

Reply by Austria

Questionnaire concerning a new global instrument on the international recovery of child support and other forms of family maintenance

Part I (Practice under existing international instruments)

The replies provided to the questionnaire of 1999 are still valid with the following exceptions:

Question no.10: The agreement with the United Kingdom is no longer valid because the United Kingdom insisted that documents coming from Austria have to be accompanied by translations into English.

Question no.16: In Austria a computerized central register of inhabitants has been established. The Austrian receiving agency has access to this register.

Question no.17: In 2002 the minimum amount that must be left to the debtor and cannot be seized is 473 Euro per month.

Part II (Questions concerning national systems of maintenance obligations in respect of children and other family members)

Question no.1: Concerning children there are always periodic payments ordered (fixed amounts and no percentages of the debtor's income). Concerning spouses or ex-spouses more flexibility is possible (eg lump sums, property transfer).

Question no.2: Child, spouse, ex-spouse, parent

Question no.3: A child - even after having reached the age of majority - who is not self-supporting (eg a child who is a major but still studying is entitled to be maintained).

Question no.4: In the case of a child up to the age of 21 years: the law of his/her habitual residence (Hague Convention 1956); other children: the law of their nationality (according to Austrian private international law). In the case of spouses: the law of the common nationality; if they have no common nationality: the law of the habitual residence. In the case of ex-spouses: the law of the common nationality resp. habitual residence at the time of the divorce (according to Austrian private international law).

Question no.5: Judicial process

Question no.6: Yes. If the child is a minor and habitually resident in Austria or an Austrian national child maintenance is ordered in an informal ex-officio proceedings (so-called "ausserstreitiges Verfahren"); in all other cases the lodging of a formal law-suit is necessary (so-called "streitiges Verfahren").

Question no.7: Yes (see answer to question no.6); processes can only be joined if both applications (child and spousal maintenance) have to be decided in the "streitiges Verfahren".

Question no.8: There are guidelines used by the courts (percentages from the debtor's net income which depend on the age of the child and the average needs of children depending of the age).

Question no.9: Yes, if the applicant lives in a state where the standard of living is lower than in Austria (lower average living costs).

Question no.10: Yes, concerning persons other than children there are no detailed guidelines.

Question no.11: See answer to question no.4

Question no.12: No automatic reassessment

Question no.13: No automatic adjustment

Question no.14: A modification is possible if the relevant factors have changed (needs of the applicant, resources of the debtor); the modification is made by the same court if it still has jurisdiction.

Question no.15: A foreign order can only be modified by an Austrian court if it has international jurisdiction (which is not existing under Art.5 para.2 of the Brussel I - Regulation when the maintenance creditor is habitually resident in another EU-Member State).

Question no.16: Law of the child's nationality (according to Austrian private international law).

Question no.17: If a child is born out of wedlock paternity must be established by recognition or judgment (based on biological evidence).

Question no.18: Biological proof is necessary (blood testing, DNA analysis etc); an indication of costs is impossible. These costs are of course covered by the legal aid scheme if legal aid has been granted. Concerning legal aid there are no different requirements for residents and non-residents.

Question no.19: No

Question no. 20: Children living in Austria may be assisted by the child welfare authority ("Jugendamt"). Claimants living abroad may request legal aid and after granting legal aid they will be assisted by an Austrian attorney-at-law.

Question no. 21: The means test concerning child maintenance is child centred; the means of the custodian parent are irrelevant. The general requirement is that the fees for the proceedings would infringe the necessary costs of living of the person concerned. Legal aid to minor children is nearly automatically granted.

Question no.22: The substantial requirements are the same (infringement of the necessary living costs by the fees of the court proceedings).

Question no.23: No indication possible

Question no. 24: No compensation ("Aufrechnung") of expenses due to the debtor with his/her maintenance obligations.

Question no.25: The maintenance creditor has to apply for the appropriate enforcement measures to the court (eg seizure of salary or other property of the debtor).

Question no.26: The best way is to make an application under the UN Convention 1956 on the recovery of maintenance abroad.

Question no. 27: See answer to question no.25

Question no. 28: All maintenance decisions are dealt with in the same way. The means available are: wage withholding, seizure of movable and immovable property with forced sale as a consequence, deduction of unemployment payments and social benefits if they are higher than the minimum amount that has to be left to the debtor. Commitment to prison or division of pensions is not possible.

Question no.29: Approx. 10 Euro; there are rather high bank fees if payments are transferred from Austria to Sweden.

