expertise in handling international cases and dealing with foreign authorities. An applicant who is not experienced in such matters will benefit from that expertise if the Central Authority advises or assists him or her with preparation of the application. It will also be necessary to apply the language requirements of the Convention (in Art. 41 and 42) to those essential documents that accompany the application.

335. Two experts opposed this provision on the grounds that it was a matter for national law how an applicant should be assisted. At a minimum, the obligation could be met by giving the applicant a copy of the Country Profile of the requested State.

Paragraph 2 – The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit the application to the Central Authority of the requested State. The application shall be accompanied by the transmittal form set out in Annex 1 to the Convention. [The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Article 21(1) *a), b)* and *d)* [and 26(2)]].

336. This paragraph describes the second step taken by the requesting Central Authority in the application process, after the application has been prepared in accordance with paragraph 1. Article 12(2) imposes an obligation on the sending authority to check the application before sending, to be satisfied of its compliance with the requirements of the Convention. The requirements of the Convention will vary according to the type of application that has been submitted. The use of the words "when satisfied" gives the Central Authority first, a time limit for when the application must be sent *i.e.* when satisfied, and second, a discretion to refuse to transmit the application if it is not satisfied as to its compliance with the Convention. If the sending Central Authority is not satisfied as to compliance, it is not bound to transmit the application.

337. A failure to comply with the Convention requirements is the only basis on which the requesting (sending) Central Authority may refuse to transmit the application. The possibility was considered to include a provision allowing the requesting Central Authority to refuse to transmit an application for other reasons. Article 4(1) of the 1956 New York Convention has such a provision. It states: "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." Previous drafts of Article 12(4) in Preliminary Document No 13 and Article 12(8) in Working Document No 71 provided that an application which was not "well-founded" need not be accepted, either by the requesting or requested Central Authority. Except on the question of compliance with the Convention, the possibility of ex officio review (and the possibility of rejection or refusal) by the Central Authority was not supported (see also the explanation of Articles 12(8) and 9 below.

338. Article 12(2) refers to the administrative process of checking the application and making an assessment, on the basis of the information and documents provided by the applicant, that the Convention requirements are satisfied. The legal process of making a final determination on the application can only be undertaken when the evidence of both the applicant and the respondent is placed before the competent legal authority. It is possible that during the legal proceedings, it may become apparent from the evidence presented, that the Convention requirements are not met. This outcome is no reflection on the checking processes of either the requesting or requested Central Authority which are required to make a decision to accept the application on the basis of one party's information only. For legal reasons it may be desirable to include in the application form a statement such as the one appearing at the end of the Financial Circumstances Form, referring to the consequences of making a false statement.

339. The Transmittal Form referred to in Article 12(2) was proposed as a compromise in the event of application forms not being mandatory. A mandatory Transmittal Form was proposed to be used as a cover letter setting out the minimum information required in an application. The application forms could be recommended forms but this question has not yet been finally decided. The debate on the use of forms is referred to above at paragraphs 295-301 under Article 11.

340. The Transmittal Form was developed by the Forms Working Group. The text was submitted to the 2006 Special Commission as an Annexure to the Convention text in Preliminary Document No 16. It is designed to accompany any of the available applications.

341. The third sentence of Article 12(2) refers to the obligations in Articles 21 and 26 to provide specific documents with an application for recognition and enforcement of a decision, or recognition and enforcement of an authentic instrument or private agreement. In addition, it repeats in part, Article 21(3), according to which a certified copy of the document concerned must be provided promptly to the requested State.

Paragraph 3 – The requested Central Authority shall within six weeks from the date of receipt of the application, acknowledge receipt [in the form the content of which is set out in Annex ..] and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

342. The need for clear time limits was referred to above [at paragraphs 331-332]. In order to avoid overburdening the requested Central Authority, it was considered that a period of six weeks would be sufficient to acknowledge receipt of the application and deal with the other matters listed in paragraph 3. The time limit of 6 weeks was a compromise between the shortest and the longest periods proposed. Within 6 weeks of receipt of the application, the requested Central Authority must take the following steps: acknowledge receipt, advise on initial steps, request further information or documents, and provide contact details of the responsible case officer or unit. It was considered a more efficient use of time if Central Authorities would send one communication only (email, fax or letter), which contains an acknowledgment, with an outline of steps taken or to be taken, and a request for further information or documents if necessary.

343. The Acknowledgement Form[123] prepared by the Forms Working Group is designed to acknowledge receipt of the application within 6 weeks of the date of receipt. At the same time as sending the acknowledgement, or at a later time, but also within 6 weeks of receipt, the requested Central Authority must also inform the requesting Central Authority of the initial steps that have been or will be taken, and the contact details of the person or unit handling the application. The requested Central Authority may use the "informing" stage of the process to request additional information or documents. Paragraph 3 envisages at least one and possibly two communications from the requested Central Authority within 6 weeks of receiving the application. However an acknowledgment only and nothing further within 6 weeks, would not satisfy this obligation.

344. A number of Central Authorities do not provide the name and address of the person responsible for dealing with the application, and in those cases it is sufficient to indicate the unit responsible or provide a contact number.

345. The Acknowledgement Form is intended to simplify and expedite the procedure established in paragraph 3. It is to be used in conjunction with a Status of Application Form to report on the progress of an application. The Status of Application Form is specifically adapted for each type of application. The forms are designed so as to require

[123] The draft Form first appeared in Prel. Doc. No 15/2005 at pp. 29-30. A revised Form is in Prel. Doc. No 31-A/2007, Annex 1.

the minimum possible input by or burden on the Central Authority. The basic Central Authority contact details and details to identify the case must be entered on the form, and a checklist of possible actions which have been or will be taken is included. The relevant actions need only be indicated on the list. These forms have not yet been discussed in the Special Commission and the reference to the Acknowledgement Form remains in square brackets at this stage.

Paragraph 4 – Within three months after the acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

346. Paragraph 4 ensures there will be a follow-up communication within 3 months of the acknowledgement, to give a progress or status report. After the first three months, as developments occur, further communications will usually be needed to explain in more detail what additional steps may be taken, or to provide progress reports on what has been achieved to date. These communications will ensure compliance with paragraph 5.

347. The terms of paragraph 4 reflect the intent of the proposal in Working Document No 47. The rationale for the proposal was that the combined operation of paragraphs 3 and 4 "serves as a type of quality control to ensure that the first steps were initiated, and a guarantee that the case is ongoing." Adherence to the two time limits will indicate significant progress towards achieving effective co-operation.

348. The Status of Application Report may be made on the recommended form[124] developed by the Forms Working Group for this purpose. As with the Acknowledgement Form, the Status of Application Report is designed to achieve the maximum efficiency for minimum input by the Central Authority. The Status of Application Form has not yet been discussed in the Special Commission.

Paragraph 5 – Requesting and requested Central Authorities shall –

349. Paragraph 5 places direct obligations on both requesting and requested Central Authorities to provide, as a minimum, basic levels of co-operation for individual cases.

Sub-paragraph *a)* – keep each other informed of the person or unit responsible for a particular case;

350. Experts recognised that due to the large numbers of maintenance cases that are likely to be processed and the often lengthy periods taken to resolve them, changes in Central Authority personnel are inevitable. In order to maintain continuity and prevent cases being overlooked, it was considered important that information be provided of the contact details of the person or unit responsible for each case. This obligation in sub-paragraph *a)* requires that the contact information be kept updated after providing the necessary contact information at the beginning of the application process, as required in Article 11(1) *h)* (the requesting Central Authority) and in Article 12(3) (the requested Central Authority).

351. In some countries, a unit rather than an individual is responsible for a case, and only the unit's contact details are provided. In other countries, an individual case officer will have continuing responsibility for the case. It is a matter for each Central Authority to decide whose contact details may be disclosed.

352. The obligation imposed by this provision will be easily met by making regular status or progress reports on the recommended form, and ensuring that the contact details on the form are amended as necessary.

Sub-paragraph *b)* – keep each other informed of the progress of the case and provide timely responses to enquiries.

353. It has been a feature of international maintenance cases to date that progress is often very slow, and progress reports can be irregular and infrequent. There is an understandable reluctance by requested Central Authorities to send reports of "no progress" and to be overburdened with too frequent requests for progress reports. A compromise is needed between the applicant's and the requesting Central Authority's

[124] Prel. Doc. No 31-B/2007, Annexes A-D.

"need to know" and the requested Central Authority's "ability to provide" details of progress. Following the acknowledgment and initial report within 6 weeks of the receipt of an application, and the follow-up report within 3 months after the acknowledgement, there is still an ongoing obligation to provide progress reports, as sub-paragraph *b)* emphasises. The Status of Application Form can be used expeditiously by Central Authorities to keep each other informed. The obligation to provide timely responses to enquiries is an aspect of the obligation of co-operation, mentioned in Article 5 *a)* and relates to that object of the Convention referred to in Article 1 *a)* and in the Preamble.

Paragraph 6 – Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

354. The emphasis in paragraph 6 is on speed but not at the expense of a proper consideration of the issues. A "proper consideration of the issues" may be affected by a number of matters, including: the legal complexity of the case; the availability of properly qualified personnel to assess the case; the ability to locate the debtor; the speed with which the requesting Central Authority can provide additional information sought by the requested Central Authority.

355. The Convention aims to address the "chronic problems of delay in processing applications" and the reasons for such delay, referred to in the Preliminary Document No 3. The report also notes the universal consensus that "a primary objective of the Convention should be to provide a faster moving and more responsive system for the processing of applications."[125] All the provisions of Article 12 are directed to this aim.

Paragraph 7 – Central Authorities shall employ the most rapid means of communication at their disposal.

356. The emphasis in paragraph 7 is also on speed, but the phrase "at their disposal" acknowledges that Central Authorities will have different levels of resources and equipment. Many Central Authorities communicate informally by email for progress reports and information requests. E-mail is certainly the most rapid and inexpensive communication tool. More formal communications may require other methods of sending. Some original documents or certified copies might have to be sent by mail, if an electronic version is not acceptable or possible. Central Authorities should choose the most rapid means of communication, or of sending documents, bearing in mind the nature of the documents or communication, the deadline for their receipt, and the distance to be sent.

Paragraph 8 – A requested Central Authority may refuse to process an application only if it is manifest that the requirements of this Convention are not fulfilled. In such case, that Central Authority shall promptly inform the requesting Central Authority of its reasons.

357. Paragraph 8 is inspired by Article 27 of the 1980 Hague Child Abduction Convention.

358. Both Requesting and Requested Central Authorities, under paragraphs 2 and 8 respectively have a discretion to refuse an application if not satisfied that it complies with the requirements of the Convention. However, paragraph 8 which applies to the requested Central Authority has more restrictive language than paragraph 2 which applies to the requesting Central Authority. In paragraph 8, the application's failure to fulfil requirements must be "manifest", in other words, clear on the face of the documents received, whereas the requesting Central Authority must merely be 'satisfied' in paragraph 2.

359. It is always open to a requested Central Authority, if it is not satisfied, to request further information when necessary to establish that the application does in fact comply with the requirements of the Convention. Such a request should clarify for the requesting State where the application is considered to be defective or deficient so that the problems may be rectified. Even when some uncertainty remains as to whether an application satisfies the Convention requirements, it is preferable for the Central

[125] Prel. Doc. No 3/2003, p. 25.

Authority to err on the side caution and certainly not make any decision which should more properly be left to the authority deciding upon the application.

360. A second ground for refusing the application was discussed and omitted, namely where the requested Central Authority considers that the application is without foundation. This would have given a wider discretion to the requested or requesting Central Authority to refuse the application in certain situations, for example, where the applicant is 'vexatious', or is a repeat applicant who cannot be helped, or who is abusing the Convention process. Some experts considered that this would allow the Central Authority to make a subjective judgment about the merits of the case, and this was not an appropriate role for a Central Authority.

361. In the second sentence of paragraph 8, the requested Central Authority must inform the requesting Central Authority, of its reasons for refusing to accept the application. The requested Central Authority is not required to inform the applicant, as Article 9 makes clear that an applicant in a requesting country cannot make a Chapter III application direct to the Central Authority of the requested country. Direct communication between the requested Central Authority and the applicant may be necessary in exceptional cases, and the Convention does not prohibit such communication (see also the explanation of contact details in Art. 11(1) *b)* at para. 306 above).

362. The use of the word 'promptly' in the second sentence of paragraph 8 requires the requested Central Authority to inform the requesting Central Authority with the minimum delay of its reasons not to accept the application.

Paragraph 9 – The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to produce these within a period of at least 3 months. If the requesting Central Authority does not produce the additional documents or information within that period, the requested Central Authority may decide that it will no longer process the application, in which case it shall inform the requesting Central Authority of this decision.

363. The purpose of paragraph 9 is to ensure that the requested Central Authority deals fairly with an incomplete application, without at the same time being placed in a difficult situation by an unresponsive requesting Central Authority or applicant. The onus is on the requesting Central Authority to provide the necessary information or document, and inactive cases need not be kept open if the information or document is not forthcoming.

364. If the document or information is not provided within the 3 month period, the requested Central Authority is not obliged to process the application any further. On the other hand, the words "may decide" give a discretion to the requested Central Authority: if it is willing to wait longer than 3 months for the document or information, it may do so. Processing of the application may be suspended until the information or document is received. It is reasonable to expect that the requested Central Authority would agree to an extension of time if the requesting Central Authority responded that it was unable to meet the 3 month deadline, but would provide the document or information at a later date.

[Article 13 Means of communications – Admissibility

The admissibility in the courts or administrative authorities of the Contracting States of any application transmitted by the Central Authority of a requesting State in accordance with the terms of this Convention, or of any documents or other information appended thereto or provided by a Central Authority, may not be challenged by reason only of the means of communications employed between the Central Authorities concerned.]

365. Article 13 was developed in response to the mandate of the Chair of the 2006 Special Commission to the Drafting Committee to ensure that the language of the

Convention is media-neutral and without altering the substance of the text. It is to be understood that this provision has to be read in conjunction with Article 12(7) which provides that "Central Authorities shall employ the most rapid means of communication at their disposal".

366. This provision would allow any application and related documents or information transmitted by the Central Authority of the requesting State to be admissible in the courts or administrative authorities of the Contracting States irrespective of the medium or means of communication employed. However, domestic rules of evidence would still be applicable with regard to the substance of the documents and information.

367. The phrase "between the Central Authorities concerned" refers to the Central Authorities of the requested and requesting States, and not to the Central Authorities within a federal State. The phrase was added to avoid any misunderstanding that the Convention may have been attempting to regulate the means of communication between a Central Authority and other authorities within the same State.

368. An example of the operation of this provision is given in Preliminary Document No 26, *Observations of the Drafting Committee on the Text of the Preliminary Draft Convention.* It is to be noted that at this point in time, very few judicial or administrative authorities deliver and / or accept electronic documents that meet the requirements of integrity, irrevocability and identification (authentication) for secured electronic transmission.

369. The language of Article 13 is borrowed from Article 30 of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* the inclusion of which is at the request of the Special Commission. This provision is in square brackets as it has not yet been discussed.

Article 14 Effective access to procedures[126]

370. The right to have effective access to services and procedures is a fundamental principle of the Convention. The procedures referred to in Article 14 may be administrative or judicial procedures.

371. The rationale for providing effective access to procedures, and the potential benefits to be gained, were clearly stated in the Report on Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, including Legal Aid and Assistance:

– "*Applicants for maintenance generally have very limited resources, and even small financial barriers may inhibit use by them of the opportunities otherwise provided by the new Convention. The costs for the applicant should not be such as to inhibit the use of, or prevent effective access to, the services and procedures provided for in the Convention.*

- *At the same time the Convention, if it is to be attractive to a wide range of Contracting Parties, should not be seen to impose excessive financial burdens on them. This does not mean that the provision of services under the Convention will be free of cost to Contracting Parties, but rather that the costs of providing services should not be disproportionate to the benefits in terms of achieving support for more children and other family dependants and in consequence reducing welfare budgets.*"[127]

372. "Effective access to procedures" for a person seeking assistance under this Convention implies the ability, with the assistance of authorities in the requested State, to put one's case as fully and as effectively as possible to the appropriate authorities of the requested State. It also implies that a lack of means should not be a barrier.

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[126] Prel. Doc. No 26/2007 contains the following comment "Consideration should be given to whether these provisions should apply (in whole or in part) to direct applications or to applications by public bodies."
[127] Prel. Doc. No 10/2004 at paras 39-40. See also para. 3.

373. Under this Convention, it will be necessary to ensure that accessibility of procedures in different countries is equivalent, regardless of whether the child support systems are court-based or administrative. The approach may be different from one system to another, but the results should be equivalent. On the one hand, for example, effective access to administrative procedures may be ensured without the need for legal representation or even appearance requirements (*i.e.* a cost effective and swift procedure). On the other hand, in judicial procedures, the State may need to pay the costs for legal representation and legal advice (*i.e.* State assistance in relation to a more complex system). The special needs of foreign applicants, such as problems of distance and language, also need to be considered.

374. The Convention provides for minimum standards to ensure "effective access to procedures". Contracting States are always encouraged to provide services at a higher standard, if possible. For example, the European Community has minimum rules established through a directive issued to its States,[128] and Member States would continue to apply these "higher standard" rules among themselves, and if possible, to extend these to other Contracting States.

375. The Special Commission has not decided the question whether Articles 14 to 14 *ter* apply to a public body and, in particular, whether free legal assistance should be provided to public bodies in accordance with Article 14 (Option 2) *bis*. Nor has it yet been decided whether public bodies may apply, under Article 10, for the establishment or modification of a decision and, if so, whether Article 14 to 14 *ter* would apply to such applications. The more important issue for public bodies is to ensure that they have access to the Central Authority route for applications and to the Central Authority services, free of cost to an applicant, as provided for in Article 8(2).

376. Two options regarding effective access to procedures are presented in the draft Convention. In both options, the fundamental principle of effective access is accepted. Article 14(4) in Option 1 and Option 2 are identical. Article 14(5) in Option 1 is identical to Article 14 *ter b)* in Option 2 after the opening phrase. Articles 14(1), (2) and (6) in Option 1 are similar to Articles 14(1), (3) and (5) in Option 2. The drafting of Option 1 is based on the factors and principles referred to in the Report on Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, including Legal Aid and Assistance.[129] Option 2 was originally proposed during the 2006 Special Commission by the Informal Group on Article 14 (formerly Art. 13) in Working Document No 94. The principal difference between Options 1 and 2 is that in Option 2 child support applications are privileged by qualifying generally for free legal assistance, subject to limited exceptions.

Option 1[130]

Paragraph 1 – The requested State shall provide applicants with effective access to procedures, including appeal procedures, arising from applications under Chapter III, where necessary by the provision of free legal assistance.

377. The phrase "legal assistance" is defined in Article 3 as "the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State" and includes "assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". In a particular case, one or more of the factors included in that definition may be relevant. The phrase "legal assistance" is also explained and discussed at paragraphs 128-144 of this Report in relation to Article 6(2) *a)*. The explanation of "legal assistance" in paragraph 1 should therefore be read in conjunction with the explanation for Article 6(2) *a)*. The phrase "effective access to procedures" is explained in the general comments for Article 14, above.

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[128] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
[129] Prel. Doc. No 10/2004, *supra*, note 127, paras 45-47.
[130] Prel. Doc. No 26/2007, p. 5, contains the following under Art. 14: "Consideration should be given to whether Article 14 should apply (in whole or in part) to "direct applications" and / or to applications by public bodies."

378. Paragraph 1 imposes an obligation on the Contracting State to ensure that an applicant who has made an application of the kind referred to in Article 10(1) or (2) has effective access to the procedures of the requested State which may arise in connection with the particular application. "Applicant" may therefore include a creditor, a debtor or a public body. The procedures in question may be administrative or judicial, and include appeal procedures. The procedures include any separate procedures that may be required at the enforcement stage or for an appeal. Where "effective access to procedures" can only be guaranteed by providing free legal assistance, this must be provided in the form appropriate to the particular situation.

379. As the definition of "legal assistance" in Article 3 *c)* makes clear, the provision of "free legal assistance" is intended, where necessary, to include legal advice and representation. If either are needed and not provided, there can be no genuinely effective access to procedures. But if legal advice or representation is not provided free of charge in the requested State, free assistance must be given to the applicant to apply for whatever legal aid or other financial assistance will give him or her access to the necessary procedures (see Art. 14(4)).

380. Provision of legal advice is an important component of legal assistance. It may be needed to help determine whether an application has a chance of success and what other assistance or representation, if any, is needed. The advice could indicate that legal assistance or representation is not needed, or that legal aid will be available to obtain independent legal representation. A failure to provide legal advice in the first instance may be a denial of access to justice.

381. The implementation of Article 14 is closely linked to Article 6(1) *b)* which imposes an obligation on the Central Authority to institute or facilitate the institution of legal proceedings, and Article 6(2) *a)* under which the Central Authority may, if the circumstances require, be required to provide or facilitate the provision of legal assistance. The manner in which each Contracting State intends to fulfil its obligations in Articles 6 and 14(1) must be explained in accordance with Article 51(1) *b)* and *c)*. This information can also be included in the Country Profile (Art. 51(2)), and in the information provided in accordance with Article 5 *b)*.

382. Countries which do not have a system of free legal representation may where this is required be able to establish a network of *pro bono* lawyers to assist foreign applicants.

Paragraph 2 – The requested State shall not be obliged to provide the legal assistance referred to in paragraph 1 where the procedures are designed to enable the applicant to make the case without the need for such assistance, and where the Central Authority provides such free services as are necessary.

383. Paragraph 1 states the general and overarching principle that Contracting States must provide applicants with effective access to procedures. Paragraphs 2 and 3 make it clear that the obligation to provide effective access does not always require the provision of free legal assistance for this purpose.

384. This may be the case under paragraph 2 where the procedures are "designed to enable the applicant to make the case without the need for" legal assistance. The simplified procedures of administrative schemes operating in certain countries come within this description. As a general rule, administrative systems are able to make an enforceable maintenance decision without the need for legal representation and without the need for the applicant to appear in person. However, if an administrative decision has to be appealed to a court, it is most likely that legal assistance or representation would be needed, and then the obligation referred to in paragraph 1 would apply. Paragraph 1 refers specifically to legal assistance for appeal procedures.

385. The second condition for operation of this provision is that the Central Authority must provide the free services necessary to "enable the applicant to make the case" without legal assistance. This means the requested Central Authority must provide free administrative assistance or advice to help the potential applicant to pursue the claim for recovery of maintenance.

Paragraph 3 – The provision of free legal assistance may be made subject to a means or a merits test. A Contracting State may declare in accordance with Article 58 that it will provide free legal assistance in applications concerning child support on the basis of the assessment of the child's means only, or without any means test at all.

386. In many countries, free legal assistance (including legal advice or legal representation) is provided to citizens or residents who satisfy a means and merits test. A "means test" examines the amount of income and assets of a person, to determine if their income is sufficiently low to enable them to qualify for a grant of free legal assistance. "Merits" in this context does not refer to the merits of the person as an individual but to their case for child support. A "merits test" examines the prospects of success and the worthiness of any legal proceedings for which a person may be granted free legal assistance. If prospects of success are poor, a grant of aid is unlikely to be made, even if the person qualifies for aid under the "means test". The purpose of the means and merits test is to ensure that limited public funds for legal aid and representation are used for the most deserving cases which have a good chance of success.

387. The second sentence was added following discussion of Working Document No 53 submitted by the European Community at the 2005 Special Commission. The proposal conforms to the European Union Directive on Access to Justice.[131] The provision means that in a child support case, States have the option to agree to provide free legal aid based on the means of the child, or to provide free legal aid without imposing any means test at all. An optional declaration system was preferred, as many States do not at present make such generous provision in child support cases.

388. Some experts were opposed to the idea of completely free services for all children. In some systems it is necessary to take into account, not only the means and resources of the child, but also those of the child's household or family. Some countries cannot apply a means test to a child for the purposes of legal aid, unless the child lives apart from the family. Other countries offer free legal representation in any proceedings concerning a child. The system of declarations provided for in paragraph 3 takes account of such variations.

389. In some countries free legal aid is not, strictly speaking, free. Applicants may be required to make a contribution to their legal costs based on their income, and a small income would mean either that no contribution or only a small contribution was required.

