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**OBSERVATIONS DU COMITÉ DE RÉDACTION SUR LE TEXTE  
DE L'AVANT-PROJET DE CONVENTION**

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**OBSERVATIONS OF THE DRAFTING COMMITTEE ON THE TEXT OF  
THE PRELIMINARY DRAFT CONVENTION**

*Document préliminaire No 26 de janvier 2007  
à l'intention de la Vingt-et-unième session de novembre 2007*

*Preliminary Document No 26 of January 2007  
for the attention of the Twenty-first Session of November 2007*

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## OBSERVATIONS OF THE DRAFTING COMMITTEE ON THE TEXT OF THE PRELIMINARY DRAFT CONVENTION

### Introduction

The purpose of these observations of the Drafting Committee is to bring to the attention of the delegates to the Diplomatic Session –

- a) any necessary explanations with regard to certain amendments made by the Drafting Committee to Working Document No 98 of 26 June 2006;
- b) certain policy issues that still need to be addressed; and,
- c) certain possible drafting changes that may result from the acceptance or rejection of some of bracketed language.

### Article 1

The Drafting Committee considered that a reference to “direct applications” in the “object” Article was inappropriate. Nothing in this Article precludes “direct applications”, and it would be misleading to suggest that provision for “direct applications” is a primary object of the Convention.

### Article 2

The new structure of Article 2 does not involve a change of substance. It reflects the wish of the Special Commission that the Article should begin by describing the core maintenance obligations to which the whole of the Convention applies, followed by the obligations to which the Convention, or parts of the Convention, may be extended by declaration.

### Article 3

A definition of “residence” no longer appears in Article 3. The partial definition now appears in Article 9, the only place where the concept of “residence” is used on its own.

#### [Article 3 c)]

The definition of the term “legal assistance” may need to be revisited in the light of the discussions that are to take place at the Special Commission meeting of May 2007.

### Article 5 b)

This provision may need to be deleted if Article 51 is accepted.

### Article 7(1)

The addition of the language in the second set of brackets (*i.e.* “in making an application under Article 10 or”) may be necessary if reference to Article 6(2) *g), h), i)* and *j)* is retained in the first set of bracketed language.

### Article 9

For an explanation concerning the inclusion of the sentence “[f]or the purpose of this provision, residence excludes mere presence” see Article 3 above.

### Article 10(2)

Consideration should be given to the inclusion of an application by the debtor for recognition or for establishment of a decision.

### **Article 11(1) h) – Option 1**

This provision was added at the suggestion of the Forms Committee. It provides for the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the application that are necessary for follow-up purposes under Article 12(3), (4), (5), (8) and (9).

### **Article 12(2) (and 13, 21 and 26)**

Additional language has been added to Articles 12(2), 13, 21 and 26, further to the mandate of the Chair of the Meeting of the Special Commission 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).

The aim of this additional language, 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, either at the request of the requested Central Authority (Article 12(2)), or at the request of the competent Authority of the State addressed (Article 21(3)) or upon a challenge or an appeal by the defendant (Article 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)].

### **Article 12(9)**

The Drafting Committee was instructed by the Chair of the Meeting of the Special Commission to insert the text proposed in Working Document No 95 subject to drafting improvements.

### **[Article 13]**

The draft reflects the analysis and suggestions of the Permanent Bureau. 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”.

Applying this Article in conjunction with Article 21(3), a competent authority in the State addressed could for example request the Central Authority in the requesting State to produce a complete certified copy of a statement of arrears, if that is required by the rules of evidence of the State addressed, where the paper version of the statement of arrears received in the first place by regular mail was not certified. The result would be the same, whatever the medium employed, whether the statement of arrears was sent in the first place by fax or by e-mail. However, if the competent authority in the State addressed is not equipped with a secured fax or a secured e-mail (*i.e.* systems that can ensure the authentication (identity of the author), veracity and integrity of the documents transmitted) to receive a certified copy of the statement of arrears, this means of communication and the medium employed would not be at the disposal of the authorities concerned and the certified copy of the document would have to be transmitted using another medium and / or means of communication.

Consideration should be given whether the interaction between Article 13 and Article 21(3) creates any difficulty.

## **Article 14 – Option 1 or Articles 14 to 14 *quater* – Option 2**

In order to assist the discussion of Article 14 during the May 2007 Meeting of the Special Commission, the Drafting Committee has prepared two alternatives for Article 14. Option 1 is the pre-existing text. Option 2 makes a clear distinction between free legal assistance for applications concerning child support under Chapter III and free legal assistance for other applications. Option 2 is based on Working Document No 94.

### **Article 14 – Generally**

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.