Question no. 30: No

Part III (Questions concerning the elements to be included in the new instrument)

Question no. 31: If there is an enforceable court order the authorities in receiving state should immediately start enforcement proceedings. This is done in Austria in the case of incoming applications under the UN Convention 1956. Other states unfortunately start very time consuming activities to convince the debtor to comply with his/her maintenance obligations voluntarily (in France police is involved, in Germany the youth welfare authority, in Italy the local administrative authority). Enormous paperwork has to be done for the sake of granting legal aid to the applicant (eg France).

Question no. 32: The transmitting agencies under the UN Convention 1956 are not at all checking whether or not the documentation is complete before it is sent to the receiving authority. This has the negative effect that the receiving authority has

sometimes to draw up extensive requests for amendments. The transmitting authorities should be obliged to check the completeness of the applications.

Question no. 33: Some of the elements mentioned seem to be reasonable. Lit.d (direct rules of jurisdiction) is not realistic. In lit.f (legal aid) a child centred approach/ means testing is indispensable. Lit.h should not be dealt with; this is a question of the bank system and not of a Hague Convention.

Austria strongly opposes to any reciprocity requirement (lit.i); this seems to be out-dated nowadays.

Standard forms are not recommended (lit.j).

Public authorities claiming reimbursement should be included (lit.l).

Question no. 34: Austria is in favour of not allowing reservations whatsoever. Reservations would weaken the system and cause difficulties to the practitioners (lit.a and b). Lit.c: Yes

Question no. 35: No suggestions

Part IV (Negotiating partners and miscellaneous)

Question no. 36: No suggestions

Question no. 37: Unfortunately no

Question no. 38: No relevant website or brochures available

General observation

There is no justification to use different terms "child *support*" and "*maintenance* for spouses etc". There term "**maintenance**" which is used in all relevant Hague Conventions should be used generally in the future convention. The term "support" might be familiar to the USA but this is not a justification per se.

PART I PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS

The questionnaire on maintenance obligations, which was sent out in advance of the Special Commission of April 1999 has already provided much information on practice under the existing international instruments. Parts I to IV of that questionnaire are attached to this document as Annex I.

States and organisations which responded to the questionnaire in 1999 are requested only to supply supplementary responses to Parts I to IV of that questionnaire, covering any relevant developments since April 1999.¹

States and organisations which were not able to respond in 1999 are asked to provide full responses.

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

Form of maintenance decision

- 1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Answer: A maintenance order is a decision in respect of a maintenance obligation. A maintenance obligation means a liability that is a liability of:

- (i) a parent of a child to pay a periodic amount for the maintenance of the child;
- (ii) a step-parent of a child to pay a periodic amount for the maintenance of the child; or
- (iii) a party to a marriage to pay a periodic amount for the maintenance of the other party to the marriage;

whether or not the liability arises under a decision of a court order, or court registered agreement or administrative assessment.

Essentially only periodic amounts are enforceable in Australia. However, there may be circumstances where a lump sum etc may be taken into account to reduce the original periodic payment.

Lump sum and other non-periodic maintenance liabilities (eg school fees, medical costs) can be enforced privately by the payee or by AG's on behalf of the payee.

Eligibility

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

Answer: Only a child or spouse.

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

Answer:

- ?? under 18 years of age;
- ?? not a member of a couple (i.e. living with a person of the opposite sex on a genuine domestic basis or with someone they are legally married to);
- ?? in some circumstances a child cared for under a child welfare law may not be considered dependant for child support purposes.

¹ See extracts from responses to the Questionnaire on Maintenance Obligations, Prel. Doc. No 3 for the attention of the Special Commission of April 1999 (<http://www.hcch.net/e/workprog/maint.html>).

A child may also be considered dependant, after the age of eighteen, if they are completing their education or have special needs such as a disability.

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

Answer: (a) *Family Law Act 1975 and Child Support (Assessment) Act 1989*
(b) *Family Law Act 1975*

Procedures for the initial assessment of maintenance

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

Answer: Child Support is generally determined by an administrative process. The majority of domestic child support cases are determined by the Australian Child Support Agency (ACSA) using an administrative formula to work out an assessment of child support. The applicant, either the creditor or debtor must meet a number of requirements to be eligible for an assessment. These requirements are basically that the child is in the care of the creditor and that either the parents separated or the child was born after 1 October 1989.