390. Variations in practice are noted in the Report on Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, including Legal Aid and Assistance.[132]

Paragraph 4 – Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

391. Paragraph 4 is intended to prevent discrimination against applicants from abroad. If free legal assistance (including advice or representation) is available to applicants in domestic cases, it should also be available on the same or equivalent conditions to applicants in international cases. The rule applies equally to debtors and creditors.

Paragraph 5 – Subject to paragraph 2, a creditor, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed in the same circumstances.

392. Paragraph 5 applies exclusively to proceedings for recognition and enforcement brought by the creditor. Its purpose is to guarantee for the creditor, at the stage of recognition and enforcement, the same level of legal assistance which she / he enjoyed in the original proceedings to the extent that this is possible under the law of the State

[131] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. [See, *supra*, note 134 of old text]
[132] Prel. Doc. No 10/2004, at paras 20, 21, 24 and 25.

addressed. The creditor must have received the benefit before making the application for recognition and enforcement. The benefit in the State of origin is not one to which the creditor "is entitled" (*i.e.* at present or in the future) but one from which she / he "has benefited" (*i.e.* in the past). This interpretation could lead to injustice if the creditor has never needed or sought legal aid in the past, but needs it now for recognition and enforcement. Consideration might be given to substituting the words "is entitled to" for "has benefited from" (in line 1).

393. Paragraph 5 does not direct the State addressed to provide to the creditor the same type of legal assistance he / she received in the State of origin. The legal assistance to be provided in the State addressed should be "at least to the same extent" that a creditor would receive in "the same circumstances", that is, the circumstances in which the creditor received the legal aid in the State of origin. It is understood that "the same circumstances" refers to the original proceedings which led to the establishment of the maintenance decision (whether or not this was the principal proceeding or ancillary to other family law proceedings),

394. The nature of the legal assistance is to be understood according to the definition in Article 3 *c)*. The free legal assistance to be expected is that "provided for by law of the State addressed". If the law of the State addressed makes no provision for free legal assistance, then the creditor will not receive anything. However, the State addressed is still bound by the overarching requirement to provide effective access to procedures.

395. This paragraph is inspired by Article 15 of the 1973 Hague Maintenance Convention (Enforcement). It was modified by the Drafting Committee to adopt the term "legal assistance" used throughout this Convention. Paragraph 5 was also improved when a clearer definition of "legal assistance" was also proposed (see Art. 3) at the 2007 Special Commission.

396. Paragraph 5 is "subject to paragraph 2". Therefore no free legal assistance need be provided under paragraph 5 if the State addressed has administrative procedures or simplified legal procedures where legal assistance is not necessary to initiate proceedings for recognition and enforcement.

397. The question was raised whether this paragraph was really an applicable law rule *i.e.* that the law of the requesting State applies to the entitlement to legal assistance in the requested State. This is clearly not the intention, as indicated by the words "provided for by the law of the State addressed".

398. Paragraph 5 was revised in accordance with a proposal in Working Document No 116. It mirrors Article 14 *ter b)* in Option 2 in substance. Paragraph 5 refers to a "creditor" rather than an "applicant". A policy question remains, as it does with Article 14 *ter b)*, whether the provision should apply to all applicants and not simply to creditors.

399. The term "legal aid" is not used in the Convention and has been replaced by "free legal assistance". The terms "State of origin" and "State addressed" are used (not requesting and requested State) as they are the necessary terms in the context of recognition and enforcement proceedings.

Paragraph 6 – No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings brought by a creditor under the Convention.

400. Paragraph 6 protects the creditor from any requirement of the requested Central Authority or State for an amount of money as a security, bond or deposit to guarantee the payment of any costs or expenses for legal proceedings. The purpose of the provision is to ensure the creditor is not faced with any financial obstacle or disincentive before being able to make application for the recovery of maintenance.

401. This article applies exclusively to any proceedings brought by the creditor under the Convention. It derives from similar provisions in Article 9 of the 1956 New York Convention and in Article 16 of the 1973 Hague Maintenance Convention (Enforcement); although in those Conventions the provisions are not limited to proceedings brought by a creditor.

402. The question of who would pay costs where the creditor loses the case is addressed by Article 40(2) which permits recovery of costs from the unsuccessful party.

Option 2 (Arts 14 to 14* ter*)

Article 14 Effective access to procedures

403. Article 14 (formerly Art. 13) Option 2 was originally proposed in Working Document No 94 by the Informal Group on the former Article 13. There was extensive discussion of Option 2 at the Special Commission of May 2007 and it received widespread support. The Drafting Committee expanded the text according to the mandate of the Special Commission.

Paragraph 1 – The requested State shall provide applicants with effective access to the procedures, including enforcement and appeal procedures, arising from applications under Chapter III.

404. Paragraph 1 is the same as for Option 1, Article 14(1) except that the last phrase is deleted. Paragraph 1 imposes an obligation on the Contracting State to ensure that an applicant who has made an application of the kind referred to in Article 10(1) or (2) has effective access to the procedures of the requested State which may arise in connection with the particular application. "Applicant" may therefore include a creditor, a debtor or a public body. The procedures in question may be administrative or judicial. The procedures include appeal procedures any separate procedures that may be required at the enforcement stage. Where "effective access to procedures" can only be guaranteed by providing free legal assistance, this must be provided in the form appropriate to the particular situation.

405. The implementation of Article 14 is closely linked to Article 6(1) *b)* which imposes an obligation on the Central Authority to institute or facilitate the institution of legal proceedings, and Article 6(2) *a)* under which the Central Authority may, if the circumstances require, be required to provide or facilitate the provision of legal assistance. The manner in which each Contracting State intends to fulfil its obligations in Articles 6 and 14(1) must be explained in accordance with Article 51(1) *b)* and *c)*. This information can also be included in the Country Profile (Art. 51(2)), and in the information provided in accordance with Article 5 *b)*.

Paragraph 2 – To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14, 14 *bis* and 14 *ter* unless paragraph 3 applies.

406. Paragraph 2 confirms unambiguously how effective access to procedures referred to in paragraph 1 must be provided: the Contracting State must "provide free legal assistance". There is a specific exception in paragraph 3 for simplified procedures, and other conditions on the provisions of free legal assistance in Articles 14(4) and (5) and Articles 14 *bis* and 14 *ter*.

407. The phrase "legal assistance" is defined in Article 3 as "the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State" and includes "assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". In a particular case, one or more of the factors included in that definition may be relevant. The phrase "legal assistance" is also explained and discussed at paragraphs 128-134 of this Report in relation to Article 6(2) *a)*. The explanation of "legal assistance" in paragraph 1 and 2 should therefore be read in conjunction with the explanation for Article 6(2) *a)*. The phrase "effective access to procedures" is explained in the general comments for Article 14 above.

408. As the definition of "legal assistance" in Article 3 *c)* makes clear, the provision of "free legal assistance" is intended, where necessary, to include legal advice and representation. If either are needed and not provided, there can be no genuinely effective access to procedures. But if legal advice or representation is not provided free of charge in the requested State, free assistance must be given to the applicant to apply

for whatever legal aid or other financial assistance will give him or her access to the necessary procedures (see Art. 14(4)).

409. Provision of legal advice is an important component of legal assistance. It may be needed to help determine whether an application has a chance of success and what other assistance or representation, if any, is needed. The advice could indicate that legal assistance or representation is not needed, or that legal aid will be available to obtain independent legal representation. A failure to provide legal advice in the first instance may be a denial of access to justice. Countries which do not have a system of free legal representation may be able to establish a network of pro bono lawyers to assist foreign applicants. Paragraph 2 was proposed in Working Document No 119 at the 2007 Special Commission.

Paragraph 3 – The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures are designed to enable the applicant to make the case without the need for such assistance, and where the Central Authority provides such free services as are necessary free of charge.

410. Paragraph 3 is similar in wording and intent to Option 1, Article 14(2). Paragraph 1 states the general and overarching principle that Contracting States must provide applicants with effective access to procedures. Paragraph 2 confirms that effective access to procedures means free legal assistance, and imposes some conditions. Paragraph 3 refers to a requested State with simplified procedures where the obligation to provide effective access does not always require the provision of free legal assistance.

411. Free legal assistance need not be provided where the procedures are "designed to enable the applicant to make the case without the need for" legal assistance. The simplified procedures of administrative schemes operating in certain countries come within this description. As a general rule, administrative systems are able to make an enforceable maintenance decision without the need for legal representation and without the need for the applicant to appear in person. However, if an administrative decision has to be appealed to a court, simplified procedures may no longer be used and it is most likely that legal assistance or representation would be needed. Then the obligation referred to in paragraph 1 would apply. Paragraph 1 refers specifically to legal assistance for enforcement and appeal procedures.

412. The second condition for operation of this provision is that the Central Authority must provide the free services necessary to "enable the applicant to make the case" without legal assistance. This means the requested Central Authority must provide free administrative assistance or advice to help the potential applicant to pursue the claim for recovery of maintenance.

Paragraph 4 – Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

413. Paragraph 4 is the same as Option 1 Article 14(4). Paragraph 4 is intended to prevent discrimination against applicants from abroad. If free legal assistance (including advice or representation) is available to applicants in domestic cases, it should also be available on the same or equivalent conditions to applicants in international cases. The rule applies equally to debtors and creditors.

Paragraph 5 – No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings [brought by the creditor] under the Convention

414. Paragraph 5 is the same as Option 1 Article 14(6). The only difference is that in Option 2 the words "brought by the creditor" are in square brackets because it has not been resolved whether the benefits of the provision should be confined to the creditor or extended to other applicants

415. Paragraph 5 protects the creditor from any requirement of the requested Central Authority or State for an amount of money as a security, bond or deposit to guarantee the payment of any costs or expenses for legal proceedings. The purpose of the provision

is to ensure the creditor is not faced with any financial obstacle or disincentive before being able to make application for the recovery of maintenance.

416. This provision derives from similar provisions in Article 9 of the 1956 New York Convention and in Article 16 of the 1973 Hague Maintenance Convention (Enforcement), although in those Conventions the provisions are not limited to proceedings brought by a creditor.

417. The question of who would pay costs where the creditor loses the case is addressed by Article 40(2) which permits recovery of costs from the unsuccessful party.

Article 14 bis Free legal assistance for child support applications

Paragraph 1 – The requested State shall provide free legal assistance in respect of all applications [by a creditor] under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21.

418. Paragraph 1 sets out a general rule that free legal assistance must be provided in applications in respect of child support under Chapter III. Reflecting the scope provision (Art. 2(1)), this obligation applies only in respect of children below the age of 21 and only to maintenance obligations towards a child which arise from a parent-child relationship.

419. It is important to emphasise that the obligation to provide free legal assistance in child support cases does not arise if the requested State, in accordance with Article 14(3), provides simplified procedures which make the provision of free legal assistance unnecessary (Art. 14(2) makes it clear that the obligations arising under Art. 14 *bis* does not arise where Art. 14(3) applies). However, where simplified procedures are not available, the obligation to provide free legal assistance in child support cases is stronger than in other cases in that neither a means no a merits test may be applied. This is in contrast to Option 1, Article 14(3). The idea of this privileged position for child support cases received extensive support in the 2007 meeting of the Special Commission.

420. The general rule will not apply to direct applications concerning child support, as they are not made under Chapter III. Other exceptions to the rule are stated in Article 14 *bis*(2) but they are unlikely to affect the majority of cases. One question still to be resolved is whether Article 14 *bis* (1) should only apply to applications by creditors. If the words "by a creditor" in square brackets are deleted, the provision will apply to all applications under Chapter III including applications by debtors and public bodies. Concerns were expressed that a debtor would receive free legal assistance to reduce his child support obligation through a modification application under Article 10(2). On the other hand, there was much support for the principle that debtors and creditors should both be assisted fairly and equitably. A court is unlikely to reduce the child support payments without sound reasons. A debtor whose circumstances have changed and who can no longer afford to make payments at the original level is entitled to seek a reduction in his child support obligation, and avoid the consequences of an accumulation of arrears.

Paragraph 2 – Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1) *a)* and *b)* –

[Sub-paragraph *a)* – impose reasonable charges for the costs of genetic testing when such testing is necessary in order to establish a maintenance decision in that State; or]

421. Paragraph 2 establishes some limited exceptions to the general rule in paragraph 1. The exceptions do not apply to applications for recognition and enforcement of decisions concerning child support.

422. Paragraph 2 *a)* establishes the first exception. In cases where genetic testing must be undertaken to determine parentage prior to the establishment of a maintenance decision (Art. 10(1) *c)*), the requested State may impose reasonable charges. The

chapeau is permissive (it uses the term "may") and a State is not obliged to impose charges.

423. The phrase "reasonable charges for the costs of genetic testing" implies that, at the very most, only the actual cost of the procedure itself should be charged for. A State could also charge only for the cost of the scientific procedure. In other cases, charges may have to be imposed for the use of specialised courier services for biological samples. However, what cannot be charged for are the administrative costs of the Central Authority. These must be borne by the Central Authority in accordance with Article 8(1).

424. It could be argued that genetic testing is not a legal procedure and should not be included in Article 14 at all. However this is not a sound argument bearing in mind the objects of the Convention. Genetic testing is inevitably a part of the legal procedures to establish maintenance when paternity is challenged. Genetic testing comes within the revised definition of "legal assistance" in Article 3. Furthermore, it would be a failure of the Convention to offer free legal assistance for all the less expensive steps leading to the recovery of maintenance and then refuse such assistance at arguably the most important step.

425. This provision should be read in conjunction with Article 40 (Recovery of costs). In order that recovery of maintenance is not impeded by a lack of access to genetic testing procedures, a State should ensure that such access is available to applicants under Article 10(1) *c)*, and if necessary, the cost of the genetic testing procedure is recovered from the unsuccessful party.

426. Sub-paragraph 2 *a)* is in square brackets as the question of costs for genetic testing has not been resolved. It is recognised that in many States the costs could be quite high, and there is a concern to ensure that States will not be obliged to bear these costs, especially if the number of cases is also high. On the other hand, it is becoming more common, in cases where the parents are not married, for the alleged father to challenge paternity. Hence there is a serious concern that a failure to undertake genetic testing procedures because the applicant cannot afford the costs will result in the failure of many valid applications for the recovery of maintenance.

Sub-paragraph *b)* – refuse free legal assistance, if it considers that, on the merits, the application [or any appeal] is manifestly unfounded

427. The exception in paragraph 2 *b)* is necessary to protect Central Authorities and competent authorities in the requested State from the burden and costs of processing and providing free legal assistance for applications which are "manifestly unfounded". It remains to be decided whether this provision should apply to appeals. At present, the only basis on which a requested Central Authority may refuse to process an application is where it is "manifest that the requirements of the Convention are not met" (Art. 12(8)). If the requirements of the Convention are met, the application must be accepted. According to Article 14 *bis*(2) *b)* if the requested State believes an application for child support is "manifestly unfounded", it may refuse free legal assistance

428. The responsibility lies with the State and not the Central Authority to make the determination that the application (or appeal) is "manifestly unfounded" and free legal assistance is refused. In most States, the Central Authority is not the decision making body for questions arising under Article 14(2). It is a matter for the requested State to decide which competent authority should make the determination.

429. The question of whether an application (or appeal) is "manifestly unfounded" would be decided on a case by case basis and in accordance with the internal law. However, by way of example, an application may be "manifestly unfounded" if the same applicant has previously applied for and been refused free legal assistance, and there has been no change in the applicant's circumstances to justify a reconsideration of his application. An appeal may be "manifestly unfounded" if it is clear from the documents and the decision on appeal that there are no grounds in law for the appeal.

430. With regard to the third exception, Article 14 *bis (2) c)*, the Special Commission developed two options. A third option is that there should be no third exception. The purpose of the first two options is to establish some balance in the exception case where

an applicant for child support has significant financial resources and would not be disadvantaged by paying for his or her own legal expenses.

Option A

Sub-paragraph *c)* – refuse free legal assistance, if it is manifest that the applicant's financial circumstances are exceptionally strong. In assessing whether the financial circumstances are exceptionally strong, account shall be taken of the cost of living in the requesting State.

431. "Exceptionally strong" financial circumstances imply that an applicant is extremely wealthy. However, the measure of wealth is to be made by the requested State against the cost of living in the requesting State. This requirement is intended to prevent a refusal of free legal assistance due to misconceptions of the relative wealth or affluence in the two countries concerned. For example, in a developed country which has high wages and a high cost of living, an applicant may have a job, a house (with a mortgage) and a car (with a bank loan). In her own country, the applicant is not at all a wealthy person. But in a requested State which has low average wages and cost of living, such an applicant may appear wealthy, and not deserving of free legal assistance.

432. In Option A, it is the requested state which must take into account the cost of living in the requesting State when assessing whether the applicant's financial circumstances are such that free legal assistance should be refused. This rule may give rise to problems in certain cases. For example, when the applicant is in the requesting state on a temporary work assignment and receiving a higher income and benefits than he or she would in her habitual residence country. A problem could also arise when the applicant lives in a high cost city, but the average cost of living for the requesting country as a whole is lower than in the city of residence.

Option B

Sub-paragraph *c)* – where it considers that the economic situation of the applicant is disproportionate to the requirements under which legal assistance applicants are deemed able to bear the costs of proceedings, so inform the requesting Central Authority. If the requesting Central Authority determines that, taking into account costs foreseen in the requested State, the applicant should be provided free legal assistance, the requested Central Authority shall provide such assistance. If the requesting Central Authority determines that the applicant would not be entitled to free legal assistance, it shall so notify the requested Central Authority. With prior authorisation of the applicant, the requested Central Authority shall proceed upon the application and may charge for legal assistance.

433. The procedure in Option B is complex and requires some clarification. The steps appear to be as follows:

a) the requested State informs the requesting Central Authority that the applicant's economic situation is disproportionate and he / she is unlikely to receive free legal assistance;

b) the requesting Central Authority looks at the known costs in the requested State and decides if the applicant should receive free legal assistance. If yes, the requested State must provide it; or

c) the requesting Central Authority decides the applicant is not entitled to free legal assistance (in the requesting State) and informs the requested Central Authority;

d) the requested Central Authority proceeds and charges for legal assistance with prior authorisation from applicant.

434. The requested State makes the first determination that the economic situation is "disproportionate" and then the matter proceeds to an exchange of information between authorities and Central Authorities. However, an applicant who is notified that charges will be imposed may prefer to make a direct application or pursue some other remedy under the law of the requested State.

435. The main problem with Option B concerns the requesting Central Authority's role to examine the "costs foreseen in the requested State" and the consequences of its decision following that examination. If the requesting Central Authority decides that the applicant should receive free legal assistance, the requested Central Authority must provide it. But it is not clear which costs are referred to or who will provide the information on which the requesting Central Authority bases its decision.

Option C

436. Option C is that there should not be a third exception. This is favoured by those who regard the advantages of a system for filtering out the rare undeserving cases to be far outweighed by its disadvantages, namely the complexity and possible costs involved as well s the danger of delaying the application process for the deserving cases.

Article 14 ter Applications not qualifying under Article 14 bis

437. Article 14 *ter* applies to applications not qualifying under Article 14 *bis.* A person who meets this description may apply to the requested State for free legal assistance, but such assistance may be subject to a means or merits test (Art. 14 *ter a)*) Applications are not restricted to Chapter III applications. The categories of applications within the scope of Article 14 *ter* are:

a) an application for the support of a child who is over the age of 21;

b) an application for child support by a person who is refused free legal assistance under Article 14 *bis* (2) *b)* or *c)*;

c) an application for spousal support;

d) an application by a relative for other forms of family maintenance;

e) direct applications under Article 16(5).

438. In relation to other forms of family maintenance, this provision will only apply between Contracting States which make the declaration referred to in Article 2(2) concerning maintenance orders "arising from a family relationship, parentage, marriage or affinity". Contracting States may also declare that they will apply the Convention to children over the age of 21 who need maintenance.

In the case of an application not qualifying under Article 14 *bis* –

Paragraph *a)* – the provision of free legal assistance may be made subject to a means or a merits test.

439. In many countries, free legal assistance (including legal advice or legal representation) is provided to citizens or residents who satisfy a means and merits test. A "means test" examines the amount of income and assets of a person, to determine if their income is sufficiently low to enable them to qualify for a grant of free legal assistance. "Merits" in this context does not refer to the merits of the person as an individual but to their case for child support. A "merits test" examines the prospects of success and the worthiness of any legal proceedings for which a person may be granted free legal assistance. If prospects of success are poor, a grant of aid is unlikely to be made, even if the person qualifies for aid under the "means test". The purpose of the means and merits test is to ensure that limited public funds for legal aid and representation are used for the most deserving or needy cases which have a good chance of success.

440. In some countries free legal aid is not, strictly speaking, free. Applicants may be required to make a contribution to their legal costs based on their income, and a small income would mean either that no contribution or only a small contribution was required. Variations in practice are noted in the Report on Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, including Legal Aid and Assistance.[133]

[133] Prel. Doc. 10/2004, at paras 20, 21, 24 and 25.

Paragraph *b)* – [an applicant] [a creditor], who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.[134]

441. Paragraph *b)* is the same as Option 1, Article 14(5) except that in Option 1, the provision only applies to a creditor. It remains to be decided whether this provision will apply only to creditors or to any applicant. Its purpose is to guarantee for the applicant, at the stage of recognition and enforcement, the same level of legal assistance which she / he enjoyed in the original proceedings to the extent that this is possible under the law of the State addressed. The applicant must have received the benefit before making the application for recognition and enforcement. The benefit in the State of origin is not one to which the applicant "is entitled" (*i.e.* at present or in the future) but one from which she / he "has benefited" (*i.e.* in the past). This interpretation could lead to injustice if the applicant has never needed or sought legal aid in the past, but needs it now for recognition and enforcement. Consideration might be given to substituting the words "is entitled to" for "has benefited from" (in line 1).

442. Paragraph *b)* does not direct the State addressed to provide to the applicant the same type of legal assistance he / she received in the State of origin. The legal assistance to be provided in the State addressed should be "at least to the same extent" that an applicant would receive in "the same circumstances", that is, the circumstances in which the applicant received the legal aid in the State of origin. For example, if the applicant received full legal representation for court proceedings, the equivalent assistance must be provided in the State addressed. It is understood that "the same circumstances" refers to the original proceedings which led to the establishment of the maintenance decision (whether or not this was the principal proceeding or ancillary to other family law proceedings).

443. The nature of the legal assistance is to be understood according to the definition in Article 3 *c)*. The free legal assistance to be expected is that "provided for by law of the State addressed". If the law of the State addressed makes no provision for free legal assistance, then the applicant will not receive anything. However, the State addressed is still bound by the overarching requirement to provide "effective access" to procedures.

444. This paragraph is inspired by Article 15 of the 1973 Hague Maintenance Convention (Enforcement). It was modified by the Drafting Committee to adopt the term "legal assistance" used throughout this Convention. Paragraph *b)* was also improved when a clearer definition of "legal assistance" was also proposed (see Art. 3) at the 2007 Special Commission.

445. The question was raised whether this paragraph was really an applicable law rule *i.e.* that the law of the requesting State applies to the entitlement to legal assistance in the requested State. This is clearly not the intention, as indicated by the words "provided for by the law of the State addressed".

[134] This may be subject to a declaration or reservation.

CHAPTER IV – RESTRICTIONS ON BRINGING PROCEEDINGS

Article 15 Limit on proceedings

446. It is very important for the Convention, for the protection of the creditor and for the fight against denial of justice, to have this rule.[135] The aim of this provision is to prevent the misuse of jurisdiction. Such a rule is especially needed in the absence of direct rules of jurisdiction in the Convention. This rule has to be read jointly with Article 17 (Bases for recognition and enforcement), because it is necessary to have decisions capable of being recognised under Article 17.[136] [137]

447. Two examples can illustrate the practical problems to which this Article seeks to provide an answer.

448. In the first case, a decision is given in State A where creditor and respondent are residents. The debtor changes residence to State B. The creditor applies for recognition and enforcement in State B, where a review of the merits (Art. 24) is not possible. In the same case, it is possible to imagine that, although recognition and enforcement have been accorded, the debtor seizes the authorities in State B to revise the original decision on the basis of changed circumstances. However, such a revision is not possible in many legal systems where the modification has to be made in State A, either because State A is the State where the creditor is resident or because it is the State where the original decision was made and the creditor remained resident there.[138]

449. In the second case, a decision is given in State A where creditor and respondent are residents and, in this case, the creditor changes residence to State B. The circumstances have changed and he seeks a modification of the decision in State A. This modification will be possible in certain systems,[139] but it will not be possible in others[140] which require some kind of nexus between the defendant and the jurisdiction in which modification is sought.