### **Article 14 *bis* (2) *b*)**

Article 14 *bis* (2) *b*) sets out alternatives. A Central Authority may use the first alternative, if such procedure is available. In this case, if there is a determination that there is no eligibility for free legal assistance, the requested Central Authority should notify the requesting Central Authority. The applicant may then decide to file directly with the Competent Authority in accordance with Article 34.

### **Article 14 *ter c*)**

Article 14 *ter c*) could be subject to a declaration or reservation.

### **Article 14 *quater***

Article 14 *quater* could be subject to a declaration or reservation for non child support cases.

## **Article 15**

Note that Article 34 makes it clear that the provisions of Article 15 apply also to “direct requests to competent authorities”.

## **Article 16**

It remains to be decided whether authentic instruments and private agreements should be covered by the general scope of application of the Convention and, if so, whether they should be the subject of an opt-in provision. Such provision could read as follows: “A Contracting State may, in accordance with Article 58 declare that it will apply this Convention also to authentic instruments and private agreements relating to maintenance obligations, in accordance with Article 26.”

The Drafting Committee recognises that if a mandatory or optional provision relating to private agreements and authentic instruments is eventually accepted, some consequential amendments to Chapter III and possibly other Chapters will be needed.

The Drafting Committee notes that the Special Commission is further considering whether any other provisions of the Chapter should not apply to authentic instruments and private agreements. For example, if authentic instruments and private agreements are to be covered by the general scope of application of the Convention, may they be the subject of “direct applications”?

**Article 17**

Consideration should be given to whether disputes relating to maintenance obligations in respect of “vulnerable adults” should also be excepted in Article 17(1) e).

**Article 20(11)**

The question remains open whether there should be any further elaboration of this provision along, for example, any of the following lines:

- stay or suspension of enforcement might be prohibited while an appeal is pending;
- the decision given on the challenge or appeal might be contested only by a single appeal. Such an appeal might be limited to points of law;
- if there is a stay or suspension of enforcement there might be a requirement for the posting of a security or a bond;
- if the decision is not taken within a specified period of time there might be an obligation, on request, to provide an explanation for the delay.

**Article 21**

The draft reflects the analysis and suggestions of the Permanent Bureau.

**Article 26**

See under Article 16 above.

**Article 27**

The content of Working Document No 81 has been inserted in this Article. The title of the provision would read “Reciprocal arrangements involving the use of provisional and confirmation orders” instead of “Commonwealth arrangements for the reciprocal enforcement of maintenance obligations”. It is to be noted that these arrangements sometimes apply to States other than Member States of the Commonwealth.

**Article 28(3)**

Consideration should be given to the inclusion of wording to the effect that in the case of applications through Central Authorities enforcement should be without further cost to the applicant.

**Article 33**

Consideration needs to be given to whether public bodies should be able to pursue applications in the State addressed other than for recognition and enforcement such as for establishment of a decision in favour of the public body and whether a public body should be entitled to apply directly to a competent authority in the State addressed for recognition and enforcement.

See also comments under Article 14 – Generally, above.

**Article 34**

The Drafting Committee recognises that if Article 34 is accepted some consequential amendments will be required. Article 20(3) should be deleted and Article 20(4) would become 20(3) and could read: “Nothing in paragraph 2 shall prevent the use of simpler or more expeditious procedures”.

Further consideration needs to be given to whether any other provisions of Chapters V, VI or VII should be excepted in respect of direct requests for recognition and enforcement such as, for instance, Article 38.

#### **Article 40(1)**

Consideration should be given to the question whether this principle should apply only in respect of child support.

#### **Article 43**

Further consideration will be given to this Article by a group of interested States assisted by the Permanent Bureau.

#### **Article 44**

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*.

If the applicable law rules are the subject of a separate protocol, a provision concerning the relationship between the new protocol and the old 1956 and 1973 Hague Conventions on applicable law will need to be incorporated in the general provisions of the protocol.

#### **Article 46 c)**

This provision may require adjustments depending on the results of the May 2007 Meeting of the Special Commission.

#### **Article 49**

Further work on the matter of "amendments of forms" will be carried out by the Permanent Bureau in advance of the Diplomatic Conference.

#### **Article 51**

It is to be noted that, if this provision is approved, Article 5 b) and Article 32 may be deleted.

#### **Article 52 – Option 1**

This option is used when a distinction is made for bilateralisation purposes between Member States, States participating in the Session, and third States.

#### **Article 52 – Option 2**

This option is used for a completely open Convention, *i.e.* one where no bilateralisation is possible.

#### **Article 60 b)**

Adjustments to this provision will be required depending on the option adopted under Article 52.

**Transmittal form – new declaration at the end of the transmittal form**

This declaration provides that the information contained in the transmittal form and accompanying application, and the enclosed documents, correspond to and are in conformity with the information and documents provided by the applicant to the requesting Central Authority. This may address the sworn statement issue raised in Working Document No 100.