If the applicant does not meet these requirements they may apply to a court for child support. Australian child support law prevents an order for child support being made judicially if the child is eligible for an administrative assessment of child support.

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

Answer: No. However a debtor who is overseas can only apply for an administrative assessment if the application is made on their behalf by the appropriate authority.

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

Answer: Yes. Spousal maintenance can only be determined judicially. However, it may be possible, in limited circumstances, for child support and spousal maintenance to be determined by a court at the same time.

Methods of calculating maintenance

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

Answer: An Australian child support assessment is determined using a formula. Attachment B has details of the basic formula. The ACSA website (www.csa.gov.au) has calculators which parents can use to get an idea of the amount of child support payable under the formula.

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

Answer: No

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

Answer: Yes. Spousal maintenance can only be determined by a court.

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

Answer: (a) *Child Support (Assessment) Act 1989 and Family Law Act 1975*

(b) *Family Law Act 1975* -Spousal maintenance only and does not provide for other family members

Reassessment / adjustment / modification of maintenance decisions or assessments

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

Answer: Child Support that has been administratively determined by ACSA is reassessed automatically. Generally a reassessment by ACSA would occur every 10 to 15 months and the trigger for a reassessment is almost always because ACSA receives newer information about the parents' taxable income. If the parents circumstances change the assessment can be updated more frequently providing a greater degree of flexibility.

Court orders for spousal maintenance or child support may contain clauses for automatic changes. Generally these would be annual. ACSA will recalculate the payment if the order is registered with ACSA.

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

Answer: An assessment is based on a parent's taxable income (see attachment B) and a new assessment will be done either at the end of 15 months or when a parent lodges their taxable income with the Australian Taxation Office from the last financial year (1 July to 30 June).

Generally court orders have automatic adjustments linked to the Australian Consumer Price Index.

14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?

Answer: In relation to an assessment a number of circumstances can be taken in to consideration such as change in income or care or contact of the child/ren. A parent can also apply to ACSA to have their assessment changed if they believe that special circumstances exist. There are 10 reasons that a parent could apply (see attachment C). This is called the Change of Assessment process and where either parent is dissatisfied with the decision they can formally object to the decision. If still dissatisfied with the outcome either parent can apply to the court for a departure order under the *Family Law Act* because of their special circumstances.

Child or spousal support determined by a court can be changed if similar circumstances exist but any changes must be made by a court.

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

Answer: A foreign decision or assessment cannot be varied or modified administratively. A parent can apply to an Australian Court to have the decision modified or varied or they may be advised to apply to the issuing jurisdiction. In these cases ACSA would assist the parent in the transmission of an application to the overseas jurisdiction.

When the Australian court varies a foreign decision that variation order may be final or provisional depending on which foreign jurisdiction made the original order.

Establishing paternity

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

Answer: Under the *Child Support (Assessment) Act 1989* ACSA is able to make a number of presumptions in relation to paternity. Once a presumption of paternity has been met an assessment for

child support can be made (providing all other eligibility requirements are met). Similar presumptions also apply under the *Family Law Act 1975*. Any decision made in relation to paternity under the *Child Support (Assessment) Act 1989* is rebuttable under the *Family Law Act 1975*.

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

Answer: To establish an Australian administrative assessment ACSA can make a number of presumptions as to paternity. These requirements needed are listed in attachment A. If one or more of these presumptions are met ACSA will be satisfied that the person is a parent and a legal liability, using an administrative formula, is raised by ACSA.

If the presumption requirements are not met or paternity is disputed parties may have the issue of paternity decided by a court having jurisdiction under the *Family Law Act 1975*.

A court has similar rules relating to presumption as used by ACSA in determining parentage (see Attachment A). A court can also order parentage testing to be undertaken to assist in determining paternity. Under Australian law the results of that any procedure do not automatically result in a finding of parentage by the court. The court still has to determine that it is satisfied as to parentage.

Where an overseas court or administrative authority has made a decision on the basis of their paternity rules, ACSA will simply accept that order or assessment.

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

Answer: See attachment D

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

Answer: (a) No (b) No

But, rare exception if contrary to public policy.

Legal and administrative aid and assistance

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

Answer: Legal assistance may be available through the Australian Attorney-General's Department (AG's). AG's may provide assistance in relation to variation of existing orders and parentage issues. The procedures and practices are still to be formalised by AG's, but as a general rule AG's will assist a creditor who is overseas to establish parentage.