450. The rule in Article 15 looks somewhat like a rule on jurisdiction. However since there was no agreement on the inclusion in the Convention on direct rules of jurisdiction, the rule in Article 15 simply operates to prevent recognition of a modification decision where the rule is broken (see Art. 19 *f)*).

451. The provision includes a general rule (para. 1) and the exceptions to the general rule (para. 2).[141]

Paragraph 1 – Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made.

452. As a general rule, once a decision has been given in the country of the habitual residence of the creditor,[142] the debtor has no possibility of bringing proceedings for a new or modified decision in another Contracting State, as long as the creditor maintains

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[135] See Prel. Doc. No 3/2003, see *supra* footnote 10, para. 125, and Work. Doc. No 88 from the European Community.
[136] See comments under paras 475 *et seq.* of this Report.
[137] See also Art. 10, para. 2.
[138] A practical example is a Spanish decision of the Supreme Court (DATOS) about the following case: an Argentinean couple divorced in Argentina, including in the decision a small quantity for the maintenance of the children of the couple. The father came to Barcelona, where he got a good job. The mother and the children came to Spain and asked for modification. The Supreme court says that Spanish Courts have no jurisdiction because it is the Courts of origin that have jurisdiction to modify the first decision. It renders a general solution for a particular case.
[139] For example, under the Brussels / Lugano scheme.
[140] For example, under the UIFSA regime.
[141] The current draft comes from Work. Doc. No 88 of the European Community and from the observations of the United States in Prel. Doc. No 23/2006, see *supra* footnote ??.
[142] It is the essential case. See Prel. Doc. No 3/2003, see *supra* footnote 15, para. 25.

residence in that State. It has to be underlined that in this case it is required that the residence of the creditor is "habitual".

453. This provision could be seen as a certain trend towards *perpetuatio jurisdictionis*, which constitutes a benefit for the creditor, thereby preventing the debtor from immediately initiating new proceedings after a decision has been given in one Contracting State. It is also a guarantee for the Court, which knows that it could modify the decision if circumstances so require.

Paragraph 2 – The previous paragraph shall not apply –

454. However, in certain exceptional circumstances the rule in paragraph 1 may be set aside. There are four cases:

Sub-paragraph *a)* – where, except in disputes relating to maintenance obligations in respect of children, there is agreement in writing between the parties to the jurisdiction of that other Contracting State;

455. The first case is where there is an agreement between the parties on the jurisdiction of the courts of this other Contracting State relating to obligations in respect of children.[143] The conditions are the same as those expressed in Article 17(1) *e)*.[144] But the purpose of the two provisions is different. Article 15(2) *a)* does not create a direct jurisdiction basis, but merely an authorisation for the debtor to bring proceedings.

Sub-paragraph *b)* – where the creditor submits to the jurisdiction of that other Contracting State either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

456. The second case is where the creditor submits to the jurisdiction in another Contracting State. In this case, the conditions are the same as those expressed in Article 17(1) *b)*.

Sub-paragraph *c)* – where the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or make a new decision; or,

457. In sub-paragraph *c)* a particular case is envisaged, when the courts of the country of origin cannot, or refuse to, exercise jurisdiction to modify the previous decision or to give a new one, according to its internal law[145].

Sub–paragraph *d)* – where the decision made in the State of origin cannot be recognised or declared enforceable in the Contracting State where proceedings to modify the decision or make a new decision are contemplated.

458. A last possibility is contemplated in sub-paragraph *d)*. This is the case where the decision rendered in the State where the creditor is habitually resident cannot be recognised or declared enforceable, by virtue of the grounds established in Article 19 in the State where proceedings to modify the decision or to adopt a new decision are attempted.

CHAPTER V – RECOGNITION AND ENFORCEMENT

459. The scope of Chapter V on recognition and enforcement of decisions is more or less the same as the scope of the 1958 Hague Maintenance Convention and the 1973 Hague Maintenance Convention (Enforcement). Building on these two instruments, the Chapter sets out important improvements deriving from developments that have occurred in

[143] As in relation to Art. 17(1) *e)*, consideration should be given to whether "vulnerable adults" should also be excepted from Art. 15.
[144] See definition of "agreement in writing" in Art. 3 *d)*.
[145] The proposal in Work. Doc. No 72 from Brazil has not been accepted, that suggested to substitute "cannot or refuses to" by "final decision". The reason is that "final" is linked to a decision on the merits, when this sub-paragraph relates to a question of pure procedure.

national, regional or international systems of maintenance recovery,[146] such as the trend towards administrative systems of child support (Art. 16(1)), the possibility to cover authentic instruments and private agreements (Art. 16(4)),[147] the "fact based approach" (Art. 17(3)), the possibility to register a decision for enforcement or to have it declared enforceable when an application has been made through a Central Authority (Art. 20(2), the limitation of *ex officio* review (Art. 20(4), and the possibility to use standardised forms (Art. 21). The Chapter is geared towards opportunities provided by advances in information technology facilitating electronic communications[148] while at the same time setting safeguards in relation to the transmission of documents (Art. 20(7) *c)* and 21(3)). The Convention contains an efficient system for the recognition and enforcement of decisions; one that will provide the widest recognition of existing decisions. It eliminates the costs and delays that are incurred if the creditor has to pursue a fresh application because an existing decision cannot be recognised. In conjunction with Chapter IV, it will also help to reduce the problems arising from multiple conflicting orders.[149]

460. As we said before, this Chapter deals with the traditional question of private international law, which is not strictly speaking "enforcement", but the intermediate procedures to which a foreign decision is subject before being enforced *stricto sensu* under Chapter VI.

Article 16 Scope of the Chapter

Paragraph 1 – This Chapter applies to a decision rendered by a judicial or administrative authority in respect of a maintenance obligation. Such decision includes a settlement or agreement concluded before or approved by such an authority. A decision may include automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance or interest and a determination of costs or expenses.

461. The first Article of the Chapter is devoted to determining the scope of application of Chapter V. To that end, paragraph 1 determines to what decisions this Chapter applies, without including a definition of decision.[150]

462. As in the 1973 Hague Maintenance Convention (Enforcement) the Chapter will apply to a decision whether rendered by a judicial authority or an administrative authority. However, contrary to the 1973 Hague Maintenance Convention (Enforcement), the term administrative authority has been defined. This was at the request of States which are less familiar with the concept of administrative authority or that know of administrative authorities that are different from the ones contemplated under the Convention. Hopefully this may help to attract certain States to become parties to the new Convention which were not willing to join the 1973 Hague Maintenance Convention (Enforcement). It was agreed that administrative decisions should be recognised and enforced in the same way as judicial decisions if the "administrative authority" which has rendered the decision meets the definition of requirements of paragraph 3.

463. Several reasons militate in favour of an explicit inclusion of decisions given by an "administrative authority" in the scope of Chapter V. First, following the example of a number of Nordic States from the 1960's, an increasing number of jurisdictions such as New Zealand, Australia and states within the United States have introduced administrative systems for maintenance. While offering the same level of legal safeguards as judicial authorities, these specialised authorities can process applications faster and more efficiently. Second, it would be unfair to oblige a State with an administrative system to recognise and enforce foreign judicial decisions, while decisions

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[146] Developments as of 2003 in national, regional and international systems are described in Prel. Doc. No 3/2003, see *supra* footnote 15, pp. 9-13, 30-38 and 45-49.
[147] It is to be noted that authentic instruments and private agreements were covered by way of a declaration under the 1973 Hague Maintenance Convention (Enforcement). Hopefully, the safeguards developed under Art. 26 will reassure the States that were reluctant to extend the application of the 1973 Hague Maintenance Convention (Enforcement) to that matter.
[148] See above, at Part IV of this Report.
[149] See *supra* paras 28 of this Report.
[150] See *supra*, paras 57-67 of this Report, comments to Art. 3.

of a State with an administrative system would not be recognised in a country equipped with a judicial system.

464. As for the 1973 Hague Maintenance Convention (Enforcement) a decision will include a "settlement" or "agreement", as long as it is concluded before or approved by a judicial or administrative authority. The inclusion of both settlements and agreements will ensure a broad coverage of the Chapter as the two terms have different meanings in the different legal systems.

465. The decision that would fall under the scope of the Convention "may" also include other elements.

466. The Convention is adapted to modern times by providing that the term "decision" may include "adjustment by indexation", which refers to a dynamic maintenance order or automatic adjustment by operation of the law to take into account foreseeable increases or decreases in the costs of living. These adjustments which are increasingly more frequent consist either of providing a formula in the decision to calculate the periodic adjustment of the maintenance amount or of attaching to the decision a table of indexation indicating the periodic increase of the amount of maintenance to be paid. Where this is the case, the authorities in the State addressed will be required to recognise and enforce the decision as adjusted in accordance with the form of indexation specified by the decision, for example, one which is linked to a cost-of-living index in the State of origin. These automatic adjustments reduce the need to modify the original decision.

467. In the second place, a requirement to pay arrears, retroactive maintenance or interest may also be included. It is clear that arrears are included in the scope of the Convention. The difference between "arrears" and "retroactive maintenance" is that "retroactive maintenance" means maintenance for periods prior to the application for a decision while "arrears" refer to the unpaid maintenance for periods after the decision.

468. Finally, the determination of costs or expenses in proceedings may also constitute part of the decision. Therefore there is no need to have a separate rule for their recognition and enforcement. This rule is meant to cover also costs or expenses ordered in unsuccessful maintenance applications. See also paragraph 636 under Article 40 of this Report.

Paragraph 2 – If a decision does not relate solely to a maintenance obligation, the effect of this Chapter is limited to the parts of the decision which concern maintenance obligations.

469. This rule comes from Article 3 of the 1973 Hague Maintenance Convention (Enforcement). It has been included in Article 16 instead of Article 2 as the application of the rule is limited to Chapter V. This rule provides an important safeguard in relation to preliminary or ancillary questions. For example, if a maintenance decision also includes a decision in relation to the establishment of parentage, this latter decision would not necessarily have to be recognised and enforced under the Convention. This is very important since in some States it would be contrary to public policy to recognise the establishment of parentage only for the purposes of maintenance where their domestic law would require that the recognition of parentage could only be done *erga omnes*. Therefore through this provision it would be possible for such States to recognise and enforce only the part of the decision that deals with the maintenance payment without giving effect to the establishment of parentage per se.

Paragraph 3 – For the purpose of paragraph 1, "administrative authority" means a public body whose decisions, under the law of the State where it is established –

470. As explained in relation to paragraph 1, a decision within the scope of this Chapter can be one ordered either by a judicial authority or by an administrative authority. However, at the request of some States not comfortable with this concept, a definition of what constitutes an administrative authority has been included in the text. There are three elements: 1) The administrative authority has to be a "public body"; 2) the decision of the administrative authority must be subject to the control of a judicial

authority in the State of origin; and 3) the decision of the administrative authority must have the same force and effect as a decision of a judicial authority.

[Paragraph 4 – This Chapter also applies to authentic instruments and private agreements relating to a maintenance obligation in accordance with Article 26.]

471. Paragraph 4 is still between brackets as Article 26 is also still between brackets. Under Article 25 of the 1973 Hague Maintenance Convention (Enforcement) it is possible to extend the application of the Convention by way of declaration to authentic instruments and private agreements. It has yet to be decided whether in this Convention this inclusion is mandatory or at the option of Contracting States.

Paragraph 5 – The provisions of this Chapter apply to an application for recognition and enforcement made directly to a competent authority of the State addressed in accordance with Article 34.

472. The Convention is primarily developed to operate within a low cost and efficient system of co-operation resting on Central Authorities in the Contracting States. However, nothing in the Convention prevents application for recognition and enforcement of a decision directly (*i.e.* without going through the Central Authorities in accordance with Art. 9) to the competent authority in the State addressed if this authority has jurisdiction to recognise and enforce the said decision. It will be for each State to decide whether the competent authority for recognition and enforcement will be an administrative or judicial authority for that purpose.

473. Article 34 (below) makes it clear that the whole of Chapter V applies to a request for recognition and enforcement made directly to a competent authority.

474. However, it remains to be discussed whether an applicant making a direct application to a competent authority will have the possibility to use the forms provided under Article 20 or even to examine whether this person could benefit from Article 36 that deals with the exemption from legalisation or any analogous formality with regard to documents transmitted under the Convention, which could include documents transmitted directly to the competent authority.

Article 17 Bases for recognition and enforcement

475. The bases for recognition and enforcement are a set of indirect rules of jurisdiction. In other words, recognition is accorded to a decision made in another Contracting State provided that certain jurisdictional requirements are satisfied. It is not the actual basis on which that authority exercised jurisdiction which is relevant. The question is whether one of the indirect bases for jurisdiction in fact existed. (For an explanation of why the Convention does not include direct rules of jurisdiction, see above at Part V of this Report.)

476. In contrast with the Chapters on administrative co-operation,[151] the term "habitual residence" is used throughout Article 17. In this context, the term relates to a particular set of facts relevant to habitual residence that must be assessed on a case-by-case basis in the light of the context of the new Convention. The criterion of habitual residence allows for the determination of a sufficient connection between the individuals concerned and the requested State to avoid forum shopping and *lis pendens*. It is unlikely that the operation of the new Convention would be adversely affected by the case-law on habitual residence arising from the 1980 Hague Child Abduction Convention. The term will not hold the same pivotal position as it does in abduction cases. It has to be added that most applications for recognition and enforcement of maintenance decisions are likely to be uncontested. Finally, there is no evidence that the use of the term "habitual residence" created any difficulty under the 1973 Hague Maintenance Convention (Enforcement). For the discussion as to whether the Convention should contain a definition of "habitual residence", see above at paragraphs 59 and 60 under Article 3.

[151] See, in particular, Art. 9 and comments under paras 240 *et seq.* of this Report.

477. Throughout the Article, the word "proceedings" is used. The term includes both judicial and administrative proceedings. Similarly, no problem has arisen from the use of this term under the 1973 Hague Maintenance Convention (Enforcement).

Paragraph 1 – A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if –

478. Paragraph 1 sets out the grounds of jurisdictions in a State of origin upon which a judicial or administrative decision made in that State will be recognised and enforced in the requested State.[152] The obligation to recognise and enforce such a decision is clear from the text as the term "shall" is employed and not "may".

479. The list of grounds included in the Article is a closed list. Therefore, there will be no obligation to recognise and enforce a decision under the Convention if other grounds are used.

480. It is to be noted that the application through the Central Authority (the administrative co-operation system) for recognition and enforcement is provided for under Article 10(1) *a)*, see paragraphs 249-254 of this Report.

Sub-paragraph *a)* – the respondent was habitually resident in the State of origin at the time proceedings were instituted;

481. The first ground of indirect jurisdiction is the habitual residence of the respondent in the State of origin. This very widely accepted ground of jurisdiction appears in Article 7(1) of the 1973 Hague Maintenance Convention (Enforcement). The existence of the ground of jurisdiction and the factual elements leading to it have to be assessed at the time when proceedings were instituted, without taking into account any possible change thereafter.

Sub-paragraph *b)* – the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

482. The possibility to expressly submit to the jurisdiction is included in sub-paragraph *b)* as well as the possibility of submission to the jurisdiction, if the respondent enters an appearance without contesting the jurisdiction and defending on the merits. This very widely accepted ground of jurisdiction appears in Article 7(3) of the 1973 Hague Maintenance Convention (Enforcement). However, under the new Convention it has to be noted that the respondent does not have the possibility to object to the jurisdiction at any moment. The respondent has to object "at the first available opportunity", in accordance with the internal law of the State of origin.

483. It is to be noted that submission by the respondent to the jurisdiction in this case is different from agreement to the jurisdiction under sub-paragraph *e)*.

Sub-paragraph *c)* – the creditor was habitually resident in the State of origin at the time proceedings were instituted;

484. The habitual residence of the maintenance creditor is a special ground of jurisdiction found in many regional instruments and national systems of maintenance recovery, set to protect the creditor as a weaker party. This widely accepted ground of indirect jurisdiction is also included in Article 7(1) of the 1973 Hague Maintenance Convention (Enforcement). However, some States, in particular the United States, cannot accept this ground of jurisdiction because of constitutional requirement of "*due process*". That is because the residence of the creditor alone does not provide any required nexus between the authority exercising jurisdiction and the debtor for enforcement of money orders. It is to accommodate these States that the possibility of making a reservation in respect of this ground of jurisdiction has been set out in paragraph 2 of this Article.[153] As for sub-paragraph *a)* the existence of this ground of jurisdiction and the factual elements leading to it have to be assessed at the time when the proceedings were instituted,

[152] Work. Doc. No 89 of the European Community.
[153] See Art. 16(2), and comments at para. 469 of this Report.

without taking into account any possible change thereafter. It is to be noted that the term "creditor" includes, without any doubt, the child for whom maintenance was ordered. This explains why a special rule for the child as a creditor is not included in the text.

485. The possibility of a reservation in respect of this paragraph is set out in paragraph 2.

Sub-paragraph *d)* – the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

486. This new ground of indirect jurisdiction received great support during the Third meeting of the Special Commission in April 2005.[154] The situation is clearly different from the one in sub-paragraph *c)* and it seems acceptable to countries of civil law and Common Law traditions, in particular the United States for which this new ground will create a bridge. This ground sets strict conditions: that the respondent has lived with the child in the State where the child continues having the habitual residence or has lived in that State and provided support for the child there. It reflects a frequent situation where the debtor has been living in the same country as the child, paid maintenance and afterwards, for work related reasons, has moved to another country. This new basis for recognition involves a nexus between the debtor and the jurisdiction in which the child has his or her habitual residence.

487. It is to be noted that further consideration is being given by two delegations to the possibility of an amendment that would provide for a reservation in relation to Article 17(1) *d)*.

Sub-paragraph *e)* – except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or

488. The agreement to the jurisdiction by the parties has been discussed taking into account if party autonomy provides an adequate basis for jurisdiction in maintenance. It has been agreed to include this possibility with the exception of disputes relating to maintenance obligations in respect of children. The Diplomatic Session should discuss whether this exception should be extended to vulnerable adults.

489. Attention has to be paid to the fact that submission by the respondent in sub-paragraph *b)* is not the same as agreement to the jurisdiction in sub-paragraph *e)*. The possibility of a reservation in respect of this sub-paragraph is set out in paragraph 2.

Sub-paragraph *f)* – the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

490. In sub-paragraph *f)* it is established that a decision given by an authority exercising jurisdiction on a matter of personal status or on parental responsibility will be recognised. The discussion in the Special Commission first focussed on the need to include this ground of jurisdiction. It seems that the rule could be useful since in many situations covered by sub-paragraph *f)*, for example in the case of divorce, decisions are taken in relation to maintenance.

491. However, consideration has been given to additional wording to reduce the risk of including cases where the originating authority has exercised an exorbitant jurisdiction on a matter of personal status, for example where jurisdiction has been exercised solely on the basis of nationality. This explains the addition of the terms "unless that jurisdiction was based solely on the nationality of one of the parties",[155] at the end of the provision as it could constitute an exorbitant ground of jurisdiction. Another possibility

[154] After a proposal of Switzerland in Work. Doc. No 63.
[155] See in this respect Art. 8 of the Brussels II *bis* Regulation.

could have been to include a provision similar to Article 8 of the 1973 Hague Maintenance Convention (Enforcement) which provides that "*Without prejudice to the provisions of Article 7, the authority of a Contracting State which has given judgment on a maintenance claim shall be considered to have jurisdiction for the purposes of this Convention if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognised as having jurisdiction in that matter, according to the law of the State addressed*", which has the advantage of recognising the maintenance decision under the Convention only if divorce is recognised according to the internal law of the State addressed.

492. The possibility of a reservation in respect of this sub-paragraph is set out in paragraph 2.

Paragraph 2 – A Contracting State may make a reservation, in accordance with Article 57, in respect of paragraph 1 *c)*, *e)* or *f)*.

493. As has been noted in the previous paragraphs, some of the grounds of jurisdiction are not acceptable to some countries. This is why the possibility to make a reservation has been set out in paragraph 2. It will facilitate the acceptance of the Convention for more States. The possibility to make a reservation, in accordance with Article 57, is currently accepted for paragraph 1 *c)*, *e)* and *f)*. The question remains open in relation to sub-paragraph *d)*. It appears that the difficulty for some States is in relation to the general formulation of sub-paragraph *d*). According to the law in force in those States, it is necessary to identify on a case-by-case basis if there is a real and substantial link with the State of the habitual residence of the child.

494. It is important to note that reservations under the Convention, in accordance with Article 57(4), have no reciprocal effect.[156] That is because according to the practice under Hague Conventions it is possible, as in this case, to negotiate and adopt a system of non-reciprocal reservations. This solution provides an answer to the question concerning the unintended consequences of coupling Article 17(2) and Article 57. For example, the United States of America may make a reservation in relation to Article 16(1) *c)* (jurisdiction based on creditor's habitual residence) because this ground of jurisdiction does not meet their due process requirement that there be a nexus between the defendant and the forum. This would not release other Contracting States from the obligation to recognise a decision made in the United States of America when the creditor was in fact resident there, even though the ground of jurisdiction actually relied on by the US authority is not one included in Article 17 (*e.g.* tag jurisdiction).

Paragraph 3 – A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

495. Paragraph 3 provides for a solution with regard to the effect of making a reservation in relation to grounds of jurisdiction set out in paragraph 2. This is in line with the spirit of the Convention, that is, to recognise and enforce as many maintenance decisions as possible. The so-called "fact-based approach" from the United States, which is a new development introduced in this Convention, is the essential element of this Article, and is based on a proposal made by the European Community.[157] Just as the residence of the creditor does not sit well with some countries, the "fact-based approach" is unknown to others. In order to be a useful ground to facilitate the recognition and enforcement of decisions it has to be correctly understood. Under this approach, a foreign decision is recognised if made in factual circumstances that would, *mutatis mutandis*, be a basis for jurisdiction in the State addressed. In consequence, the ground of direct jurisdiction on which the judge of origin acted is disregarded and attention is only paid to the links of factual proximity. The United States delegation states that with

[156] See Prel. Doc. No 23/2006, see *supra* footnote 102, p. 41 and Report of Meeting No 15, p. 4 of the Special Commission of June 2006.
[157] Work. Doc. No 56 by the European Community. See also Prel. Doc. No 3/2003, see *supra* footnote 15, paras 87 and 88.

this approach, very few foreign decisions on maintenance are not recognized in the United States.

496. Consideration has been given to a proposal[158] that raises the questions: (1) whether fact based jurisdiction should appear in paragraph 1 instead of paragraph 3; and, (2) wherever the fact based jurisdiction is used, whether Contracting States should list in a declaration any additional bases of jurisdiction to those listed in paragraph 1 and how they operate. If the "fact-based approach" had appeared in paragraph 1, all Contracting States would have been required to make this declaration. The proposal met some resistance as it would be complex to operate. Therefore, paragraph 3 opens the possibility of using the "fact-based approach" only to States making a reservation in relation to the grounds listed under paragraph 2.

497. A rule similar to the "fact-based approach" has been adopted in some bilateral treaties entered into by the United States.[159].

Paragraph 4 – A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision. The preceding sentence does not apply to direct applications for recognition and enforcement under Article 16(5) unless a new application is made under Article 10(1) *d)*.

498. Paragraph 4, as paragraph 3, provides another solution, in the case of States which have made a reservation in relation to grounds of jurisdiction set out in paragraph 2, to ensure the recovery of maintenance by creditors. Where recognition of a decision "is not possible as a result of a reservation", the State shall take all appropriate measures to establish a decision, if the debtor's habitual residence is in the State that made the reservation.[160] In that case, as the provision does not apply to direct applications, it will be the Central Authority which will proceed with the necessary applications in order to establish a new decision,[161] without the need for a new application from the creditor. Where the "fact-based" approach would not produce any result, for example in the very difficult case of pure creditor based jurisdiction (*i.e.* without any other *nexus*) this fall-back rule will increase the chance of recovery of maintenance.

499. In the case of a direct application for recognition and enforcement the creditor cannot rely on the automatic action of the Central Authority to establish a decision, and will have to make an application under Article 10(1) *d)*.

Paragraph 5 – A decision in favour of a child under the age of 18 which cannot be recognised by virtue only of a reservation under Article 17(1) *c)*, *e)* or *f)* shall be accepted as establishing the eligibility of that child for maintenance in the requested State.

500. The Working Group on Applicable Law found that the difference in approach between States that apply in principle, the law of the creditor's habitual residence and those which always rely on the law of the forum is liable to produce, in certain specific cases, unfair results.[162] This is the case in particular when a decision issued in the State of the creditor's residence cannot be recognised in the State of the debtor's residence for lack of indirect jurisdiction resulting from the reservation under Article 17(1) *c)*, *e)* or *f)*. In that case, the maintenance creditor is compelled to bring his or her claim in a country other than that of his or her own residence. This solution is acceptable if the *lex fori* grants the creditor a standard of protection equivalent to, or higher than, that to which he or she would have been entitled on the basis of the law of his or her own residence.

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[158] See Work. Doc. No 63 from Switzerland.

[159] See Annex 4 in the Appendices to Prel. Doc. No 3/2003, see *supra* footnote 15. See also the agreement between the US and the Netherlands of 30 May 2001, Arts VII and VIII, in the *Netherlands Journal of Private International Law* …

[160] This provision differs from Art. 15(2). In that case the possibility is for the debtor as long as the creditor's habitual residence remains in the State where the original decision was made.

[161] Under Art. 6 of the Convention. See comments under paras 102 *et seq.* of this Report.

[162] "Proposal by the Working Group on the Law Applicable to Maintenance Obligations", Reported presented to the Special Commission, Prel. Doc. No 14/2005, p. 13, para. 62.

On the other hand, application of the *lex fori* leads to unfair results if it is less favourable for the creditor, and in particular if it considers the creditor to be ineligible for maintenance, for instance by reason of age. In such case, the creditor is unable to institute proceedings in the debtor's country. In the light of these findings, it was agreed to include in the text of the Convention a mandatory conflict of law rule to provide a solution for children under the age of 18.[163]

501. In this context "eligibility" refers to a child's entitlement to maintenance. It does not refer to an entitlement to a specific quantum or level of maintenance. The principal purpose of the proceedings in the requested State would then be to establish the quantum of the maintenance obligation. The Convention does not say if the rule is a rebuttable (*iuris tantum*) presumption or a *iuris et de iure* presumption. From the perspective of the object of the Convention that is to ensure the effective international recovery of family maintenance (Art. 1) and the interdiction of review of the merits (Art. 24), it seems that it could not be a rebuttable presumption because, in fact, if it would have been the result, in a lot of cases the debtor would try to modify the decision rendered in the country of origin of the "eligibility".

502. As mentioned in relation to Article 2(1),[164] the fact that the Convention applies to children under the age of 21 does not mean that States are obliged to modify their laws if maintenance is limited to children under the age of 18. The only obligation under the Convention will be to recognise and enforce a foreign decision for a child under the age of 21. Therefore, if the "eligibility" is accepted according to the law of the State of origin for a child under 21 but older than 18, the result would be to oblige the requested State to establish maintenance for a child that cannot obtain maintenance under its internal law. This explains why in Article 17(5), a different age limit is established.

Paragraph 6 – A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

503. During the discussions in the 2005 Special Commission meeting, special attention was paid to distinguishing the conditions under which a foreign decision is recognised and the conditions under which a foreign decision is enforced. This raises the question of the distinction between recognition and enforcement. Recognition means that the court addressed accepts the determination of the legal rights and obligations made by the authorities of origin. Enforcement means the application of the legal procedures of the court addressed to establish the enforceability of the decision in the State addressed. It is possible to apply only for recognition, and recognition need not be accompanied or followed by enforcement.

504. Consensus exists as to requiring less for recognition than for enforcement. As for recognition, it is sufficient that the decision has effect in the State of origin, whereas in the case of enforcement, it is required that the decision be enforceable in the State of origin. However, the possibility of seeking enforcement when the decision in the country of origin is only provisionally enforceable is not excluded.

505. Paragraph 6 is meant to replace and modernise wording to the same effect found in Article 4 of the 1973 Hague Maintenance Convention (Enforcement) which could lead to diverging interpretations. That Convention provides that the maintenance decision shall be recognised and enforced if it is no longer subject to ordinary forms of review in the State of origin. It went on to provide that "provisionally enforceable decisions and provisional measures shall, although subject to ordinary forms of review, be recognised or enforced in the State addressed if similar decisions may be rendered and enforced in that State. In the context of maintenance, where decisions are never final since they are subject to modifications in relation to changes of circumstances such as exchange rate fluctuations, differences of earnings of the debtor and changes of needs of the creditor, the wording of the 1973 Hague Maintenance Convention (Enforcement) was not ideal.

[163] *Ibid*.
[164] Comments under paras 45 *et seq.* of this Report.

Article 18 Severability and partial recognition and enforcement

Paragraph 1 – If the State addressed is unable to recognise or enforce the whole of the decision it shall recognise or enforce any severable part of the decision which can be so recognised or enforced.

506. Whereas Article 16(2) limits the application of Chapter V to the elements of the decision that deal with maintenance obligations, this paragraph limits the recognition and enforcement to any severable parts of the decision that can be recognised and enforced in the State of origin. This wording is a net improvement in comparison with Article 10 of the 1973 Hague Maintenance Convention (Enforcement) that is to the same effect. For example, a decision grants maintenance to a mother who is a registered partner and her child. However, if maintenance obligations between registered partners are not within the scope of the Convention for the State addressed, the part of the decision awarding maintenance to the mother will not be entitled to recognition and enforcement. On the other hand, it will still possible to recognise and enforce the part of the decision concerning the child. "Severable" means that the part of the decision in question is capable of standing alone.

Paragraph 2 – Partial recognition or enforcement of a decision can always be applied for.

507. The wording of this paragraph is borrowed from Article 14 of the 1973 Hague Maintenance Convention (Enforcement). It may be that the creditor, for different reasons, would prefer to tone down the application for recognition and enforcement. For example, fiscal considerations could compel the creditor not to seek full recognition and enforcement of the decision.[165] The rule is only of practical value if a similar provision does not already exist in the law of the State addressed.

Article 19 Grounds for refusing recognition and enforcement

508. In the spirit of the Convention on the Rights of the Child and other equally important international human rights instruments, one of the objectives of the new Convention is to recognise and enforce as many maintenance decisions as possible. However, in some circumstances recognition or enforcement may be refused for reasons such as public policy, fraud in connection with a matter of procedure, competition between a case which is pending and later initiation of proceedings before another authority (*lis pendens*), conflicting decisions (*res judicata*), infringement of due process or violation of important rules set out in the Convention. The use of the term "or" at the end of sub-paragraph *e)* ii) shows clearly that the conditions for non-recognition and enforcement are non-cumulative but alternatives. Furthermore, even if one of the conditions is met, the requested competent authority is under no obligation to refuse recognition and enforcement. The verb "may" expresses the idea of possibility and not of obligation. That would have been expressed by "must" or "shall". It is to be noted that recognition and enforcement of decisions are rarely refused on the basis of the grounds set out in this provision.

Recognition and enforcement of a decision may be refused –

Paragraph *a)* – if recognition and enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed;

509. As in other Hague Conventions, such as the 1973 Hague Maintenance Convention (Enforcement) and other international instruments, the first ground of non-recognition or non-enforcement of decisions relating to maintenance is the fact that it is manifestly contrary to public policy (*ordre public)* in the State in which recognition or enforcement is sought. In its application of this provision, the competent authority should verify whether the recognition and enforcement of a specific decision would lead to an intolerable result in the requested State. A discrepancy of any kind with the internal law is not sufficient to use this exception. Verifying whether a decision is contrary to public policy should not

[165] Verwilghen Report at para. ….

serve as a pretext for embarking on a general review on the merits, something which is expressly forbidden under the Convention (see Art. 24 and paragraph 568 of this Report). The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement).

510. Some delegations expressed their concerns[166] regarding the possible systematic use of the public policy exception in relation to issues of personal status. For example, in some countries a foreign decision may create a constitutional problem if it establishes that a man has to pay maintenance to a child born out of wedlock. In that respect, some experts proposed an additional ground for refusing recognition and enforcement.[167]

Paragraph *b)* – if the decision was obtained by fraud in connection with a matter of procedure;

511. This ground for non-recognition has been the subject of lengthy discussions since it appears that there are important differences among the different States as to the meaning of fraud and as to its relation with other exceptions. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served on the wrong address, or where the party seeks to corrupt the authority or conceals evidence, etc.[168] The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement).

512. Discussions in the Special Commission revealed some confusion as to what is fraud and how it is different from *ordre public*. The two concepts are different. Cases of fraud are not necessarily covered by the public policy exception as shown in the above examples. The concept of fraud presupposes the presence of a subjective element of wilful misrepresentation or fraudulent machinations, not simply a mistake or negligence, on the part of the party seeking recognition and enforcement. It is important to note that in this paragraph reference is made only to fraud in connection with a matter of procedure which is different from the exception of "*fraude à la loi*" in choice of law questions. Furthermore, fraud in this paragraph relates to what is called "procedural *ordre public*".

513. The recent 2005 Hague Choice of Court Convention, includes as a ground for the refusal of recognition and enforcement the case where "the judgment was obtained by fraud in connection with a matter of procedure" (Art. 9 *d)*),[169] which is a "procedural *ordre public*".[170] The inclusion of this ground could be contemplated if the idea behind this concept is the same as Article 22(2) *b)* of the 2000 Hague Adults Convention ("fundamental principles of procedure*")* or Article 23(2) *b)* 1996 Hague Child Protection Convention ("fundamental principles of procedure", linked to the best interest of the child).

Paragraph *c)* – 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;

514. The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement). This ground to some extent integrates in the Convention the concept of *lis pendens* at the time of recognition and enforcement, where it is usually provided under the direct jurisdiction rules. However, it is not strictly *lis pendens* as the provision only covers proceedings for the same "purpose". It does not provide for proceedings with the same "cause of action". It is to be understood that the "purpose" of an action refers to the "claim" while the "cause of action" refers to the "legal basis". Therefore, two cases with the same legal basis but for different purposes could co-exist.

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[166] A proposal was made by some experts in Work. Doc. No 51.
[167] *Ibid*.
[168] See Art. 10(1) *d)* (available applications and comments under paras 269 *et seq.* of this Report.
[169] Explanatory Report T. Hartley – M. Dogauchi, para. 189.
[170] After this inclusion, if, at the end of the day, this ground for refusing recognition and enforcement is excluded from the Convention on maintenance, the only way of justifying the exclusion could be that after studying the question, it seems not adequate for maintenance.

515. The Convention does not include any rule indicating when proceedings are pending in a State. One will have to refer to the internal law of the requested State on this matter.

Paragraph *d)* – 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;

516. The case of conflicting decisions is another ground for not recognising or enforcing a foreign decision. The decision has to be rendered between the same parties and for the same purpose. The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement). There is nothing mentioned in this provision as to the date on which the decision has been rendered in another State. For the case where the decision has been given in the State addressed, no other condition is needed and it is connected with paragraph *c)*. For the case where the decision has been given in a different State to the State addressed, it is necessary for this decision to fulfil the conditions to be recognised or enforced in the State addressed. For this last case, nothing is said in the Convention about the date on which the decision has been given in this third State. It could pose a problem in relation to Article 14 if it has been given before or after a decision for which recognition and enforcement has been sought.

Paragraph *e)* – if the respondent had neither –

i) **proper notice of the proceedings and an opportunity to be heard, nor**

ii) **proper notice of the decision and the opportunity to challenge it on fact and law; or**

517. Recognition and enforcement of the decisions may be refused if the respondent had neither proper notice of the proceedings and did not have the opportunity to be heard nor proper notice of the decision and the opportunity to challenge it. These rules are well known in other Conventions. However, where under Article 6 of the 1973 Hague Maintenance Convention (Enforcement), the authority addressed had the obligation to refuse recognition and enforcement, in this case the authority, as for the previous sub-paragraphs, has a discretion in this respect. The terms "proper notice" mean that it is sufficient that the defendant be notified in a way to provide an opportunity to react, but it is not necessary for the defendant to have been "duly served". The use of the term "proper notice" is adequate for both the judicial system and the administrative system. The first element of sub-paragraph *e)* is geared towards judicial systems or even administrative systems where the defendant is heard before the authority. On the other hand, the second element of the sub-paragraph is adapted to administrative systems where decisions are rendered ex-parte and due process respected by allowing the defendant to challenge the decision on fact and law after the decision is rendered. This is the case in administrative systems such as in Australia and Norway, application systems such as in Canada and Reciprocal Enforcement of Maintenance Orders that involve the use of provisional and confirmation orders (Art. 27) such as in New Zealand.

518. In this case, the terms "opportunity to challenge" have to be interpreted in a sensible way, which is to have a reasonable and adequate opportunity to challenge the decision. For example, it will not be a genuine opportunity to give the defendant five minutes to challenge the decision. The opportunity to challenge the decision has to be on a point of fact or law or on both.[171]

519. Many States, including most countries of Common Law tradition, have no objection to the service of a foreign writ on their territory without any involvement of their authorities. They see it as a matter of conveying information.

520. However, other States of civil law tradition, consider the service of a writ to be a sovereign act (official act). They consider that their sovereignty is infringed if a foreign

[171] See Art. 10 *d)* (available applications) and also comments to Art. 20(6).

writ is served on their territory without their permission. Permission would normally be given through an international agreement laying down the procedure to be followed.[172] Such States would be unwilling to recognise a foreign judgment if the writ was not served in such a way.[173]

Paragraph *f)* – if the decision was made in violation of Article 15.

521. Since a decision to modify an existing decision could be rendered in a non-Contracting State, which could later become a Contracting State to the Convention, it is essential to include a rule to refuse the recognition and enforcement of a decision that would be contrary to the rules regarding modification that are set out in Article 15.

Article 20 Procedure on an application for recognition and enforcement

522. This Article governs certain aspects of the procedure to be followed for recognition and enforcement of a foreign decision when both recognition and enforcement are asked for. The objective is to establish a procedure which is simplified, speedy and low cost. The new procedure is designed to overcome the complexity and costs associated with many procedures in international cases – which have resulted in their serious under-use. The objective is an ambitious one, and one which is more difficult to achieve at the international level than at regional levels where the development of simplified systems is easier.[174] Nevertheless, for many States the development of a streamlined and partially harmonised procedure at the international level is seen as a necessity if the maintenance rights of average creditors are to be given real effect at the international level. By contrast, certain States maintain concerns about undue interference with domestic laws and procedures. It is for this reason that, at the meeting of the Special Commission in May 2007, time was set aside for further discussion of this Article.

523. Important features of the new procedure are –

(a) a rapid and simple procedure for the registration of a foreign decision for enforcement (or for a declaration of its enforceability) excluding submissions from the parties and allowing only limited *ex officio* review (see below under para. 4), and

(b) the onus of raising objections to the registration (or declaration) is placed on the debtor whose right to challenge or appeal is limited both as to time and as to the grounds.

524. In the usual case of an application for recognition and enforcement made through the Central Authorities under Chapter III, the starting point for this Article is that the application has been processed, and not rejected, by the requested Central Authority under Article 12.[175] The application will be accompanied by the documents specified in Article 21. This Article specifies which actions are then to be performed by the requested State's authorities, and the courses of action open to the applicant and the respondent.

525. The phrase "procedure on an application for recognition and enforcement" includes all the possibilities existing in the different States: registration for enforcement, declaration of enforceability, *exequatur*, etc.

526. A distinction is made between the case where the application has been made through Central Authorities (para. 2) and the case where it has been made directly to a competent authority (para. 3). See also Article 34.

Paragraph 1 – Subject to the provisions of this Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

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[172] Namely, the 1965 Hague Service Convention. Also, among the Member States of the European Union, Council Regulation (EC) 1348/2000, of 29 May 2000, on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, *OJ*, L 160, p. 37.
[173] See also comments to Art. 20(4).
[174] See, for example, Brussels / Lugano, UIFSA and Canadian regimes.
[175] See comments on Art. 12.

527. The most common international maintenance case is one where the creditor seizes the authorities of the country of his residence. This underlines the importance of the enforcement procedure in the country of the debtor, which must be fast, cheap and simple. But, given that the Convention is not designed to harmonise all aspects of the procedure, a reference is made to the law of the requested State, whose law will govern the procedure on an application for recognition and enforcement of a foreign decision on maintenance insofar as it is not otherwise covered in the Convention.

528. This Article is not to be confused with Article 28, which refers to enforcement measures, which means enforcement *stricto sensu* and does not mean the intermediate procedure to which a foreign decision is submitted before being enforced under national law.[176]

Paragraph 2 – Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

a) **refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or**

b) **if it is the competent authority take such steps itself.**

529. Paragraphs 2 and 3 govern the process of recognition of enforcement or declaration of enforceability. They are drafted flexibly to accommodate different procedures of *exequatur*, but at the same time they require prompt action.

530. For the cases where the application is made through the Central Authority in the State of origin, paragraph 2 makes reference to the two different possibilities according to the particularities of the States. It is possible that in some States it is the Central Authority of the requested State which determines if the decision may be registered for enforcement or declared enforceable. In other States, it may not be possible for the Central Authority to make this determination and, in those cases the Central Authority must promptly refer the application to the competent authority in the requested State. In both cases, the responsible authorities must act "*promptly*" or "*without delay*" in registering or declaring enforceable the decision.

Paragraph 3 – In the case of a direct application to a competent authority in the requested State in accordance with Article 16(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

531. A special rule has been included for the case of a direct application in accordance with Article 16(5). As Central Authorities are not involved in such a case, paragraph 3 establishes that the competent authority that has received the application has to declare the decision enforceable or register the decision for enforcement "*without delay*"

532. The authority of the requested State must give its decision "*without delay*", a term which is not equivalent to "*immediately [on completion of the formalities in Article 53]*" as in Article 41 of the Brussels Regulation. The reason is that it was not considered realistic to introduce such a rule in a worldwide Convention, just as it was not considered advisable to set a time limit. The aim of the term "*without delay*" is to lead the authority in the State addressed to decide on the application as soon as possible, in the same way that the term "*expeditiously*" is used in other Conventions.[177] But it is the internal law of the State addressed which determines the practical effect of this expression.

533. "Without delay" in paragraphs 2 and 3 and "promptly" in paragraph 2 have the same meaning.

Paragraph 4 – A declaration or registration may be refused only for the reasons specified in [Articles 17 and 19] [Article 19 *a)*]. At this stage neither the applicant nor the respondent is entitled to make any submissions.

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[176] As to the contents of the application, see *supra*, Art. 11.
[177] Art. 14 of the 2005 Hague Choice of Court Convention.

534. This paragraph specifies the grounds on which the relevant authority in the requested State may review *ex officio* the application for recognition and enforcement. Two possibilities appear in the text. According to the first one, the grounds are those specified in Articles 17 and 19. According to the second one, the only ground is that specified in Article 19 *a)*.

535. No doubt exists as to Article 19 *a)*, which specifies incompatibility with public policy of the requested State as a ground for refusing recognition and enforcement. This approach limits the possibilities of examination by the competent authority. The second possibility expressed is to extend the grounds for review to all those included in Article 19 and to Article 17 (bases for recognition and enforcement). It should be noted, however, that other compromise positions are possible, such as a combination of Articles 17 and 19 *a)*.

536. At the stage of registration or declaration, neither the applicant nor the respondent have any possibility to make submissions. The reason for this is that the procedure has to be as fast and as simple as possible and, probably, in the great majority of cases, no further submissions would be made.

537. It is to be noted that at the time of the *ex officio* review, the competent authority for registration of the decision for enforcement or for a declaration of enforceability in the State addressed could ask either directly, in accordance with Article 21(3), or through its Central Authority, in accordance with Article 12(2), from the Central Authority of the requesting State for a complete copy certified by the competent authority in the State of origin of any document specified under Article 21(1) *a)*, *b)* and *d)* [and 26(2)]. In the case of a "direct application", the competent authority may ask the applicant directly to produce the complete certified copy of these documents.

Paragraph 5 – The applicant and the respondent shall be promptly notified of the declaration or registration, or the refusal thereof, made under paragraphs 2 and 3 and may bring a challenge or appeal on fact and on a point of law.

538. The declaration of enforceability or the registration made according to paragraph 1 will be "*promptly*" notified both to the applicant and to the respondent. The use of the term "*promptly*" responds to the same interest and difficulties seen in paragraphs 2 and 3 and seeks to express the idea that the notification has to be made as soon as possible. As to the distinction between notice and service, see *supra*, Article 19 *e)*, see paragraphs 517-520 of this Report.

539. The rule in paragraph 5 allows the applicant and the respondent to challenge or to appeal against the decision for or against registration or a declaration. But the only grounds for the appeal are those cited in paragraph 7 or 8 below. This limitation on the possible grounds of appeal should be seen in the light of the control (save in the case of "direct" requests) which has been exercised by the Central Authorities in processing the application, and in the light of the standard limitations set out in Articles 23 and 24.

540. The right to challenge or appeal "*on fact and on a point of law*" means that the challenge or appeal may be on fact, on a point of law, or on fact and on a point of law. Two terms are employed in this and following paragraphs: "challenge" or "appeal". The objective is to ensure that the applicant and respondent have the opportunity to challenge the decision whether made in an administrative or judicial procedure, depending on the system operating in the State addressed. It is not a review of the merits or a new finding of facts, prohibited by Articles 23 and 24. The challenge or appeal may only be on grounds set out in paragraph 7 or, in the case of the respondent, also in paragraph 8.

541. At the stage of challenge or appeal, the procedure is adversarial. It is what in France or in other countries of civil law is known as "*contradictoire*", which means that both parties have the opportunity to be heard. It should be made clear that "adversarial" or "*contradictoire*" must not, under any circumstances, be equated with "contentious". In some States the term means contentious as well as adversarial, whereas this is not the case in others. Hence, although the procedure must always be adversarial, whether or

not it is also contentious will depend on internal law of the forum which also determines other matters of procedure (*lex fori regit processum).*

Paragraph 6 – A challenge or an appeal is to be lodged within 30 days of notification under paragraph 6. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

542. An important improvement in this Convention is the establishment of a time-limit in which the respondent may lodge a challenge or an appeal against the declaration of enforceability or registration for enforcement. This follows the Convention objective of making the decision on maintenance effective as soon as possible. Any undue delay has to be avoided and a long delay for such a challenge or appeal may be damaging for the maintenance creditor.

543. Since a grant of *exequatur* will be the normal outcome of an application for recognition and enforcement, it is logical that the time allowed for appeal should be brief, 30 days from the date of notification of the decision.[178] If the contesting party is resident in a Contracting State other than that in which the decision authorising recognition and enforcement was given, the time for appealing is longer, 60 days. No habitual residence is required as it is only a question of challenge. The time-limit is the same for both parties, applicant and respondent. But the applicant has always the possibility to introduce a new application.

Paragraph 7 – A challenge or appeal may be founded only on the following –

a) **the grounds for refusing recognition and enforcement set out in Article 19;**

b) **the bases for recognition and enforcement under Article 17;**

c) **the authenticity, veracity or integrity of any document transmitted in accordance with Article 21(1) *a)*, *b)* or *d)*.**

544. The aims of the Convention and the limitations on the right to appeal in paragraph 6 result in the only grounds for appeal being those set out in paragraph 7. These are in sub-paragraph *a)*, the grounds for refusing recognition and enforcement set out in Article 19, and in sub-paragraph *b)*, the bases for recognition and enforcement under Article 17. Finally, and using a medium-neutral language, another ground for challenge or appeal refers to the authenticity, veracity and integrity or the required documents. Article 21, paragraph 3, sets out the procedure for obtaining a complete certified copy of any document which is subject of a challenge or appeal. The term "authenticity" in this context should be understood as meaning the identity of the sender.

Paragraph 8 – A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt if the recognition and enforcement was only applied for in respect of payments that fell due in the past.

545. Paragraph 8 adds a ground of challenge or appeal only applicable to the respondent. If the respondent has discharged the debt, this is a clear reason for opposing recognition and enforcement in so far as the decision concerns that past debt.