AG's will obtain a spousal or child maintenance order under UNCRAM (if they are not eligible for an assessment) without charge to an applicant. No means-testing applies.

AG's will secure confirmation of a provisional order or a provisional variation order without charge to a foreign applicant. No means-testing applies. AG's will seek a variation in Australia on behalf of an overseas applicant and no charge applies.

In limited circumstances AG's may be able to assist an overseas respondent to a variation application. Applicants in Australia who require a provisional order, variation order, or a declaration of paternity etc can apply for domestic legal aid. Means testing does apply to grants of domestic legal aid.

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

Different guidelines apply in each state for domestic grants of legal aid for someone residing in Australia. Sometimes domestic legal aid may be provided to an overseas resident in limited circumstances.

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

As noted above means-testing does not apply to procedures undertaken by AG's and they are provided free of charge. This includes securing a spousal or child maintenance order under UNCRAM, obtaining a variation order in an Australian court for an overseas party and securing confirmation of a provisional order or a provisional variation order and the transmittal of a provisional order overseas.

Legal costs and expenses

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

See above.

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

Answer: No

Collection and transfer arrangements and enforcement of decisions

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

Answer: Payment and collection of both child support and spousal maintenance is handled by ACSA where these liabilities are registered with us. Periodic liabilities, once registered with ACSA, become debts due to the Commonwealth of Australia and then payable to the other parent once payments have been collected.

In cases that commenced prior to ACSA becoming responsible for overseas matters Australian courts may be involved in the collection of maintenance and make payments overseas.

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

Answer: When a liability is registered with ACSA or an Australian liability transmitted, ACSA is responsible for the transfer and receipt of all payments. e.g. overseas central authority forwards payment to ACSA who then pays the Australian creditor. However, collection of child support is not guaranteed and only the amount collected from the debtor is transmitted to the creditor.

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

Answer:

- ?? Register the liability within 90 days of receipt
- ?? Determine periodic amounts for child and/or spousal maintenance (Collectable by the ACSA)
- ?? Determine non periodic amounts (Recoverable by applicant through Australian Court)
- ?? Calculate total arrears to the date of registration and the ongoing amount converted to Australian dollars on the date of registration
- ?? Determine disbursement options – whether paid to overseas authority or direct to the creditor

- ?? Issue letters to debtor and creditor and if appropriate the transmitting authority
- ?? Commence collection action with debtor
- ?? Disburse monies, when received from the debtor, to creditor or transmitting authority monthly

The procedures are the same for child support or spousal maintenance.

In some limited circumstances the court and AG's may be responsible for enforcement of non-periodic maintenance decisions such as overseas maintenance entry liabilities. Once an order is obtained for spousal or child maintenance in an Australian court it can then be registered with the ACSA for enforcement.

- 28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:

Answer: Enforcement powers are the same for child and spousal decisions

- wage withholding; YES
- tax refund intercepts; YES
- garnishment from bank accounts or other sources; YES
- deductions from social security payments; YES - limited to AUD\$5.00 per week.
- forced sale of property; YES
- division of pension benefits; in some circumstances when superannuation is being paid to a debtor ACSA can garnishee the payments and
- committal to prison; YES - However this power would only be used as a very last resort.

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

Answer: For the months October to December 2002 approximately AU\$465 269.00 was transferred to overseas jurisdictions (excluding New Zealand) at a cost of approximately \$8 800.00.

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

Answer: We currently use 2 options to disburse monies to creditors outside Australia, depending on where the money is being sent.

New Zealand

Once per month by the 25th of the month for all monies collected from debtors for creditors in New Zealand ACSA produces one Excel spreadsheet detailing a break-up of payments for these clients in Australian dollars and the converted amount in NZ \$. This spreadsheet is forwarded to NZIRD together with one electronic payment for the total amount. This fits with NZIRD timeframes and is then disbursed to NZ clients by NZIRD in their major disbursement on the 7th of the following month.

All other Overseas Jurisdictions

In relation to all monies collected from debtors for creditors in other overseas jurisdictions, ACSA (via another government department) purchase an overseas foreign currency cheque for each creditor which is mailed to each client or overseas authority as appropriate. This is done automatically via the Reserve Bank and Citibank through clearing houses in London and the USA.

ACSA is currently exploring options for the transfer of funds along the lines of an electronic system that also converts currency.