Paragraph 9 – The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

546. As well as the applicant and the respondent having to be notified of the declaration or registration or the refusal thereof, they must also be promptly notified of the decision on the appeal or the challenge in order to decide whether to accept the decision or consider further appeal under paragraph 10 where this is possible. The notification may be effected directly or through the Central Authority. The Convention does not specify the method to be used.

[178] For the moment, the time periods in this paragraph are taken from Work. Doc. No 67 (International Association of Women Judges).

Paragraph 10 – Further appeal is possible only if permitted by the law of the State addressed.

547. Paragraph 10 addresses the question of any possible further appeal by the applicant or respondent.[179] The text only accepts further appeal if it is permitted by the law of the State addressed, which seems unnecessary, given the existence of Article 20, paragraph 1.[180] The question remains open whether there should be any further elaboration of this provision, taking into account the potential for abuse of appeal procedures. In fact, the possibility of multiple opportunities to challenge a decision could undermine the efficiency of the application of the Convention. This would have a negative effect on the mutual confidence of States in the application of the Convention. Further, the costs and delays that may be involved in further appeals may inhibit applications. In order to avoid these unfortunate consequences, consideration may be given to further provisions such as a prohibition on stay or suspension of enforcement while an appeal is pending, or limiting appeals to points of law. See further the Observations of the Drafting Committee, Preliminary Document No 26, under Article 20(11).

Paragraph 11 – Nothing in this Article shall prevent the use of simpler or more expeditious procedures.

548. The objective of achieving a rapid procedure is further underlined by the rule in paragraph 11 clarifying that it is possible for Contracting States to put in place simpler or more expeditious procedures. Some doubts were expressed on the inclusion of this rule in addition to the rule in Article 46 *b)* (most effective rule). There does appear to be some overlap. The rule in Article 20(11) allows a Contracting State unilaterally to introduce simpler or more expeditious procedures. The rule in Article 46 *b)* allows this to be done unilaterally or under an international agreement between the requesting State and requested State. The Drafting Committee has raised the question whether there are any provisions in Article 20 from which Contracting States should not be allowed to derogate.

Article 21 Documents

549. According to this Article, the application for recognition and enforcement under Article 20 has to be accompanied by the documents enumerated therein. A certain degree of flexibility has been introduced in this Article, by allowing Contracting States that would prefer to receive an abstract or extract of the decision in lieu of a complete text of the decision to make a declaration in accordance with paragraph 2.

Paragraph 1 – An application for recognition and enforcement under Article 20 shall be accompanied by the following –

550. Paragraph 1 contains the classical solution, according to which a party seeking recognition and enforcement has to produce some documents. In all circumstances the documents listed in *a)* and *b)* have to be produced. However, the documents in *c)*, *d)*, *e)* and *f)* have to be produced only if necessary, depending on the circumstances.

551. The documents accompanying an application for recognition and enforcement do not need to be certified when initially transmitted by a Central Authority or produced for the first time directly by an applicant in accordance with Article 34. As for Article 12(2), the aim of the new wording of Article 21 is to ensure in a first stage the swift and low cost transmission (whatever the medium employed) of applications, including accompanying documents, while recognising the need for sometimes making available at

[179] The right of double instance is only for criminal procedures, as is recognised by Art. 14.5 of the international pact and civil and political rights of 1966 and, in Europe, Art. 2 of the Protocol number 7, of 22 November 1984 to the Rome Convention of 1950. This rule having been examined by the European Court of Human Rights in the decision of 13 February 2001, Krombach case, para. 93 ss, as Krombach, has not had the opportunity to appeal in France as he did not entered in appearance. It may be noted that the principle of double instance is required by the European Court of Human rights only for criminal questions and no similar decision on civil matters has been given.

[180] See European Community, Work. Doc. No 86. During the meeting of the Special Commission in June 2006, working documents on this point were presented by China and Japan (Work. Doc. No 93) and Israel (Work. Doc. No 96).

a later stage a complete copy certified by the competent authority in the State of origin of any document specified under Article 21(1) *a)*, *b)* and *d)*. Under Article 21, it is only upon a challenge or appeal under Article 20(7) *c)* founded on the authenticity, veracity or integrity of the document or upon request by the competent authority in the requested State, that a complete copy of the document concerned, certified by the competent authority in the State of origin, is required (para. 3).

552. It is relevant to note that the Forms Working Group has developed forms for most of the documents that are required under this Article.[181] The forms in question use as much as possible tick boxes and as little as possible open text, usually limited to numbers, addresses and names, thus limiting the need for translation. These forms, which follow very closely the terminology of the Convention, are available in English, French and Spanish templates and could be translated into any other language. As a consequence, a form which has been completed in French could for the most part be read in Spanish without the need for translation.

Sub–paragraph *a)* – a complete text of the decision;

553. Sub-paragraph *a)* requires that a complete text of the decision accompany the application for recognition. This refers to the whole judgment and not just to the final order (*dispositif).* It has to be underlined that this rule simply requires the production of the maintenance "decision" not a copy, nor the original. Therefore, it will be possible and easy to produce the electronic version of a decision. As mentioned above, if the authenticity, veracity or integrity of the decision is challenged a complete certified copy of the decision will be provided by either the Central Authority of the requesting State, in the case of an application under Chapter III, or by the applicant where the application for recognition and enforcement is made directly to the competent authority of the State addressed.

Sub-paragraph *b)* – a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met;

554. To fulfil the requirements of this article, a document stating that the decision is enforceable in the country of origin has to be produced in all cases. Taking into account that a decision of an administrative authority can also be recognised and enforced under the Convention, it seems necessary to recall that the requirements of Article 16(3) have to be fulfilled. In some countries the enforceability is not controlled *ex officio*, however a decision on maintenance is, in principle, enforceable, unless one of the parties challenges it.

Sub-paragraph *c)* – if the respondent did not appear in the proceedings in the State of origin, a document establishing that the conditions of Article 19 e) were met;

555. For those cases where maintenance was ordered by default due to the non-appearance by the respondent, it will be necessary to produce a document establishing that the conditions of Article 19 *e)* are fulfilled. That is to say that the respondent had proper notice of the proceedings and an opportunity to be heard, or had proper notice of the decision and the opportunity to challenge it. It is important to produce this document since the absence of this document may lead to non-recognition and enforcement under Article 19.

Sub-paragraph *d)* – where necessary, a document showing the amount of any arrears and the date such amount was calculated;

556. As the Convention covers arrears (Art. 6(2) *e)* and Art. 16(1)) a special rule has been set out for the production of a document to facilitate the recovery of arrears. It will be important to indicate the date at which the amount as been calculated in order to provide for interest if any.

[181] See Prel. Doc. No 31-B/2007.

Sub-paragraph *e)* – where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;

557. Taking into account the rule in Article 16(1)[182] a special formal requirement is needed for cases where the decision provides for automatic adjustment by indexation. As the calculation of indexation adjustments may be rather difficult, any information provided by the Central Authority of the requesting State could assist the authorities of the State addressed. It would not be necessary to send a formal document. Any informal document, such as an e-mail or a fax would suffice.

Sub-paragraph *f)* – where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.

558. If the applicant has been entitled to legal assistance in the State of origin it will be necessary to produce the appropriate documentation in order to have the same right in the State addressed.

Paragraph 2 – A Contracting State may by declaration under Article 58 specify circumstances in which it will accept an abstract or extract of the decision drawn up by the competent authority of the State of origin in lieu of a complete text of the decision; [in such a case a Contracting State may use the form set out in Annex ..].

559. The wish to simplify the procedure for recognition and enforcement has been discussed on many occasions. This led to the idea that it might only be necessary to produce an abstract or extract of the decision instead of the complete text of the decision. However, this is a solution that cannot be imposed to everybody. Another argument in favour of this solution is that it will result in serious savings with regard to the translation of documents.[183] The proposed solution[184] consists of accepting an abstract or extract of the foreign decision accompanied by a form set out in one of the Annexes to the Convention. The solution has great advantages, where for example, in a long judgment with regard to a divorce, only a few paragraphs are devoted to support. Another advantage results from the use of forms that would guarantee the inclusion of all the necessary data.

560. To take advantage of this possibility a Contracting State would simply have to make a declaration under Article 58 specifying the circumstances in which it will accept this much simpler and cheaper transmission. It is to be noted that the Forms Working Group has developed a model form of an abstract.[185]

561. An "abstract" means a summary or résumé of the decision, whereas "extract" means a verbatim excerpt from the decision. A declaration could provide that a Contracting State could accept one or the other or both.

Paragraph 3 – Upon a challenge or appeal under Article 20(7) *c)* or upon request by the competent authority in the requested State, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –

***a)* by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;**

***b)* by the applicant, where the application has been made directly to a competent authority of the State addressed.**

562. This paragraph provides that certified copies of documents would have to be made available either upon a challenge or an appeal under Article 20(7) *c)* by the defendant or at the request of the competent authority of the State addressed. In the case of *ex officio*

[182] See *supra*, Art. 16(1) and paras 430 *et seq.* of this Report. This provision was proposed by the United States of America in Prel. Doc. No 23/2006, para. 5, see *supra* footnote ???.
[183] See *infra*, Arts 41 and 42.
[184] Originating from Work. Doc. No 87, of the International Association for Women Judges.
[185] Prel. Doc. No 31-B/2007, Annex A.

review, the onus would be on the competent authority, where in the case of proceedings the onus would be on the defendant. It is to be noted that it is very rare in maintenance cases that the defendant would challenge the documents accompanying the application for recognition and enforcement.

563. Consequently, upon a challenge or appeal by the defendant or upon request by the competent authority in the State addressed, either the Central Authority of the requesting State, where the application had been made in accordance with Chapter III, or the applicant, when the application has been made directly, should provide a complete copy certified by the competent authority in the State of origin of any document referred to in Article 21(1) *a)*, *b)*, *(d)*.

564. The object is to establish the authenticity of the documents in accordance with the law of the State in which the decision was given. The text of this rule refers only to a "complete copy of the document concerned", simplifying previous drafting in which the more strict terms "original" or "true copy" were used.

565. The French equivalent of "certified" raised the question whether the certification should be by the originating authority or by another competent authority. If the application is processed through the Central Authority, it does not seem necessary to expressly designate who will be responsible for the certification under *a)*. However, if the application is a direct one, some difficulties may arise. The applicant will have to ascertain which are the competent authorities to certify the requested or challenged documents.

Article 22 Procedure on an application for recognition

This Chapter shall apply *mutatis mutandis* to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.

566. Usually an application is for both recognition and enforcement, which is the subject matter of Article 20. But it is also possible that the applicant asks only for recognition, although this is unusual in matters of maintenance. In this case, Article 22 provides for the application *mutatis mutandis* of Chapter V. The use of the expression "*mutatis mutandis*" creates some uncertainty. It is clear that the requirement that the decision be enforceable (Art. 20(2)) is replaced by a requirement that the decision "has effect" in the State of origin. Beyond this, uncertainty arises from the difficulty of translating in simple terms the Latin expression "*mutatis mutandis*". It means changing those provisions which can be and need to be changed, taking into account the differences between recognition and enforcement. It implies also making changes which are necessary to make sense. Another possible translation is "with suitable or necessary amendments" or "the necessary changes having been made". It is better in a worldwide Convention to avoid the use of Latin expressions.

Article 23 Findings of fact

Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.

567. What was a novel provision (Art. 9) in the 1973 Hague Maintenance Convention (Enforcement) in relation to recognition and enforcement is now a common provision. The court addressed has to accept findings of fact made by the court of origin. More specifically, the authority of the requested State is bound by the findings of fact on which the authority of origin has based its jurisdiction. In that context, the term "jurisdiction" means jurisdiction under the Convention. If, for example, the authority of the State of origin decided on the basis of the facts presented to it that it was the authority of the State of habitual residence of the creditor, the authority of the requested State will not be able to review the facts on which the authority of origin based its assessment of habitual residence. It speaks for itself that the authority of the requested State will not have to take into account findings of facts resulting from fraud. There are a number of occasions where courts do not indicate the facts upon which jurisdiction is based. Even if

this observation may limit the practical reach of the rule, it is not sufficient to condemn its principle. This rule is encountered in other Conventions.[186]

Article 24 No review of the merits

There shall be no review by any competent authority of the State addressed of the merits of a decision.

568. The prohibition of review on the merits of a decision is also a standard provision in conventions on recognition and enforcement of decisions.[187] Without it, foreign judgments might in some countries be reviewed by the court addressed as if it were an appellate court hearing an appeal from the court of origin. It is without prejudice to the review, necessary to apply the provisions of this Chapter (Chapter V), although this is not expressly stated.[188] This prohibition concerns recognition under Article 17 and following and would also apply to a procedure on an application for recognition under Article 22. This prohibition extends both to registration systems and to systems based on declarations of enforceability. It may be advisable to reintegrate into Article 24 the last portion of Article 13 of the 1973 Hague Maintenance Convention (Enforcement) which provided "unless this Convention otherwise provides".

Article 25 Physical presence of the child or applicant

[The physical presence of the child or applicant shall not be required in any proceedings in the requested State under this Chapter.]

569. This provision, according to which the physical presence of the child or the applicant is not required in any proceedings in the requested State in relation to recognition and enforcement of maintenance orders, reflects the practice of many States. Requiring the presence of the child or the applicant would be contradictory to the objectives that are sought by the Convention with respect to providing a swift, efficient and accessible system of recovery of maintenance. This provision would apply in both the situations where the application for recognition and enforcement is made directly to a competent authority of the requested State or through an application under Article 10 to be processed through Central Authorities. However, in this latter case, the applicant would have the benefit of using the forms available to process the application as required under Article 21 regarding documents to be filed through the Central Authorities and the competent authority. In so doing, the case of the applicant will be made clear to the requested competent authority and would tend to indicate that the application is made in conformity with the requirements of the Convention.

570. It is important to note that this provision is in line with the 1956 New York Convention where the presence of the applicant for recovery of maintenance was not necessary as the receiving agency would have received sufficient information as required under Article 3 of that Convention to proceed with either the recognition of a decision or the establishment of a maintenance order or the confirmation of a provisional order such as one under the REMO[189] system, as the case may be. However, under the 1956 New York Convention it would have been possible for the applicant to seek the assistance of the receiving agency in order to take all appropriate steps for the recovery of maintenance including the settlement of the claim, institution and prosecution of an action and the execution of any other judicial act for the payment of maintenance. This role for the requested Central Authority comes within the range of functions under Article 6(1) *b)* of the Convention. This provision is in square brackets as it has not yet been discussed.

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[186] Art. 28(2) of the Brussels and Lugano Conventions.
[187] Art. 27 of the 1996 Hague Child Protection Convention and Art. 26 of the 2000 Hague Adults Convention.
[188] As it is in Art. 27 of the 1996 Hague Child Protection Convention and Art. 26 of the 2000 Hague Adults Convention.
[189] Reciprocal Enforcement of Maintenance Orders, hereinafter REMO, see list of abbreviations under para. 13 of this Report.

Article 26 Authentic instruments and private agreements

571. The inclusion of these two categories is the cause of some difficulties and it is why this rule is in brackets. In addition, it is not necessary for them to be linked to one another. For some countries, authentic instruments are unknown.[190] But, on the other hand, some countries are not familiar with private agreements, which are well known in other systems.[191] The present text achieved a degree of consensus at the meeting of the Special Commission in 2006.[192] [193]

572. It remains to be decided finally whether authentic instruments and private agreements should be covered by the general scope of application of the Convention and, if so, if they would be the subject of an opt-in provision. See Article 16(4). If Article 26 is adopted, consideration should be given to whether the rules for direct requests (Art. 34) should apply to authentic instruments and private agreements.

Paragraph 1 – An authentic instrument or a private agreement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

573. Paragraph 1 includes the general statement that an authentic instrument or a private agreement is entitled to recognition and enforcement. The principal condition is that in the State of origin such an authentic instrument or private agreement is enforceable as a decision. It follows that if, as is the case in some countries, an agreement is enforceable as a contract rather than a decision, it will not fall within the scope of the chapter.

Paragraph 2 – An application for recognition and enforcement of an authentic instrument or a private agreement shall be accompanied by the following –

574. Paragraphs 1 and 2 of Article 21 do not apply to authentic instruments and private agreements. This is why paragraph 2 enumerates the required documents to accompany an application for recognition and enforcement of an authentic instrument or a private agreement.

Sub-paragraph *a)* – a complete text of the authentic instrument or of the private agreement;

575. In sub-paragraph *a)* it is required that a complete text of the authentic instrument or of the private agreement be produced. For the same reasons as stated in relation to Article 21, it is not required that the copy be "*certified as true*" by the competent authority of the State in which it was made (the State of origin).

Sub-paragraph *b)* – a document stating that the particular authentic instrument or private agreement is enforceable as a decision in the State of origin.

576. In sub-paragraph *b)* a document is required from the competent authority in the State of origin stating that the particular authentic instrument or the private agreement is enforceable as a judicial decision in that State, in the sense of Article 16. It has to be underlined that what is important for the Convention is not that a certain form of agreement is enforceable according to the law of the State of origin, but that the

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[190] In the European instruments, authentic instruments are included, although they are not known in some Member States of the European Union, see Art. 50 of the Brussels and Lugano Conventions and Art. 57 of the Brussels I Regulation and also in the EEO Regulation where a definition of authentic instrument is included in Art. 4, para.3. Also, the judgment of the European Court of Justice 17 June 1999, Case C-260/97, *Unibank A/S* v. *Flemming G. Christensen*, European Court Reports (ECR), 1999.

[191] Like Canada or Denmark.

[192] In any case, settlements were included in the 1973 Hague Maintenance Convention (Enforcement) (Art. 21). Great advantages can come from the inclusion of these instruments, as there is a growing tendency to seek amicable solutions to be preferred over contentious procedures in several States. In view of the movement towards alternative methods of dispute resolution, it would be preferable to have a mechanism that would cater for the recognition and enforcement of private agreements which result from these dispute resolution systems and that would guarantee greater longevity for the Convention.

[193] After the proposal of Canada in Work. Doc. No 62, replaced afterwards by Work. Doc. No 106.

agreement in the concrete case meets the requirements of enforceability in the State of origin.

Paragraph 3 – Recognition and enforcement of an authentic instrument or a private agreement may be refused if –

a) **the recognition and enforcement is manifestly incompatible with the public policy of the requested State;**

b) **the authentic instrument or the private agreement was obtained by fraud or falsification;**

c) **the authentic instrument or the private agreement 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.**

577. The procedure for the recognition and enforcement of an authentic instrument or a private agreement will be relatively simple and quick. Not all the grounds of refusal in Article 19 apply. In fact, only three grounds for refusal are included in paragraph 3. The first (sub-para. *a)*) is incompatibility with the public policy (*ordre public)* of the requested State, equivalent to paragraph *a)* in Article 19. The second (sub-para. *b)*) is fraud, in principle equivalent to paragraph *b)* of Article 19, but, taking into account the particularities of authentic instruments and private agreements, the ground for the refusal is the fact that the instrument or the agreement "was obtained by fraud or falsification". Finally, sub-paragraph *c)* adopts the "incompatibility" principle which is expressed in similar terms to paragraph *d)* of Article 19. As in Article 19, the three grounds "*may*" be used to refuse recognition and enforcement.

Paragraph 4 – The provisions of this Chapter, with the exception of Articles 17, 19, 20(7) and 21(1) and (2), shall apply *mutatis mutandis* to the recognition and enforcement of a private agreement or authentic instrument save that –

a) **a declaration or registration in accordance with Article 20(4) may be refused only for the reasons specified in [paragraph 3] [paragraph 3 *a)*]; and**

b) **a challenge or appeal as referred to in Article 20(6) may be founded only on the following –**

- **i) the grounds for refusing recognition and enforcement set out in Article 26(3);**
- **ii) the authenticity, veracity or integrity of any document transmitted in accordance with Article 26(2).**

578. Not all the provisions in Chapter V should be applied to the recognition and enforcement of authentic instruments or private agreements. This is the reason why, in paragraph 4, Articles 17, 19, 20(7) and 21(1) and (2) are excluded. The rest of the Chapter "*shall*" be applicable *mutatis mutandis.*[194]

579. It should be recalled first that settlements or agreements concluded before or approved by a judicial or administrative authority are regarded as "decisions" (Art. 16(1)) and as such are within the scope of Chapter V. Indeed, settlements were included in the scope of the 1973 Hague Maintenance Convention (Enforcement). The advantages of including other agreements within the scope of Chapter V are considerable, given the trend towards the promotion of amicable or agreed outcomes to family disputes, through mediation and by other means, in many States. It may be argued that the promotion of agreed outcomes implies a legal structure which gives effect to agreements internationally, whether or not such agreements have been approved by a judicial or administrative authority. Moreover, failure by the Convention to accommodate the trend towards greater use of alternative dispute mechanisms may have an effect on its longevity.

[194] On this expression, see comments on Art. 22 at para. 566 of this Report.

580. The first modification (sub-para. *a)*) concerns the possible bases for refusing to register for enforcement or declare enforceable an authentic instrument or private agreement under Article 20(4). As is the case with "decisions", consensus has not yet been reached on what the bases should be, and two options are presented. The first option, allowing a wide basis for *ex officio* review, permits refusal for any of the reasons specified in paragraph 3. The second narrower option would permit refusal only for reasons of public policy.

581. Sub-paragraph *b)* confirms that the procedure for challenge or appeal in Article 20(6) also applies in the case of authentic instruments and private agreements, and the grounds for appeal are all those that appear in Article 26(3) as grounds for non recognition or enforcement. Equally, the authenticity, veracity or integrity of the documents transmitted according to Article 26(2) will serve as foundation for a challenge or appeal under Article 20(6).

Paragraph 5 – Proceedings for recognition and enforcement of an authentic instrument or a private agreement shall be suspended if proceedings concerning its validity are pending before a competent authority.

582. By definition, an authentic instrument or private agreement will not have been approved by a judicial or administrative authority in the State of origin. This is why in paragraph 5 a rule is introduced to give the opportunity to suspend the proceedings for recognition and enforcement if proceedings concerning the validity of the instrument or agreement are pending "*before a competent authority"*. The location of the competent authority is not specified.

Paragraph 6 – A State may declare that applications for recognition and enforcement of authentic instruments and private agreements shall not be made directly to a competent authority.]

583. Paragraph 6 allows a Contracting State to declare that it will not permit direct requests (in the sense of Art. 34) for the recognition and enforcement of authentic instruments and private agreements. The effect of such a declaration is that all applications would have to be processed through Central Authorities. Some States are of the view that this filtering process constitutes a necessary additional safeguard in the case of authentic instruments and private agreements.

Article 27 Reciprocal arrangements involving the use of provisional and confirmation orders

Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order –

a) **each of those States shall be deemed for the purposes of this Chapter to be a State of origin;**

b) **the requirements of Article 19 e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order; and**

c) **the requirement of Article 17(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State.]**

584. The content of Working Document No 81[195] has been inserted in this Article. Originally, the title was "Commonwealth arrangements for the reciprocal enforcement of maintenance obligations", known as REMO, but it has been changed after realising that these arrangements sometimes apply to States other than Member States of the British Commonwealth. It is a system of orders that covers decisions produced by the combined effect of a provisional order made in one State and a confirming order from another State.

[195] Presented by the Secretariat of the Commonwealth.

585. Article 27 intends to introduce a consistent rule to help determine where a maintenance decision is made. The question is also discussed under Article 10(1) *a)* at paragraph 253 of this Report.

586. The rule is still in brackets as it has to be accommodated to the structure of the Convention and further discussion has to take place as to the possibility of limiting the use of these procedures to applications through Central Authorities.

CHAPTER VI – ENFORCEMENT BY THE REQUESTED STATE

587. Once a decision has been recognised and declared enforceable in the requested State, measures have to be adopted in order actually to enforce the decision and effectively recover the maintenance. It is recognised that the best international procedures for recognition and enforcement may be frustrated if, in the end, national measures of enforcement are ineffective. This is why this Convention, for the first time in the history of Hague Conventions, contains a separate chapter on enforcement by the requested State. Chapter VI applies to applications through central authorities as well as to direct applications.

Article 28 Enforcement under national law

Paragraph 1 – Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.

588. The general rule is that the law of the requested State applies the measures to enforce the foreign decision once the *exequatur* has been accorded. This Article refers to the enforcement measures, which means, the enforcement *stricto sensu* and not the intermediate procedure to which a foreign decision is submitted before being actually enforced, to which Article 20 is devoted.[196]

Paragraph 2 – Enforcement shall be prompt.

589. In line with other parts of the Convention, this paragraph stipulates that enforcement has to be as quick as possible, "prompt". This creates a link between Chapters V and VI in the sense that at every stage, as well as between stages, in the enforcement process, speed is essential.

Paragraph 3 – In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.

590. Paragraph 3 is designed to ensure that the whole of the procedure on an application for recognition and enforcement, including *exequatur* and enforcement under national law, is treated as a continuum, not requiring further applications at different stages. As well as contributing to a speedy conclusion, the rule in paragraph 3 prevents unnecessary additional burdens being placed on the creditor at the final stages of the procedure. This rule only applies where the application has been made through Central Authorities.

Paragraph 4 – Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.

591. In some cases the applicable law will not necessarily be the law of the State addressed. This is the case with the exceptions included in paragraphs 4 and 5. The reason is that it has been necessary to include in this Chapter some mandatory provisions on applicable law, although the Convention does not include a mandatory general regime on applicable law.

592. The first exception to the application of the law of the requested State relates to the duration of the maintenance obligation. It is a problem that appears at the moment of enforcement and that cannot be solved by the law of the State addressed, but by the law of the State of origin of the decision. The wording "any rules applicable in the State

[196] See *supra*, paras 491 *et seq.* of this Report.

of origin" is purposely vague, in order to include domestic laws of the State of origin as well as its rules of private international law.

Paragraph 5 – Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.

593. The second possible exception to the application of the law of the requested State relates to the period for which arrears may be enforced. In this case, the applicable law will be alternatively the law of the State of origin of the decision or the law of the State addressed, whichever provides for a longer period. The rule clearly favours the creditor.

594. The limitation rule only applies to arrears and not to retroactive maintenance. At the enforcement stage only arrears would be taken into consideration since any retroactive maintenance would be already included in the decision. As to the distinction between arrears and retroactive maintenance, see Article 16(1).[197]

Article 29 Non-discrimination

The requested State shall provide at least the same range of enforcement methods for cases under this Convention as are available in domestic cases.

595. The general meaning of this rule is that the enforcement methods applied to foreign decisions, once they are entitled to be recognised and enforced in the requested State, cannot be less than those which apply to internal decisions. The use of the expression "at least" suggests that the requested State may discriminate positively in favour of foreign decisions by applying to them a broader range of enforcement methods than apply to domestic decisions. This is unlikely to be a common occurrence. However, the peculiar characteristic of international maintenance claims may sometimes require the application of special techniques of enforcement.

596. This Article specifies that the rule applies only for cases under the Convention.

Article 30 Enforcement measures

Paragraph 1 – Contracting States shall make available in domestic law effective measures to enforce decisions under this Convention.

597. Taking into account the objects of the Convention, the Contracting States have to ensure the effective recovery of maintenance and, to that end, to make available effective measures to enforce the decisions. The obligation is to make available the most effective measures, without any kind of limitation. The State addressed makes the measures available, and it is for national law to determine precisely which measures are authorised[198] and whose responsibility it is to activate different enforcement measures and in what order.

[Paragraph 2 – Such measures may include –

a) **wage withholding;**

b) **garnishment from bank accounts and other sources;**

c) **deductions from social security payments;**

d) **lien on or forced sale of property;**

e) **tax refund withholding;**

f) **withholding or attachment of pension benefits;**

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[197] See *supra*, paras 430 *et seq.* of this Report.
[198] See the proposal of Costa Rica, in Work. Doc. No 104.

g) **credit bureau reporting;**

h) **denial, suspension or revocation of various licenses (for example, driving licenses).]**

598. A full consensus has not yet been achieved in respect of this paragraph and this is why it is in brackets. Doubts have been expressed as to whether it is needed, as it is only a list of possible measures or examples.[199] The list is neither mandatory nor exhaustive. It is illustrative of the kind of measures which a Contracting State may consider in fulfilment of its general obligations to make effective measures available. In order to make the recovery of maintenance effective, the States shall take all the measures that could be considered as necessary to compel the debtor to fulfil his obligation. In some cases the direct objective is to make the payment effective (*e.g.*, wage withholding), but in other cases there are measures which seek to pressurise the debtor and, indirectly, induce him to pay (*e.g.*, the suspension of the driving license). Mediation, though not mentioned, is another measure which, by encouraging voluntary payment of maintenance obligations, may help to secure the objective of Article 30. The measures in paragraph 2 could still be used to encourage and facilitate payment, independently of the fact that mediation has occurred or will occur.

Article 31 Transfer of funds

Paragraph 1 – Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.

599. If the objective of the Convention is to make the recovery of maintenance easier, then it is consistent with this objective to facilitate the transfer of funds. It has a pedagogical effect to induce Contracting States to facilitate this transfer in order to really enforce the decision on maintenance and to ensure that the funds are received by the creditor as quickly as possible, and without excessive additional costs such as bank fees. To that end, see the document of Philippe Lortie with reference to the Model Law of UNCITRAL and examples of electronic communications.[200]

Paragraph 2 – A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.

600. Paragraph 2 reproduces in full Article 22 of the 1973 Hague Maintenance Convention (Enforcement), which follows the wording of the 1956 New York Convention, with minor changes of form to adapt it to the context. There is no direct sanction if this priority is not accorded, but the article has a moral weight.[201] In the 1950's this rule was introduced to provide a solution in relation to States which had established transfer restrictions aimed at protecting their currency. Nowadays, since the events of11 September 2001, this rule has gained importance as laws have been adopted in many States to control the cross-border movement of funds with a view to stop the funding of terrorist activities. In some States, it could be necessary to relax these rules in order to facilitate the transfer of funds relating to maintenance obligations.

Article 32 Information concerning enforcement rules and procedures

Contracting States, at the time of becoming a Party to this Convention, shall provide the Permanent Bureau of the Hague Conference with a description of their enforcement rules and procedures, including any debtor protection rules. Such information shall be kept up-to-date by the Contracting States.

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[199] One suggestion was to include the list in the Explanatory Report.

[200] Prel. Doc. No 9/2004 (see *supra* footnote 77) and annex, especially paras 39 *et seq.* for the Model Law of UNCITRAL and paras 47 *et seq.* for examples of electronic communications.

[201] Verwilghen Report, para. 100: "*although it is not possible to establish a direct sanction in case of violation of this rule, the formal international agreement to accord the highest priority to transfers of funds payable as maintenance is of some weight*".

601. The knowledge of internal rules of enforcement in different countries will make the operation of the Convention easier, and it will make it possible to inform interested people on the situation in other States. In order to achieve a surer and faster application of the Convention, the authorities of the Contracting States should know the legal and administrative requirements in other Contracting States. The general information would be available on the website of the Hague Conference.

602. The Working Group on the Law Applicable to Maintenance Obligations[202] proposed that this information should include the rules concerning the duration of maintenance obligations and limitation periods. This will improve the effectiveness of measures in paragraphs 4 and 5 of Article 28.

603. A new rule, still in brackets, has been proposed in Article 51,[203] in the Chapter devoted to the general provisions. If such a provision is accepted, Article 5 *b)* and Article 32 may be deleted.[204] In that case, the proposal of the Working Group on Applicable Law will have to be introduced in Article 51.

CHAPTER VII – PUBLIC BODIES

604. The origin of this Chapter is Chapter IV (Arts 18 to 20) of the 1973 Hague Maintenance Convention (Enforcement). But after more than 30 years, the provisions have to be modernised. Attention has to be paid also to the fact that, in 1973, another Hague Convention on the law applicable to maintenance obligations was adopted and it contains provisions on the applicable law in relation to public bodies (in particular, Arts 9 and 19(3)). See Article 2(4), as to the application of this Convention to public bodies.[205]

605. Although the main responsibility of maintenance is on the parents, public bodies may be called upon to provide maintenance, either temporarily or definitively, in place of the parents. The solution to this problem is not easy, as systems around the world differ largely from one to another. So, in the Australian system, the public body will only pay if a previous attempt has been made to obtain maintenance from the debtor, and the attempt has failed. On the contrary, in the Nordic systems, the public body pays maintenance and tries to solve the question with the debtor afterwards.

Article 33 – Public bodies as applicants

Paragraph 1 – For the purposes of applications for recognition and enforcement under Article 10(1), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in lieu of maintenance.

606. Although Article 2(4) expressly says that the Convention applies to claims by public bodies in respect of maintenance, Article 33 as redrafted now places some limits on the situations in which such claims may be made. These limitations have not yet been discussed in plenary and are noted in the Observations of the Drafting Committee on the text of the Preliminary Draft Convention under Article 33.[206]

607. The first limitation in paragraph 1 is on the nature of the application. Only in an application for recognition and enforcement under Article 10(1) *a)* or an application for enforcement under Article 10(1) *b)* may a public body be regarded as a creditor. This provision therefore appears to exclude a public body from making an application under the Convention to establish a decision. At the 2007 Special Commission, delegations wanted this latter issue left open for further discussion. In practice, a public body can usually establish a decision in its own jurisdiction and then apply to have that decision recognised and enforced in another Contracting State. A similar procedure may be possible for modifications of decisions. However, there may be situations where a public

[202] In the meeting of 17-18 November 2006.
[203] See *infra* paras 686 *et seq.* of this Report.
[204] See Observations of the Drafting Committee, Prel. Doc. No 26/2007, see *supra* footnote 37, under Art. 51.
[205] See *supra* paras 55- 56 of this Report.
[206] Prel. Doc. No 26/2007, see *supra* footnote 37.

body is unable to establish or modify a decision in its own jurisdiction, for example, when under its national rules there is no jurisdiction over the debtor.

608. The second limitation in paragraph 1 is that the public body must be either: (i) acting in place of the individual to whom the maintenance is owed (the creditor), or (ii) the public body itself seeks reimbursement for benefits already provided to a person in place of maintenance.

609. It has already been pointed out that the Special Commission did not decide the question whether Articles 14 to 14 *ter* apply to a public body.[207] This question is raised in the Observations of the Drafting Committee on the text of the preliminary draft Convention under Article 14.[208] Different views have been expressed on this question. Some experts stated that their public bodies always provide benefits to creditors and children if a debtor does not pay, and reimbursement will be sought whenever possible. These experts believe that their public bodies should receive all the benefits of any other applicant and should not be penalised for supporting creditors in need. Other experts said their countries would not provide free legal representation to bodies which are not in need. There seems to be no disagreement that public bodies can receive administrative assistance and co-operation from Central Authorities. These matters are discussed in more detail under Article 14 in this Report.[209]

610. As already explained,[210] the extension of the scope of the Convention to public bodies in Article 2(4) is intended to cover only child support cases on a mandatory basis. Claims for maintenance by public bodies concerning other family relationships would be dealt with on a reciprocal basis, and would only be possible between two countries which made the necessary declaration in relation to the same categories of relationships in Article 2(2).

611. If the Plenary accepts the Drafting Committee's changes to paragraph 1 to restrict applications by public bodies to applications for recognition and enforcement, the text in paragraph 1 would be improved if, after "Article 10(1)" was added "(a) or (b)". A possible ambiguity in the [English] text would be avoided if, after the word "or", the word "one" was replaced by "a public body".

Paragraph 2 – The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

612. According to this paragraph, the law to which the body is subject will govern the right of the public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits paid to an individual in place of maintenance. But it has to be clear that the law applicable to the maintenance obligations will also apply to the existence of the obligation of maintenance and the extent of this obligation.

Paragraph 3 – A public body may seek recognition or claim enforcement of –

613. Paragraph 3 envisages the two possible situations in which a public body may seek recognition or enforcement of a maintenance decision. No reference is made to the applicable law, and as a consequence it is possible to apply the substantive internal law, the autonomous conflict of law rule or the conflict of law rule included in an international Convention (*e.g.*, the States party to the 1973 Hague Maintenance Convention (Applicable Law) will apply the rules included in this Convention).

614. Attention has to be paid to the fact that Article 18 in the 1973 Hague Maintenance Convention (Enforcement) was drafted in a broader way. In the current Convention it is said that the public body seeks the reimbursement of the benefits paid "in place of" maintenance, whereas the 1973 Hague Maintenance Convention (Enforcement) only speaks of "reimbursement of benefits provided for a maintenance creditor".[211] The

[207] See para. 376 above.
[208] Prel. Doc. No 26/2007.
[209] See para. 223 above.
[210] See para. 56 above.
[211] Art. 18.

current Convention is more precise and restricting, in specifying that only those benefits which were paid "in place of" maintenance may be sought. It is a practical policy decision in the current Convention not to go so far as the 1973 Hague Maintenance Convention (Enforcement).

Sub-paragraph *a)* – a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

615. Sub-paragraph *a)* envisages the situation in which the public body was the applicant (and presumably the debtor was in most, if not all, cases the respondent) in the proceedings in which a decision was rendered against the debtor. Provided the law to which the public body is subject permits such an application, the public body may apply under Article 10(1) *a)* of this Convention for the recognition and enforcement of this decision in another Contracting State.

Sub-paragraph *b)* – a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.

616. In the case of Sub-paragraph *b)*, the decision has been given between a creditor and the maintenance debtor. The intervention of the public body is limited to the possibility of seeking recognition and enforcement of the decision, but only to the extent of the benefits already provided to the creditor in place of maintenance.

617. Three elements are important in this case. First, the existence of an obligation of maintenance between the creditor and the debtor. Second, the law applicable to the public body entitled to seek recognition and enforcement of the decision in place of the creditor. Third, the creditor has received benefits in place of maintenance.

618. The [unintended] effects of sub-paragraph *b)* seem to be that a public body cannot act for or on behalf of a creditor simply to obtain recognition and enforcement of a decision. The public body can only act when benefits have been provided to the creditor in place of maintenance. This should not cause any injustice in the majority of cases as the creditor will usually apply in his or her own name for recognition and enforcement.

Paragraph 4 – The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

619. Without prejudice to the requirements of Article 21, this paragraph establishes the requirement to prove the fulfilment of the conditions of paragraphs 2 and 3. The necessary proof need only be provided "upon request" and may be "any document" which establishes the public body's right to act in place of the individual or seek reimbursement, or to show that the benefits have been provided to the maintenance creditor.

620. The terms of paragraph 4 indicate that it is intended that public bodies can only make applications when public benefits have already been provided to the creditor in place of maintenance.

CHAPTER VIII – GENERAL PROVISIONS

621. The Chapter on General Provisions contains all provisions applicable to the previous Chapters, whether on co-operation, modification, recognition and enforcement, and public bodies. The Chapter deals with questions of direct requests to competent authorities, protection of personal information, confidentiality and privacy, the exemption of legalisation, issues of representation both related to co-operation and direct applications to a competent authority, questions of cost recovery, and questions in relation to language requirements and translation. The Chapter also includes provisions in relation to uniform interpretation and as to the application and the interpretation of the treaty in relation to non-unified legal systems. Provisions dealing with the co-ordination of the Convention in relation to other instruments that are applicable to maintenance are also included in this Chapter. In this respect it provides for the relationship with older Hague Conventions on the same subject matter, the use of the most efficient rules provided by other Conventions, the possibility for Contracting States to continue using existing treaties and to become parties to future treaties and also the possibility to conclude supplementary agreements under the Convention in order to improve the application of the Convention among themselves. A provision concerning the review of the practical operation of the Convention, which has been integrated in Hague Conventions on a regular basis since 1993, is also part of this Chapter as well as the procedure for amendments of forms, which is linked to the convening of such Special Commissions to review the operation of the Convention. The Chapter includes transition provisions. Finally, the Chapter includes a provision listing all the information concerning laws, procedures and services that have to be provided under different articles of the Convention to the Permanent Bureau by the time Contracting States deposit their instrument of ratification or accession.

Article 34 Direct requests to competent authorities

Paragraph 1 – This Convention does not exclude the possibility of recourse to such procedures as may be available under the national law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by this Convention including, subject to Article 15, for the purpose of having a maintenance decision established or modified.

Paragraph 2 – However, Article 14(5) and (6) and the provisions of Chapters V, VI and VII shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

622. As has been said in the comments to Article 1, nothing in that Article precludes "direct applications", but they are not mentioned in Article 1 (see comments in para. 36 of this Report). The reason is that it would be misleading to suggest that provision for "direct applications" is a primary object of the Convention.

623. This provision has been the object of long discussions, specially as to the determination of the provisions of the Convention that have to be applied in these cases. In the current draft (established by the Drafting Committee according to the mandate of the Special Commission in June 2006 to examine Work. Doc. No 97, presented by the International Bar Association), it has been decided that Chapters V, VI and VII of the Convention will apply in the cases of direct requests for recognition and enforcement, as well as Article 14(5) and (6) in Option 1 of Article 14. If the Diplomatic Session accepts Option 2 for Article 14, the applicable provisions will be Article 14(5) and Article 14 *ter b)*. See also Article 20(3) and comments in paragraphs 531-533 of this Report.

Article 35 Protection of personal information

Personal information gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted.

624. The protection of personal information, especially when it is computerised, is an important matter. This rule appears in all the modern Hague Conventions.[212] It is to be noted that in these Conventions, the terminology "protection of personal data" was used instead of "personal information". With recent developments in this area of the law, it was felt more appropriate to use the latter terminology. This would cover more information than the stricter term "personal data", which could be associated with personal data such as: name, date of birth, address, and other contact detail information. On the other hand, the expression "personal information" could encompass more information, which is sometimes collected in relation to the establishment of maintenance orders or their recognition.

625. The inclusion of this provision in the Convention establishes a minimum safeguard between the Contracting States as domestic laws in the area may not all be at the same level of development. It is important to provide safeguards in relation to the treatment of personal information under the Convention. If not, less information will be provided by the parties concerned and the final result could be detrimental to the successful recovery of maintenance. The provision will equally apply to Central Authorities, competent authorities, public bodies or other bodies subject to the supervision of the competent authorities of either the requesting State or requested State. As mentioned above, the provision concerning the treatment of personal information will be applied whatever the medium or means of communications used. In that respect authorities involved with the electronic transmission of such information shall take appropriate measures vis-à-vis their services providers in order to meet the requirements of the Convention.

Article 36 Confidentiality

Any authority processing personal information shall ensure its confidentiality in accordance with the law of its State.

626. Article 35 having established the scope of the personal information covered by the provision, Article 36 provides that the confidentiality of this information shall be ensured in accordance with the law of the State of the authority processing this information. However, in implementing this provision States should ensure that this protection of confidentiality would not run against the right to a fair defence by the respondent in a particular case, be it the creditor or the debtor. This rule also appears in modern Hague Conventions.[213] It will need to be closely monitored as electronic transmissions develop. This obligation of confidentiality will also have to be imposed on the authority transmitting the information, as it is also a receiver of information which it transmits electronically.

Article 37 Non disclosure of information

1. An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

2. A determination to this effect made by one Central Authority shall be binding on another Central Authority.

3. Nothing in this provision shall impede the gathering and transmitting of information between authorities.

627. This provision is to be read in conjunction with the provision relating to confidentiality. Where information will be provided to parties to maintenance proceedings in order to produce their defence, this provision will ensure that information that could lead to the location of any party or child may not be disclosed to the respondent by the authority. It is a very useful and important provision the objective of which is to protect

[212] Art. 41 of the 1996 Hague Child Protection Convention, Art. 39 of the 2000 Hague Adults Convention. In substance, also Art. 31 of the 1993 Hague Intercountry Adoption Convention.
[213] Art. 30 of the 1993 Hague Intercountry Adoption Convention, Art. 42 of the 1996 Hague Child Protection Convention and Art. 40 of the 2000 Hague Adults Convention.

the child or any other person against dangers that can result from the transmission of information to the wrong person. It could be the case, for example, in a situation of domestic violence where it could be dangerous if the debtor had knowledge of the address of child and mother.

628. In order to work effectively, this provision would require the full co-operation and trust necessary between the authorities concerned. The Central Authority of the requested State shall respect or be bound by the opinion of the requesting Central Authority that if information is disclosed to the respondent it could harm any other party or the child concerned with this case. It would not be for the requested Central Authority to opine on this matter, as it would not usually have knowledge of the parties involved in the case who would be under the jurisdiction of the requesting Central Authority. That being said, the provision would still permit the full and complete transmission of information between authorities, thus requiring a high level of trust and co-operation in the treatment of this information. Both the requesting and the requested authorities would be entitled to make the determination of non-disclosure of personal information.

629. The general rule in paragraph 1 is accompanied by two specifications in paragraphs 2 and 3. Paragraph 2 is included to bind the authorities that receive the information to the assessment of the risk made by the transmitting authority. Paragraph 3 clarifies that the non-disclosure of information in relation to third persons will not impede the communication of information between the authorities.[214]

Article 38 No legalisation

No legalisation or similar formality may be required in the context of this Convention.

630. According to a well-established practice in the Hague Conventions, Article 38 provides that all documents forwarded or delivered under the Convention must be exempt from legalisation or any analogous formality, including in the latter case the *apostille.*[215] It is a well-established practice that documents that are transmitted or exchanged by States or between their governmental institutions are exempt from legalisation or any analogous formality. In the recent 2005 Hague Choice of Court Convention, the drafting of Article 18 includes this clarification, stating that "*All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille*", but this mention seems superfluous as *apostille* is an "analogous formality".

631. Legalisation is excluded in Article 17 of the 1973 Hague Maintenance Convention (Enforcement) and also in bilateral treaties. Moreover, the countries of common law tradition usually exclude legalisation.

632. In the light of the discussion concerning the possibility for parties to directly seize competent authorities in the requested State for the purpose of recognition and enforcement of maintenance orders, it would be appropriate to discuss whether those parties should benefit from the exemption from legalisation. To do so would leave the entire responsibility for the admittance of documents and application to the competent authorities of the requested State. It would be interesting to know from the experts in the light of their practical experience in their respective States if this would be appropriate in the circumstances. If not, the provision may require some adjustments or its application may be limited to documents transmitted between authorities under the Convention.

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[214] See Prel. Doc. No 23/2006, see *supra* footnote 104, pp. 38-39, with the observations of the United States and Work. Doc. No 109, of the German Institute for Youth Human Services and Family Law.

[215] Under the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

Article 39 Power of attorney

The Central Authority of the requested State may require a power of attorney from the applicant only if it acts as legal representative in judicial proceedings or before other authorities.]

633. This provision has not yet been discussed by the Special Commission. The objective of Article 39 is to reduce the formalities that could be imposed on an applicant in order to seek the assistance of the requested Central Authority. This is again in line with the objective of the Convention to set up a swift and efficient system where only the necessary applications, authorisations and documentation would be required. If this provision was to be retained without square brackets, it could be envisaged that the Forms Working Group prepare a very simple application for the purpose of seeking the assistance of the requested State or to authorise the requested State to act on behalf of the applicant if necessary. It is to be noted that according to current practice under the 1956 New York Convention that authorities act on behalf of the claimant without the need of having formal documentary requirements to do so.

634. Article 39 provides that a power of attorney may be required only for cases where the Central Authority of the requested State acts as legal representative of the applicant in judicial proceedings or before other authorities. There is a difference between Article 8, which deals with the relationship between the applicant and the Central Authority, and Article 39, where the Central Authority represents the applicant before other authorities.

Article 40 Costs recovery

Paragraph 1 – Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

635. Paragraph 1 includes the general rule, according to which the recovery of any costs will not take precedence over the obligation of payment of maintenance, although consideration should still be given to the question of whether this principle should apply only in respect of children.

636. It is important to distinguish between costs in this Article and costs in Article 16(1). Costs in Article 16(1) are the costs associated with the decision rendered in the State of origin, while costs in Article 40 are any costs incurred in relation to the general operation of the Convention. As the phrase "recovery of costs incurred" is set against the phrase "recovery of maintenance", it seems that this provision is referring to claims against the debtor. For example, a Central Authority seeking recovery of costs from parentage testing (under Art. 7 or in accordance with Art. 10(1) *c)*) could not claim those costs ahead of the debtor's payments to the creditor. In relation to a direct application referred to in Article 34, it is also possible for the requested Central Authority to recover legal costs incurred, for example in the legal process to locate the debtor's assets. Those costs, not being costs in Article 16(1), could be claimed under Article 40.