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

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

Answer:

- ?? Not being aware of the overseas jurisdiction requirements
- ?? Overseas jurisdictions not recognising Australian maintenance liabilities that have determined administratively.
- ?? In order to issue accurate assessments, ACSA needs to be able to obtain accurate overseas income information. This is a major issue in that a majority of overseas maintenance authorities cannot provide this information.
- ?? Obtaining assistance in locating clients in overseas jurisdictions is often difficult due to overseas authorities not having legal authority to trace clients in their jurisdictions.
- ?? Overseas jurisdictions who still seem tied to a judicial process. They will now accept an administrative assessment of child support as an acceptable maintenance liability but still require, because of their own law, that this is converted into a judicial maintenance order in that country. This creates great difficulty for us when a parent in Australia applied for an assessment and wants to vary that assessment without recourse to the courts. Either parent should be able to have the assessment varied administratively where their circumstances have changed but this then has to be converted once more into a court order in some jurisdictions. A cumbersome and lengthy process is involved in doing this and seems that it would be costly for those countries who require this.

Consistent approach on variation orders. Requirement that variation orders made in Australia be provisional only for some countries can cause lengthy delays in finalising matters particularly when overseas court doesn't confirm the variation made by the Australian court. Where variation orders are final under Australian law some countries do not recognise the variations and the foreign orders continues to be enforceable in the foreign country order which leads to a situation where a payer has a liability in two countries. Lack of assistance provided to a payer or payee who wishes to vary an order in the overseas country that made the order.

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

Answer:

- ?? Often difficult to interpret the meaning of clauses etc in Overseas Court Orders
- ?? Often difficult to determine the correct amount of arrears based on the Overseas Maintenance Liability. Clear information such as statements of arrears would be of assistance.
- ?? Where details of the end date of the Overseas Maintenance Liability are not provided. e.g. the differences in the age of majority for a child across different jurisdictions.
- ?? Receiving Overseas Provisional Orders for establishing or varying orders creates difficulties in that these orders can't be confirmed in an Australian Court if an Australian administrative assessment could be made.
- ?? Difficulty with overseas authorities in not having clear rules concerning who has jurisdiction. This is especially difficult for clients to then seek variation to original orders and where these applications should be made in order to be recognised in both Australia and the other jurisdiction.

Assistance by foreign countries to locate payers. ie sometimes payees in Australia cannot provide payers birthdate or address and application will not be processed without this information.

Assistance by foreign countries in paternity disputes.

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

- a* provisions concerning administrative co-operation;

Answer: Very High, without co-operation the instrument becomes meaningless.

- b* provisions for the recognition and enforcement of foreign decisions;

Answer: Very High, under Australian Law foreign decisions are readily accepted but it is also important for foreign jurisdictions to recognise Australian decisions, especially administrative decisions.

- c* applicable law principles;

Answer: High

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

Answer: Very High, it would be good if they were uniform but not essential.

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

Answer: High

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

Answer: High

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

Answer: High

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

Answer: Very High

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

Answer: Low - Depends on the level of service. Does not need to be identical but there should be a minimum commitment guaranteed.

- j* standard forms;

Answer: Low

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

Answer: high

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

Answer: Low

- m* others. Please specify.

Answer: Include flexibility to use future technologies.

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

- a which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,

Answer: a, b, c, d, e and k

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

Answer: f, g, h, i, j, l,

- c do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?

Answer: Yes.

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

Answer:

- ?? Co-operation in locating debtor/creditor and obtaining information before a request to collect maintenance is made.
- ?? Jurisdiction issues made very clear.
- ?? Administrative co-operation very flexible and practical.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

36 Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?

Answer: No

37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?

Answer: The ACSA does not have available funds to provide this assistance, however we will discuss this with the Attorney-General's Department and advise as soon as possible.

38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

Answer: www.csa.gov.au

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

ATTACHMENT A

Presumption Of Parentage Requirements For An Australian Administrative Assessment

- ?? the child was born while the person was married to the child's mother or father. A child is born during a marriage even if the parties to the marriage have separated as long as a divorce is not finalised (i.e. before the decree absolute).
- ?? the person is named as the child's parent in a register of births or parentage information kept under Australian law or the laws of a prescribed overseas jurisdiction
- ?? an Australian court, or a court of a prescribed overseas jurisdiction has expressly found that the person is a parent of the child, or has made a finding that could not have been made unless the person was a parent of the child (and that finding has not been set aside, altered or reversed).
- ?? the person has executed an instrument under an Australian law, or the law of a prescribed overseas jurisdiction, such as a statutory declaration under the Oaths Act of an Australian state, acknowledging that they are the child's father or mother, and that instrument has not been annulled or set aside.
- ?? the person has adopted the child.
- ?? the person is a man and the child was born within 44 weeks of his marriage to the child's mother, which has since been annulled.
- ?? the person is a man who was married to the child's mother and they separated, then resumed cohabitation for 3 months or less, and the child was born within 44 weeks of the end of that last period of cohabitation but after they divorced (after the date of the decree absolute).
- ?? the person is a man who cohabited with the child's mother at any time during the period beginning 44 weeks and ending 20 weeks before the child was born, but they were not married at any time during that period.