637. See also Article 8 (Central Authority costs) in relation to cost arising from a request for a specific measure under Article 7.

Paragraph 2 – Nothing in this Convention shall prevent the recovery of costs from an unsuccessful party.

638. As a result of Article 16(1),[216] costs in relation to judicial proceedings are also included in the term "decision". This rule has to be interpreted as covering cost orders in unsuccessful maintenance applications.

Article 41 Language requirements

639. The translation of documents into the official language or one of the official languages in the requested State is a practical problem that arises in any Chapter of the Convention. This is why this rule is in Chapter VIII (General Provisions). During the

[216] See comments under paras 430 *et seq.* of this Report.

Special Commission of 2004, a proposal was adopted which was in line with traditional Hague Conference provisions in relation to translation of documents. The traditional rule found in the Hague Conventions is to ask for the translation of the documents into the official language of the requested State. But in some circumstances it may be very difficult for the requesting State to arrange for a translation into the language of the requested State. In these situations it is possible for the requesting State to send the documents translated into either English or French that happen to be the two official languages of the Hague Conference. But there is another important reason: that is because English and French rank first and second among the second most spoken and understood languages in the world immediately followed by Spanish which ranks third.[217] French and English happen also to be the two official languages of the Hague Conference. On the other hand, Spanish is not an official language of the Conference even though, for the entire negotiation of the new Convention, interpretation in Spanish was provided. As mentioned in the introduction of this Report, it is the first time that the Final Act of a Diplomatic Session[218] provides that the development of a Hague instrument should take place as far as possible in Spanish.

640. Taking into account the problems and doubts in relation to the text as initially drafted, the Drafting Committee prepared an alternative proposal that received large support. In this respect the particularities of the co-operation system under the Convention have been taken into account. Two articles are devoted to this question, Article 41, that refers to the requirements of translation, and Article 42, that includes rules to achieve the objectives of Article 41.

Paragraph 1 – Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or in another language which the requested State has indicated, by way of declaration in accordance with Article 58, it will accept, unless the competent authority of that State dispenses with translation.

641. This paragraph takes into account the difficulties for some States to accept applications and related documents in a language other than their own official language, establishing the need to accompany the application and related documents with a translation into the official language of the requested State. The competent authority in the requested State has, however, the possibility of dispensing with translation. Paragraph 1 includes the possibility of indicating other languages, by way of a declaration under Article 58, in which applications and related documents may be accepted.

642. This rule should also apply to direct applications for recognition and enforcement not made through Central Authorities.

Paragraph 2 – A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall by declaration in accordance with Article 58 specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.

643. A rule is also included for countries, like Belgium, Canada, Spain and Switzerland, where various languages are only official in a part of the territory. A proposal was made during the Special Commission meeting of 2005.[219] Another possibility would be to include a rule like Article 25 of the 1980 Hague Access to Justice Convention because the situation differs to a great extent from one country to the other.[220] This last solution has

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[217] In the Special Commission meeting of June 2004 Chile, Argentina and Mexico asked for the incorporation of Spanish as language of the Convention. For Chile, language could be an inconvenience for the exercise of access to justice, which is a human right. The term "second most spoken and understood languages" does not mean that they are the most spoken languages in the world, but the most used languages for international communication by people having another language as a first language.

[218] See footnote 6.

[219] Work. Doc. No 80, tabled by Belgium and Switzerland.

[220] Art. 25 of the 1980 Hague Access to Justice Convention says: "*A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents referred to in Articles 7 and 17 drawn up in one of those languages shall by declaration specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory*".

been introduced in paragraph 2, including a system of declarations in accordance with Article 58 by virtue of which States can specify the language or languages in which they can accept the translation and the part of their territory in which it applies.

Paragraph 3 – Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or French. However, a Contracting State may, by making a reservation in accordance with Article 57, object to the use of either French or English.

644. Paragraphs 1 and 2 refer to the language requirements for applications and related documents, for which more formalities are required as to the question of translation. But the Convention also requires regular, close and simple communication between the Central Authorities of both the requested State and the requesting State. In principle, the communications will take place in one of the official languages of the requested State or either in French or in English. It is accepted that a Contracting State may make a reservation excluding the use of either French or English, but not both.

645. Nothing excludes the possibility for Central Authorities to agree on the use of other languages in which it is possible for them to communicate. It is to be noted in this case that it is not an agreement of the Contracting States, but is an agreement between the Central Authorities that can be changed at any moment. For example, it can change if a new person in the Central Authority has knowledge of other different languages.

Article 42 Means and costs of translation

Paragraph 1 – In case of applications made under Chapter III, the Central Authorities may agree in an individual case that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If no agreement can be reached and it is not possible for the requesting Central Authority to comply with the requirements of Article 41(1) and (2), then the application and related documents may be transmitted with translation into French or English for further translation into an official language of the requested State.

646. It is easy to imagine that in many situations it is difficult to find in the State of origin a translator who can translate into the language of the requested State.[221] But in this latter State it may be easier to find a translator from any other foreign language. This is why it would be possible to agree that the translation will be made in the requested State, from the original language or from any other agreed language. Two elements have to be underlined. First, that the possibility of such an agreement is limited to applications made under Chapter III, that is to say, through Central Authorities. Second, the agreement is between the Central Authorities, on a case-by-case basis or on a bilateral basis.

647. But if such an agreement is not reached, a solution has to be found and this is why, in the second part of paragraph 1, a solution is adopted when it is not possible to make the translation for the requesting State into the language of the requested State. The starting point is a traditional Hague Conference solution: the application and related documents may be transmitted with translation into French or English. However, something new is added: it is for further translation into an official language of the requested State. It is a new rule, which is unknown in other Conventions but which seems very useful for this Convention.

Paragraph 2 – The cost of translation arising from the application of the preceding paragraph shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.

648. As a supplement to paragraph 1, paragraph 2 establishes that the cost of the translation will be borne by the requesting State, unless otherwise agreed by the Central Authorities of the States concerned. This way, it is also easier for the requested State to

[221] And, sometimes, the translation made in the requiring State is impossible to be understood.

accept the translation task. It will be possible to achieve other arrangements by agreement between the Central authorities of the States concerned.

Paragraph 3 – Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except insofar as those costs may be covered by its system of legal assistance.

649. Paragraph 3 clarifies that the costs of translation do not have to be covered by the Central Authority. However, the requesting Central Authority has the possibility to charge an applicant for the costs of translation. This rule is needed if one takes into account that the general principle, according to Article 8, is that the Central Authorities shall not impose any charge on an applicant for the provision of their services.

650. However, the applicant should not be charged if those costs may be covered by the system of legal assistance.

Article 43 Non unified legal systems

651. The rule is drawn from Article 25 of the recent 2005 Hague Choice of Court Convention.[222] These clauses for non unified legal systems are now a regular feature of Hague Conventions after some thirty years of practice by States, but they are perfected from one Convention to another. Their drafting is adapted to the purposes of each Convention. Article 43 addresses the difficulties that may result from the fact that some States are composed of two or more territorial units, each with its own judicial and / or legal systems. It occurs in the case of States such as Canada, China, the United Kingdom and Spain without regard to the organisation of the different States. This can create a problem because one has to decide in any particular case whether the reference is to the State as a whole or whether it is a particular territorial unit within that State.

Paragraph 1 – In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

a) **any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;**

b) **any reference to a decision established, recognised and / or enforced, and modified in that State shall be construed as referring, where appropriate, to a decision established, recognised and / or enforced, and modified in a territorial unit;**

c) **any reference to a judicial or administrative authority in that State shall be construed as referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;**

d) **any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;**

e) **any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in a territorial unit;**

f) **any reference to location of assets in that State shall be construed as referring, where appropriate, to the assets in the relevant territorial unit.**

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[222] See Explanatory Report of T. Hartley and M. Dogauchi, paras 259-265. Similar terms, although not identical, Art. 47 of the 1996 Hague Child Protection Convention and Art. 45 of the 2000 Hague Adults Convention.

652. Paragraph 1 needs further consideration. During the negotiations of the Diplomatic Session, the question will probably be raised as to whether it is wise to have a list that pretends to be exhaustive and to provide an answer to all the possibilities that may arise. On the other hand, it is impossible to imagine all the unforeseen consequences that could arise.

653. The current text solves the problem by providing that in those cases, the Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate ("*where appropriate*" are the words used in the Convention).

Paragraph 2 – Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

654. This is the traditional rule according to which the States with a non unified legal system are not obliged to apply the Convention to purely internal situations between territorial units, although nothing prevents them doing so.

Paragraph 3 – A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

655. Paragraph 3 deals with the territorial extent of recognition and enforcement in non-unified legal systems while Article 56 is concerned with the territorial application of the Convention. This paragraph provides that a court in a territorial unit of a Contracting State is not bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced under the Convention in another territorial unit of the first Contracting State. But nothing in the Convention prevents it from doing so. The objective of the rule is that, for example, if a foreign decision of maintenance is recognised and enforced in Macao, it does not mean that it will be recognised and enforced in Hong Kong. The competent authorities in Hong Kong must decide for themselves whether the conditions for recognition or enforcement under the Convention are met in their jurisdiction.

Paragraph 4 – This Article shall not apply to a Regional Economic Integration Organisation

656. A Regional Economic Integration Organisation (hereinafter "REIO"[223]) is not a non-unified legal system. Therefore this paragraph clarifies that the Article does not apply to an REIO, but only to States in the international sense.

Article 44 Co-ordination with prior Hague Maintenance Conventions

In relations between the Contracting States, this Convention replaces the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* and the *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* in so far as their scope of application as between such States coincides with the scope of application of this Convention.

657. Articles 44, 45 and 46 concern the relation of this Convention with other international instruments. They have been proposed by the Permanent Bureau,[224] but they have not yet been fully discussed in detail by the Special Commission.

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[223] See list of abbreviations under para. 13 of this Report.

[224] "Co-ordination between the maintenance project and other international instruments", Prel. Doc. No 18 of June 2006 for the attention of the Special Commission of June 2006 (hereinafter "Prel. Doc. No 18/2006").

658. Article 44 addresses the relation of this Convention with the two previous Hague Conventions on recognition and enforcement of decisions concerning maintenance obligations, the 1973 Hague Maintenance Convention (Enforcement) and the 1958 Hague Maintenance Convention. The general principle is that this Convention replaces the former ones, but taking into account the limits of the scope of this Convention,[225] the replacement only takes place for the recognition and enforcement of decisions relating to maintenance obligations towards children "*in so far as their scope of application as between such States coincides with the scope of application of this Convention*". Such a rule is needed taking into account the different scope of the Conventions. As for the 1958 Hague Maintenance Convention, it is limited to "*enfant légitime, non légitime ou adoptif, non marié et âgé de moins de 21 ans accomplis*"[226] and as for the 1973 Hague Maintenance Convention (Enforcement), it applies to maintenance obligations arising from "a family relationship, parentage, marriage or affinity, including maintenance obligation towards an infant who is not legitimate", although some reservations are possible in relation to some groups of persons,[227] as some of the States Party in the Convention have done.

659. As the rules on applicable law to maintenance obligations are not included in the Convention but will most likely be included in an additional Protocol, the relations with the 1956 Hague Maintenance Convention and the 1973 Hague Maintenance Convention (Applicable Law) will appear in the Protocol and not in the Convention. Consideration should be given to the inclusion of a provision addressing the relationship between this Convention and the New York Convention of 20 June 1956 on the recovery abroad of maintenance.

Article 45 Co-ordination of instruments and supplementary agreements

660. As there are numerous international instruments which relate to different aspects of the recovery of maintenance obligations, a rule on co-ordination of instruments is necessary. A clause of this kind is included for the first time in Article 9 of the *Hague Convention of 15 April 1958 on the law governing transfer of title in international sales of goods* (hereinafter "1958 Hague Sales of Goods Convention"),[228] afterwards in the conventions on maintenance[229] and in all the other latter conventions.[230]

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[225] See Art. 2 (Scope) and comments under paras 44-55 of this Report.
[226] Art. 1.
[227] Art. 1 and Art. 26.
[228] This article was included to safeguard the Nordic agreement or the Benelux agreement (*Actes et documents*, Vol. I, pp. 88-91).
[229] See Art. 23 of the 1973 Hague Maintenance Convention (Enforcement) and Art. 18 of the 1973 Hague Convention (Law Applicable).
[230] The provisions included are Art. 9 of the *Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods*, Art. 18 of the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, Art. 12 of the *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, Art. 14 of the *Hague Convention of 25 November 1965 on the Choice of Court*, Art. 25 of the 1965 Hague Service Convention, Art. 18 of the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Art. 15 of the *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, Arts 24, 25 and 26 of the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Art. 39 of the *Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons*, Art. 15 of the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*, Art. 20 of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 21 of the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Art. 22 of the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, Arts 34 and 36 of the 1980 Hague Child Abduction Convention, Art. 21 of the 1980 Access to Justice Convention, Art. 25 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Art. 22 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, Art. 23 of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Art. 39 of the 1993 Hague Intercountry Adoption Convention, Art. 52 of the 1996 Hague Child Protection Convention, Art. 49 of the 2000 Hague Adults Convention. For the first time in a Hague Convention, Art. 18 of the 2006 Hague Securities Convention, allows that a Regional Economic Integration Organisation becomes party to the Convention. Art. 36 of the 2005 Hague Choice of Court Convention envisaged the question paying especial attention to the complexity of the subject matter.

Paragraph 1 – This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

661. This paragraph concerns only prior agreements. It is in line with the usual compatibility clauses which are found in numerous conventions.

Paragraph 2 – Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by this Convention, with a view to improving the application of this Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of this Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

662. As is usual in the Hague Conventions, a possibility is open to Contracting States to conclude agreements improving the application of the Convention, as well as making more expeditious and effective the system for recognition and enforcement of maintenance decisions or for the provision of an advanced level of services. This rule allows two Contracting States or a group of them to conclude among themselves an agreement that covers the same area as the Convention. The requirements for such agreements are found in Article 41 of the Vienna Convention on the Law of Treaties of 23 May 1969, which provides that "*(1) two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty,* [which is the case at point,] *or (b) the modification in question is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole,"* [which is in effect what the rule included in Article 45 provides.]"

663. A copy of the agreement must be transmitted to the depositary of the Convention.

Paragraph 3 – The preceding paragraphs also apply to reciprocity schemes and uniform laws based on special ties between the States concerned.

664. This paragraph assimilates to the agreements referred to in paragraphs 1 and 2, uniform laws and reciprocity schemes based on the existence of special ties among the States concerned. This provision is particularly interesting for the Scandinavian States.

Paragraph 4 – This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention, as concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation.

665. The last paragraph in Article 45 deals with the situation where an REIO becomes a Party to the Convention. It is possible that the legislation adopted by the REIO might conflict with the Convention. A similar rule has been included in Article 26(6) of the 2005 Hague Choice of Court Convention.[231] The provision applies irrespective of whether the rule of the REIO is adopted before or after the Convention. The underlying principle is that where a case is purely "regional", *i.e.* within the REIO, the Convention gives way to the regional instrument. Paragraph 4 provides that the Convention will not affect the application of the rules of the REIO as concerns the recognition or enforcement of decisions as between Member States. It is important to underline that there is no provision that the decision may not be recognised or enforced to a lesser extent than under the Convention.

666. Such a rule is especially useful in relation to the European Community instruments, in particular the Brussels Convention, Lugano Convention, Brussels I Regulation and EEO Regulation, in which very simple systems for recognition and enforcement of

[231] See report Hartley-Dogauchi, specially paras 306-311.

maintenance decisions are included. There is likely to be more interest with regard to such a rule at this moment since a new Regulation on maintenance is being prepared.[232]

667. It could be asked if in this matter and situation a disconnection clause is needed.

Article 46 Most effective rule

This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State or other law in force in the requested State that provides for –

a) **broader bases for recognition of maintenance decisions, without prejudice to Article 19 *f)* of the Convention;**

b) **simplified or more expeditious procedures on an application for recognition or enforcement of maintenance decisions;**

c) **more beneficial legal assistance than that provided for under Articles 14, 14 *bis* and 14 *ter*.**

668. Article 45(2) provides for the possibility of Contracting States to conclude among themselves agreements "*consistent with the objects and purpose of this Convention*" and that "*do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention*". Article 46 goes further because it refers not only to an international instrument, but also to other laws in force in the requested State. Furthermore, it envisages that such instruments imply a more beneficial system than the one provided by the Convention for the recognition and enforcement of maintenance decisions. It is the application of the "most effective rule".

Article 47 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

669. Article 47 states that in the interpretation of the Convention, regard must be had to its international character and to the need to promote uniformity in its application. This provision is meant for authorities applying the Convention on a day to day basis. It requires them to interpret it in an international spirit so as to promote uniformity of application. Therefore, where reasonably possible, foreign decisions and writings could be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all the authorities apply it in an open-minded way.

670. In practice, it means that according to the circumstances of the case and the countries involved, the operation of the Convention takes into account "consistency". But the use of the term "uniform interpretation" is preferred because it is seen in other Conventions: Article 16 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, where the provision was accepted without discussion,[233] Article 13 of the 2006 Hague Securities Convention, and Article 23 of the 2005 Hague Choice of Court Convention.

671. This article has to be read jointly with Article 48 (Review of practical operation of the Convention) because both articles have the objective of a proper and uniform application of the Convention.

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[232] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, document COM/2005/0649 final.

[233] In the Von Mehren Explanatory Report on the 1986 Hague Sales Convention, para. 157 says that "Article 16 draws upon Article 7(1) of the Vienna Convention. The Special Commission's version was accepted subject to minor drafting changes. The provision is designed to encourage the courts to take into account, with a view to maintaining the maximum feasible degree of uniformity in the Convention's interpretation and application, the interpretation and application already given to the Convention by the courts of other legal orders. The provision is, of course, only hortatory".

Article 48 Review of practical operation of the Convention

1. The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.

2. For the purpose of such review Contracting States shall co-operate with the Permanent Bureau in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.

672. The monitoring of the Convention is the object of Article 48.[234] The same rule is in Article 42 of the 1993 Hague Intercountry Adoption Convention, Article 54 of the 1996 Hague Child Protection Convention and Article 52 of the 2000 Hague Adults Convention. There is only benefit to be derived from the organisation by the Conference, at regular intervals, of meetings to examine the practical operation of the Convention and, as appropriate, making suggestions to improve it. A slightly different rule can be found in the recent 2005 Hague Choice of Court Convention, in which Article 24 provides that the Secretary General *"shall at regular intervals make arrangements"* for the review of the operation of the Convention and for the need to make amendments. It is explained by the different nature of the Convention as there is no system of co-operation between Central Authorities in that Convention. In the previously mentioned Conventions on Abduction or Adoption, the meetings to examine the practical operation of the Convention have proven to be essential for the long lasting smooth application of the Conventions. As previously mentioned in the Introduction,[235] the importance of the 1995 and 1999 Special Commission meetings on the application of the Conventions on maintenance obligations has been underlined as a starting point for the elaboration of this new Convention.

673. In the past, Conventions were concluded and only afterwards the States and the Permanent Bureau thought about the application of the Conventions. Nowadays, monitoring of the Conventions is the core activity of the Permanent Bureau. The Permanent Bureau, in co-operation with Central Authorities, NGOs, academics, etc. accomplishes a large spectrum of activities, such as the following: a) promotion and publication of the Conventions; b) help to States in the initial implementation of the Conventions; c) technical advice;[236] d) promotion of consistent interpretation through development of case law database and Judges' Newsletter;[237] e) judicial training;[238] f) improving administrative practice, by training, publication of guides to good practice; g) building of co-operative networks;[239] h) promoting correct enforcement;[240] i) monitoring of the Convention.

674. In this case it has to be underlined that a second paragraph has been added to the said Articles in order to emphasise the fact that the States parties to the Convention must also be involved in the task of the proper functioning of the Convention[241] and, to that end, they have to co-operate with the Permanent Bureau in the gathering of information, including statistics and case law. It is useful to state this expressly, because up to now the Permanent Bureau has been sending requests for information to the Contracting States under several Conventions that are not always fully complied with or answered by all the Contracting States. This way, the importance of answering is made yet clearer in order to make the correct operation of the Convention easier.

675. This Article has to be read jointly with Article 47 (Uniform interpretation) because both Articles have the objective of a proper and uniform application of the Convention.

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[234] In relation with Art. 5 *a)*.
[235] See *supra*, under Part II of this Report.
[236] For example, the Guides to Good Practice to the 1980 Hague Child Abduction Convention.
[237] For example, INCADAT.
[238] For example, "The Judges' Newsletter".
[239] Although the idea of having a Standing Committee was supported by some delegations, it has not been included in the Convention. The co-operation between Central Authorities for the correct application of the Convention beyond what is established in this article is only possible under Art. 5 *a)* and *c)*.
[240] Although it is difficult, because it is left to internal law.
[241] See Art. 5 *a)* and *c)* and comments under paras 89-92 and 98-101 of this Report.

Article 49 Amendment of forms

1. The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Member States shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.

2. Amendments adopted by a majority of the Contracting States present and voting at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the Secretary General to all Contracting States.

3. During the period provided for by paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 57, with respect to the amendment. The State making such reservation shall until the reservation is withdrawn be treated as a State not a Party to the present Convention with respect to that amendment.

676. It is not the first time that a Hague Convention includes or recommends forms to facilitate the use of the Convention. In this case, the Forms Working Group has prepared some forms that are included as an annex to the Convention, which is easier than to have them in a separate document apart from the Convention. It will be easier for the operators of the Convention. However, at this point, a number of other forms will be model forms that will not necessarily be attached to the Convention.

677. The problem in relation with the amendment of the forms, is that it has to be sufficiently formal, but not requiring a formal modification of the Convention, with all the requirements that are necessary for the amendment of a Treaty as if the form would be an integral part of the treaty. The question is easy for some States but in other ones the Constitutional requirements are complicated. It is why Article 49(1) establishes the procedure for amending the forms through a decision of a Special Commission convoked by the Secretary General to which the Contracting States of the Convention and the Member States of the Hague Conference on Private International Law will be invited. In the agenda for the meeting, this special point will be included.

678. Paragraph 2 establishes that the modification of the form will come into force for all Contracting States on the first day of the seventh calendar month after the communication by the Secretary General of the amendment adopted by a majority of the Contracting States present and voting[242] at the Special Commission. During this period, the Contracting States may make a reservation, in accordance with Article 57, with respect to the amendment (para. 3).

679. This option is inspired by Articles 5 and 28 of the 1980 Hague Access to Justice Convention.[243]

Article 50 Transitional provisions

680. This rule is still between brackets as it has not yet been discussed by the Special Commission. The general rule is contained in paragraph 1 and a special rule is included in paragraph 2, which is a more problematic rule that is still included in brackets.

Paragraph 1 – The Convention shall apply in every case where –

a) **a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;**

[242] After the adoption of the amendment to the Statute, this reference has to be re-examined.
[243] These paragraphs formed part of Art. 11 (Option 2) of Prel. Doc. No 13/2005, see *supra* footnote 71.

b) **a direct application for recognition and enforcement has been received by the competent Authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.**

681. According to the general rules on the law of the treaties[244] the Convention would have no retroactive effect. Two possible situations have to be contemplated. The first one concerns the situation where the application is made through a Central Authority and the second one concerns direct applications.

682. In the case of applications through a Central Authority, the Convention applies if the request has been received by the Central Authority in the requested State after the Convention has entered into force between the two States, *i.e.* the requesting State and the requested State.

683. In the case of direct applications, the Convention applies if the application is received by the competent authority in the State addressed after the Convention has entered into force between the State of origin and the State addressed.

684. With this clear and simple rule it is not necessary to provide that the Convention shall apply irrespective of the date on which a decision was rendered, a decision was modified, an authentic instrument or private agreement is made or the reimbursement to a public body is owed.

[Paragraph 2 – The State addressed shall not be bound under this Convention to enforce a decision[, an authentic instrument or a private agreement] in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed.]]

685. Paragraph 2 includes a transitional provision for a particular case: what happens in respect of payments falling due prior to the entry into force of the Convention between the two States, the State of origin and the State addressed. Although the solution was doubtful for some members of the Drafting Committee, the solution adopted is that, in those cases, the State addressed "*shall not be bound*" to enforce the decision insofar as it relates to payments falling due before the Convention entered into force between the two States concerned under the Convention. However those prior payments could be enforced under internal law.

Article 51 Provision of information concerning laws, procedures and services

1. A Contracting State, by the time its instrument of ratification or accession is deposited, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –

a) **a description of its laws and procedures concerning maintenance obligations;**

b) **a description of the measures it will take to meet the obligations under Article 6(2);**

c) **a description of how it will provide applicants with effective access to procedures, as required under Article 14;**

d) **a description of its enforcement rules and procedures, including any limitations, in particular limitation periods, on enforcement.**

2. Contracting States may, in fulfilling their obligations under paragraph 1, utilise the Country Profile [Annex to the Convention]. The Country Profile may be amended from time to time by a Special Commission.

3. Information shall be kept up-to-date by the Contracting States.]

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[244] Art. 28 of the Vienna Convention on the Law of Treaties 1969, "*unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*".

686. This article is still in brackets. It is noteworthy that, if this provision is approved, Article 5 *b)* and Article 32 may be deleted, but the proposal of the Working Group on Applicable Law for modifying Article 32 would have to be taken into account for Article 51. Article 5 *b)* refers to the general obligation of the Central Authority to provide information to the Permanent Bureau as to the law and procedures concerning maintenance obligations[245] and Article 32 deals with the specific information on procedures of recognition and enforcement given by the Contracting States.[246]

687. It is important to underline the importance of the Country Profile, as it ensures that the Convention is implemented correctly and that it will be applied properly. In the long term, the Country Profile would save a lot of time as it would provide many answers in advance to requesting Central Authorities in their day-to-day operations before sending applications to requested Central Authorities therefore reducing the amount of written queries and follow-ups for additional information missing in the initial application. Information found in the Country Profile could also be a source of good practices.

688. The experience with other Hague Conventions has shown the value of an exchange of information on laws and procedures in different Contracting States. The States, and specially those that do not have a tradition of implementing legislation, would benefit from a requirement to provide certain basic information about how the Convention is to be implemented before the entry into force of the Convention. It would oblige them to think through certain practical issues at that point in time. The information obligation would rest upon States and not on Central Authorities.

689. It is important that the information concerning laws, procedures and services on maintenance would be kept up-to-date by the Contracting States, an obligation established in Article 51(3). There are two possibilities, according to the way in which the information is related to the Convention.

690. If a flexible solution is adopted, Country Profiles would be accessible on the website of the Hague Conference and via the iSupport case management and communication system. They would be completed or modified on line by the Contracting States through a secured Internet access.

691. If, on the contrary, a rigid solution is adopted and the Country Profile is in an Annex to the Convention, the amendment of the Country Profile will take place only from time to time in a Special Commission. Some experts object to having the Country Profile document as an annex to the Convention and this is why this possibility is in brackets. If the Country Profile is included as an annex, a similar rule to Article 49 (amendment of forms) will have to be included.

CHAPTER IX – FINAL PROVISIONS

692. As usual, these articles are prepared by the Permanent Bureau[247] and they are taken from previous Conventions, but including modifications arising from the special characteristics of the Convention or recent developments. The Chapter is in brackets because it has not yet been discussed by the Special Commission.

693. Although some decisions have still to be taken, normally the final provisions are adopted without lengthy discussions. This is the reason why some comments are introduced.

Article 52 Signature, ratification and accession

694. For this article, two options are presented in the preliminary draft. The first one is a classical one and the second one is new and more open solution.

Option 1

[245] See comments on Art. 5 *b)* under paras 93-97 of this Report.
[246] See comments on Art. 32 under paras 601-603 of this Report.
[247] Drafting suggestions were accepted by the Drafting Committee and first included in the draft Convention in Prel. Doc. No 16/2005.

1. The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.

2. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

3. Any other State may accede to the Convention after it has entered into force in accordance with Article 55.

4. The instrument of accession shall be deposited with the depositary.

5. Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in Article 60. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

OR

5. The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession in accordance with Article 58. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited with depositary which shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

A) Option 1 makes a distinction for bilateralisation purposes between Member States, States participating in the Session, and third States. Only Member States of the Conference and the States which participated in that Session can sign and ratify, accept or approve the Convention (paras 1 and 2), in rules drawn from Article 43 of the 1993 Hague Intercountry Adoption Convention, whereas non-Member States can only accede to it after the Convention enters into force (paras 3 and 4). As to the effects of the accession, paragraph 5 offers two possibilities:

a) The first one, drawn from Article 44 of the 1993 Hague Intercountry Adoption Convention, Article 58 of the 1996 Hague Child Protection Convention and Article 54 of the 2000 Hague Adults Convention, is that the accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in a certain period. In this case, six months is proposed, although a longer period for the receipt of objections is also possible.

b) The second possibility, taken from Article 38 of the 1980 Hague Child Abduction Convention, is that the accession will have effect only as regards the relations between the acceding State and the Contracting States which accept the accession.

Option 2

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the depositary.

B) Option 2 is for a completely open Convention, where no bilateralisation is possible. The proposed text is in Article 27 of the 2005 Hague Choice of Court Convention and, with almost the same drafting, Article 17 of the 2006 Hague Securities Convention. This

rule provides two methods by which a State may become a Contracting State to the Convention: either by signing and ratifying the Convention and then depositing its instrument of ratification, acceptance or approval of the Convention with the depositary (paras 1, 2 and 4) or, alternatively, by depositing its instrument of accession to the Convention with the depositary (paras 3 and 4). With a view to facilitating widespread adherence to the Convention, it is left to States to choose whichever method is most convenient for them.

695. There is no difference in quality or effect between the two methods provided for in this option. Both methods are available equally to Member States and non-Member States of the Hague Conference on Private International Law. Also, the provision makes no distinction between States which participated in the Diplomatic Conference at which the text of the Convention was adopted and those that did not. In this way, the broadest possible set of options and flexibility is offered to the States for becoming Contracting States. This rule does not impose any time requirement or any other prerequisite for signing, ratifying, accepting, approving or acceding to the Convention. In particular, when a State has signed the Convention, this rule does not impose a time limit for ratification, acceptance or approval; the instrument of ratification, acceptance or approval may even be deposited at the time of signing. The effect of paragraph 3 is that non-signatory States may accede before (as well as after) the Convention enters into force on the international plane under Article 55.

696. Signature, ratification, acceptance, approval or accession under Article 52 apply only to States; for Regional Economic Integration Organisations, the corresponding provisions are found in Articles 53 and 54.

Article 53 Regional Economic Integration Organisations

697. Articles 53 and 54 make provisions for an REIO to become a party to the Convention. There are two possibilities. The first one (object of Art. 53) is where both the REIO and its Member States become parties as a consequence of the fact that they enjoy concurrent external competence over the subject matter of the Convention (joint competence) or if some matters fall within the external competence of the REIO and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole). The second one (object of Art. 54) is where the REIO alone becomes a party, which might occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the Member States would be bound by the Convention by virtue of the agreement of the REIO.

Paragraph 1 – A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

698. Article 53 is drawn from Article 29 of the 2005 Hague Choice of Court Convention. This Article enables each REIO[248] constituted solely by sovereign States to sign, accept, approve or accede to the Convention,[249] but only to the extent that it has competence over matters covered by the Convention. The European Community, for example, has adopted several legal instruments that deal with matters covered by this Convention.[250] In consequence, the Community has competence to conclude international agreements that affect those instruments. For this reason (and because the European Community is

[248] It was agreed by the Diplomatic Session of 2005 that "REIO" should have an autonomous meaning (not dependant on the law of any State) and that it should be interpreted flexibly to include sub-regional and trans-regional organisations as well as organisations whose mandate extends beyond economic matters.
[249] The absence of the term "ratify" is intentional, as only States ratify Conventions.
[250] Regulation 44/2001, on jurisdiction, recognition and enforcement of decisions in civil and commercial maters and Regulation 805/2004, on European Enforcement Order, Regulation in preparation on maintenance obligations…

not a non-unified legal system within the meaning of the Convention[251]), it is necessary to include a provision in the Convention permitting the European Community (and any other REIO) to become a party of the Convention by providing it with the rights and obligations of a Contracting State. This clause appeared for the first time in the 2006 Hague Securities Convention (Art. 18) and it is also included in the 2005 Hague Choice of Court Convention (Art. 29).

Paragraph 2 – The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

699. In view of the importance of this matter, the REIO is to notify the depositary in writing specifying the matters covered by the Convention in respect of which "*competence has been transferred to that Organisation by its Member States*". Thus, the notification should be made only where, as a result of the transfer of competence, the REIO has exclusive competence in relation to the specified matters and Member States no longer have independent authority to legislate concerning them. The notification has to be made at the time of signature or of the deposit of the instrument of acceptance, approval or accession; REIO must "*promptly*" notify the depositary of all changes, if any, to the distribution of competence and all new transfers, if any, of competence. These notifications under Article 53, paragraph 2, are not to be considered as declarations covered by Article 58: notifications under Article 53 are compulsory, whereas declarations under Article 58 are not.

Paragraph 3 –.For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 54 that its Member States will not be Parties to this Convention.

700. Unless Article 54 applies, any instrument of signature, acceptance, approval or accession by an REIO will not be counted for the purposes of the entry into force in accordance with Article 55.

Paragraph 4 – Any reference to a "Contracting State" or "State" in this Convention applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate.

701. In any case in which an REIO is a party to the Convention, a reference to a Contracting State includes, where appropriate, a reference to the REIO.

Article 54 Accession by Regional Economic Integration Organisations

Paragraph 1 – At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 58 that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

702. Article 54 is drawn from Article 30 of the 2005 Hague Choice of Court Convention. This Article is concerned with the case where the REIO alone becomes a Party. Where this occurs, the REIO may declare that its Member States are bound by the Convention.[252]

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[251] In this sense, see Art. 43 and comments under paras 651 *et seq.* of this Report.

[252] This would be the case, for example, under Art. 300(7) of the Treaty establishing the European Community.

Paragraph 2 – In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention applies equally to the Member States of the Organisation, where appropriate.

703. The Member States of the REIO that have made the declaration according to paragraph 1 are bound by the Convention, which will be applied by its internal authorities although the Member States in question are not Party to the Convention. It is why the reference to "State" in the Convention has to be applied "where appropriate" also to the Member States of the REIO. As to the application of the term "State" to the REIO, see comments to Article 53, paragraph 4.

Article 55 Entry into force

Paragraph 1 –This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third [second] instrument of ratification, acceptance, approval or accession referred to in Article 52.

704. This Article is drawn from Article 19 of the 2006 Hague Securities Convention and from Article 31 of the 2005 Hague Choice of Court Convention. Article 55 specifies when the Convention will enter into force. This will be the first day of the month following the expiration of three months after the deposit of a number of instruments of ratification, acceptance approval or, according to the solution adopted in Article 52, accession. But it is not yet decided if three instruments will be required for the entry into force or two will be sufficient, as it has been accepted in Article 31 of the recent 2005 Hague Choice of Court Convention, a more flexible solution which facilitates the entry into force of the Convention.

Paragraph 2 – Thereafter the Convention shall enter into force –

a) **for each State or Regional Economic Integration Organisation referred to in Article 53 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;**

b) **for a territorial unit to which the Convention has been extended in accordance with Article 56, on the first day of the month following the expiration of three months after the notification referred to in that Article.**

705. Similar rules to those in paragraph 1 are laid down for when it comes into force for a State or REIO that consequently becomes a Party to it (Art. 55(2) *a)*) and for a territorial unit to which it has been extended under Article 56(1).

Article 56 Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 58 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

706. This rule is drawn from Article 28 of the 2005 Hague Choice of Court Convention. It permits a State which consists of two or more territorial units to declare that the Convention will extend only to some of its territorial units. Thus, for example, the United Kingdom could sign and ratify for England only or China could sign and ratify for Hong Kong only. Such a declaration may be modified at any time, always with notification to the depositary. This provision is particularly important for States in which the legislation necessary to give effect to the Convention would have to be passed by the legislatures of the units (for example, by provincial and territorial legislatures in Canada). If no declaration is made, the Convention applies to the whole State.

707. Paragraph 3 in Article 43 deals with the territorial extent of recognition and enforcement in non-unified legal systems while Article 56 concerns the territorial application of the Convention.

708. As in Article 43,[253] this Article does not apply to REIO.

Article 57 Reservations

1. Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 56(1), make one or more of the reservations provided for in Articles 17(2), 41(3) and 49(3). No other reservation shall be permitted.

2. Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

3. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

4. Reservations under this Article shall have no reciprocal effect.

709. Only three reservations are allowed under the Convention, the ones provided for in Articles 17(2), 41(3) and 49(3).[254] No other reservations are permitted. The time at which one or more reservations can be made is no later than the time of ratification, acceptance, approval or accession; in the case of a non-unified legal system, at the time of making a declaration in terms of Article 56(1). The withdrawal of a reservation is possible at any time and has to be notified to the depositary. The withdrawal will take effect on the first day of the third calendar month after the notification (paras 2 and 3).

710. A new rule has been introduced in paragraph 4 of this Article, according to which those reservations "*shall have no reciprocal effect".* As a general rule, Article 21 of the Vienna Convention on the Law of Treaties of 1969,[255] establishes what is called the "reciprocal effect" of reservations, which translates into a network of bilateral relations in the Convention, according to the reservations formulated by the States.

711. In this case, the Drafting Committee[256] discussed in relation to Article 41(3) if the reservation as to the use of either French or English has to produce a reciprocal effect and, in the same way, with regard to Article 17(2) in relation to the possible reservations on certain bases for recognition and enforcement on decisions on maintenance. Finally, the possible reservation to the amendment of a form, according to Article 49(3) was also

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[253] See *supra*, paras 626 *et seq.* of this Report.

[254] Possibility included in Art. 19 *b)* of the Vienna Convention on the Law of Treaties of 1969. In the Draft Guidelines on reservations to treaties provisionally adopted so far by the International Law Commission, after defining in 1.1. "reservation" as "a unilateral statement however phrased or named, made by a State or an International Organisation when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or Organisation purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that International Organisation", in guideline 3.1.2 defines as "specified reservations" the reservations "that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects·, International Law Commission, *Report of the 58th Session*/2006) document A/61/10, pp. 293-361.

[255] Art. 21 (Legal effects of reservations) says: "1. A reservation established with regard to another party in accordance with Arts 19, 20 and 23: a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and b) modifies those provisions to the same extent for that other party in its relations with the reserving State".

[256] In November 2006.

discussed. The preferred position of the Drafting Committee was that there is no reason to maintain in such cases the reciprocal effect of reservations. This is now expressly provided for in paragraph 4; reservations under Article 57 do not have a reciprocal effect. In fact, a similar discussion took place years ago in the Hague Conference on Private international law.[257] The conclusion was that certain reservations which are expressly provided for in Hague Conventions appear not to lend themselves to reciprocity as they are negotiated reservations.[258] The rules of the Vienna Convention are not applicable, as a special rule is established in the Hague Convention.

712. That means, for example, that if State A makes a reservation on the use of French, it does not mean that State B, that has not formulated any reservation, can refuse a communication in French coming from the authorities in State A. In the same vein, if State C makes a reservation in respect of the recognition of decisions rendered in the State of the habitual residence of the creditor, it does not mean that a decision rendered in State C where the creditor has its habitual residence would not be recognised and enforce in State D, even though State D has not made the reservation.[259]

Article 58 Declarations

1. Declarations referred to in Articles 2(2), 11(1) g) option 1, 14(3) option 1, 21(2), 41(1) and (2), 52(5) option 1, 54(1) and 56(1), may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

713. According to this article, the declarations referred in paragraph 1 may be made upon signature, ratification, acceptance, approval or accession. In difference with reservation, they cannot only be made at that moment, but also at any time thereafter and they may be modified or withdrawn at any time. They are made to the depositary (the Ministry of Foreign Affairs of the Netherlands).

714. A declaration made at the time of signature, ratification, acceptance approval or accession takes effect simultaneously with the entry intro force of the Convention for the State concerned. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, takes effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

715. It is a very flexible solution that allows States Party in the Convention to make, modify or withdraw a declaration according to the circumstances. For example, if a State applies the Convention, for the moment, only to the maintenance obligations of Article 2(1), can later extend the application of the Convention to other maintenance obligations arising from other family relations, by making a declaration in accordance with Article 2(2) and 58.

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[257] Note on reservations and options in the Hague Conventions, drawn up by the Permanent Bureau, June 1976, *Actes et documents de la Treizième session*, Tome I, *Miscellaneous matters*, pp. 102-104. On the question as a whole, the study of Georges A.L. Droz, "*Les réserves et les facultés dans les Conventions de La Haye de Droit international privé*", *Revue critique de Droit international privé*, 1969, pp. 381 ff.

[258] As stated by the General Secretary in Special Commission of June 2006, Report of Meeting No 15, p. 4.

[259] See also *supra* para. 495.

Article 59 Denunciation

1. A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a Multi-unit State to which the Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

716. This rule is taken from Article 58 of the 2000 Hague Adults Convention and from Article 33 of the 2005 Hague Choice of Court Convention. Article 59 provides that a Contracting State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 60 Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 52 and 53 of the following –

Option 1

a) the signatures, ratifications, acceptances and approvals referred to in Articles 52 and 53;

b) the accessions and objections raised to accessions referred to in Article 52(5) option 1;

OR

Option 2

a) + b) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 52 and 53;

c) the date on which the Convention enters into force in accordance with Article 55;

d) the declarations referred to in Articles 2(2), 11(1) g) option 1, 14(3) option 1, 21(2), 41(1) and (2), 52(5) option 1, 54(1) and 56(1);

e) the agreements referred to in Article 45(2);

f) the reservations referred to in Articles 17(2), 41(3) and 49(3), and the withdrawals referred to in Article 57(2);

g) the denunciations referred to in Article 59.

717. Article 60 requires the depositary, the Ministry of Foreign Affairs of the Netherlands, to notify the Members of the Hague Conference on Private International Law, and other States and REIO which have signed, ratified, accepted, approved or acceded to the Convention of various matters relevant to the Convention, such as signatures, ratifications, entry into force, reservations, declarations and denunciations. Adjustments to this provision will be required depending on the option adopted under Article 52.

ANNEX 1
LIST OF PRELIMINARY DOCUMENTS

LIST OF PRELIMINARY DOCUMENTS PUBLISHED BY THE PERMANENT BUREAU

COMMISSION II – INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Preliminary Document No 25:	Preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *January 2007*
Preliminary Document No 26:	Observations of the Drafting Committee on the text of the preliminary draft Convention – *January 2007*
Preliminary Document No 29[1]:	Revised preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *June 2007*
Preliminary Document No 30:	Preliminary draft Protocol on the law applicable to maintenance obligations - *June 2007*
Preliminary Document No 31-A:	Report of the Forms Working Group – Report – *July 2007*
Preliminary Document No 31-B:	Report of the Forms Working Group – Recommended Forms - *July 2007*
Preliminary Document No 32:	Draft Explanatory Report on the preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *August 2007*
Preliminary Document No xx:	Explanatory Report on the preliminary draft Protocol
Preliminary Document No xx:	Report of the Administrative Co-operation Working Group – Monitoring and Review and Country Profile sub-committee
Preliminary Document No xx:	Comments of States on the preliminary draft Convention
Preliminary Document No xx:	Consolidated list of proposed amendments to the preliminary draft Convention, prepared by the Permanent Bureau

[1] Prel. Docs. Nos 27 and 28 have been drawn up for the attention of the May 2007 meeting of the Special Commission and were used as the basis for discussion at that meeting.

ANNEX 2
LIST OF MEETINGS OF THE SPECIAL COMMISSION AND COMMITTEES OF THE SPECIAL COMMISSION (THE DRAFTING COMMITTEE, THE APPLICABLE LAW WORKING GROUP, THE ADMINISTRATIVE CO-OPERATION WORKING GROUP AND THE FORMS COMMITTEE)

LIST OF MEETINGS OF THE SPECIAL COMMISSION AND COMMITTEES OF THE SPECIAL COMMISSION (THE DRAFTING COMMITTEE, THE APPLICABLE LAW WORKING GROUP, THE ADMINISTRATIVE CO-OPERATION WORKING GROUP AND THE FORMS COMMITTEE)

Special Commission meetings

The Special Commission met on the following occasions –

- 5-16 May 2003
- 7-18 June 2004
- 4-15 April 2005
- 19-28 June 2006
- 18-16 May 2007

Drafting Committee meetings

The Drafting Committee had the following members: Ms Denise Gervais (Canada), Mary Helen Carlson (United States of America), Namira Negm (Egypt), Mária Kurucz (Hungary), Stefania Bariatti (Italy), María Elena Mansilla y Mejía (Mexico), Katja Lenzing (European Commission) and Cecilia Fresnado de Aguirre (Inter-American Children's Initiative) and Messrs Jin Sun (China), Lixiao Tian (China), Robert Keith (United States of America), Jérôme Déroulez (France) Edouard de Leiris (France), Mrs Jan M. Doogue, Chairman (New Zealand), Paul Beaumont (United Kingdom), Antoine Buchet (European Commission) and Miloš Haťapka (European Commission).

It met on the following occasions –

- 27 to 30 October 2003
- 12 to 16 January 2004
- 19 to 22 October 2004
- 5 to 9 September 2005
- 11 to 15 February 2006
- 16 to 18 May 2007
- 28 November and 7 December 2006 (via conference call)

Applicable Law Working Group (WGAL)

The current membership of the Applicable Law Working Group is as follows: Patricia Albuquerque Ferreira (China, SAR Macao), Nádia de Araújo (Brazil), Antoine Buchet (European Commission), Raquel Correia (Portugal), Gloria DeHart (IBA), Edouard de Leiris (France), Michèle Dubrocard (France), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Dorothea van Iterson (Netherlands), Sarah Khabirpour (Luxembourg), Åse Kristensen (Norway), Alberto Malatesta (Italy), David McClean (Commonwealth Secretariat), Tracy Morrow (Canada), Maria del Carmen Parra Rodriguez (Spain), Angelika Schlunck (Germany), Marta Zavadilová (Czech Republic), Robert Spector (United States of America), Lixiao Tian (China), Rolf Wagner (Germany), and Andrea Bonomi (Switzerland, Chair). The Co-Reporters Alegría Borrás and Jennifer Degeling and the members of the Permanent Bureau are de facto members of the WGAL.

It met once at The Hague, in November 2006; otherwise, the proceedings were conducted by means of an electronic discussion list.

Administrative Co-operation Working Group

The Administrative Co-operation Working Group is structured as a working group, and decisions are reached by group consensus. Members of the Hague Conference Permanent Bureau serve as facilitators, and Mary Helen Carlson (the United States of America),

Maria Kurucz (Hungary), Jorge Aguilar Castillo (Costa Rica) and Jennifer Degeling (Australia) were appointed as co-convenors of the Working Group.

The Administrative Co-operation Working Group held teleconference calls between the 2004 and 2005 Special Commissions and also communicated via e-mail and a listserv.

Forms Committee

The Forms Committee had the following members: Shireen Fisher, IAWJ (Co-Chair), Zoe Cameron, Australia (Co-Chair), Jorge Aguilar Castillo, Costa Rica, Philip Ashmore, United Kingdom, Ana-Sabine Boehm, DIJuF, Edouard, De-Leiris, France, Hilde Drenth, Netherlands, Kay Farley, NCSEA, Meg Haynes, United States of America, Helena Kasanova, Slovakia, Katie Levasseur, Canada (Civil Law), Tracy Morrow, Canada (Common Law), Anna SVANTESSON, Sweden, Hans-Michael VEITH, Germany, Patricia WHALEN, IAWJ, Christina WICKE, Germany, William Duncan, Permanent Bureau, Philippe Lortie, Permanent Bureau, Sandrine Alexandre, Permanent Bureau, Jenny Degeling, Rapporteur.

On 28 June 2006, the Forms Working Group met in person at The Hague after the Fourth meeting of the Special Commission to discuss its work programme until the Diplomatic Session. Between June 2006 and August 2007, the Working Group met by conference calls on 7 occasions: 30 August 2006, 22 March, 12 and 26 April, 31 May, 5 and 19 July 2007 and in person before and during the Fifth meeting of the Special Commission on 6, 7 and 13 May 2007.