Note: Cohabitation involves living together in a domestic relationship. ACSA can consider the financial and social aspects of the relationship, the nature of the household and the sexual relationship between the 2 people, in deciding whether they cohabited.

Please note that the presumption of parentage is rebuttable

ATTACHMENT A

Presumption Of Parentage Requirements Under the Family Law Act 1975

- ?? **marriage:** If a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband.
- ?? **cohabitation:** If a child is born to a woman; and at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married; the child is presumed to be a child of the man.
- ?? **birth registrations:** If a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.
- ?? **overseas court orders:** If during the lifetime of a particular person, a prescribed court has found expressly that the person is a parent of a particular child; or made a finding that it could not have made unless the person was a parent of a particular child; and the finding has not been altered, set aside or reversed; the person is conclusively presumed to be a parent of the child.
- ?? **statutory acknowledgments:** If under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and the instrument has not been annulled or otherwise set aside; the man is presumed to be the father of the child.

ATTACHMENT B

How ACSA works out how much child support is paid

All child support assessments are worked out using a basic formula. The formula takes into account each parent's income, the number of children, living expenses of the parents and the living arrangements of the children. In some circumstances, the formula may be changed. This means each assessment can be calculated fairly and accurately.

The basic formula

The basic formula used to calculate the annual rate of child support is:
(All figures 2002).

Child Support assessment for 15 month period.

| For Payer | For Payee |
|--|---|
| Taxable income ² +supplementary amounts ³ =Child support income ⁴ | Taxable income +supplementary amounts =Child support income |
| -exempted income ⁵ -50% of payees excess income =Adjusted income ⁶ | -exempted income -disregarded income ⁸ |
| x Child support percentage ⁷ = Annual rate payable | |

$\{(2 + 3 = 4) - 5 - (50\% \times 9) = 6\} \times 7 = \text{Annual child support payable}$

1. Assessment period

The period of time the assessment covers.

2. Taxable income

ACSA uses the last relevant year of income to work out a child support assessment. For example, for a child support assessment on 30 October 2001, we will use the 2000-2001 income. If the current taxable income is not available, we may use a default income. This may be a previous taxable income, increased by the relevant inflation factor.

3. Supplementary income

Any foreign income exempt from tax, plus any rental property losses, plus any reportable fringe benefits for the relevant tax year. NOTE: Reportable fringe benefits are only amounts totalling over \$1000.

4. Child support income

This is the total of the taxable income and supplementary income.

5. Exempted income

The amount deducted from the child support income, determined by the number and age of children in the care of the payer.

Year Payer exempt income with *no* dependent children

2003 \$12 315

2002 \$11 740

This is 110% of the unpartnered rate of Centrelink pension for the year in which the assessment starts.

Year Payer exempt income with *one or more* dependent children

2003 \$20 557 PLUS an additional amount for each child

2002 \$19 597 PLUS an additional amount for each child

This is 220% of the partnered rate of Centrelink pension for the child support year in which the assessment starts.

Year Payer exempt income if care of the child or children is shared with the other parent

2003 \$12 315 PLUS an additional amount for each child

2002 \$11 740 PLUS an additional amount for each child

This is 110% of the unpartnered rate of Centrelink pension.

The additional amounts are:

| Year | Aged under 13 | Between 13 and 15 | Aged 16 and over |
|------|---------------|-------------------|------------------|
| 2003 | \$2 235 | \$3 119 | \$4 672 |
| 2002 | \$2 169 | \$3 025 | \$4 454 |

6. Adjusted Income

This is the payer's child support income less any exempted income. Where the payer is not an eligible carer of the children, the payer's child support income is also reduced by 50% of the payee's excess income.

7. Child support percentage

The adjusted income is multiplied by a percentage which is based on the number of children the payee is caring for.

| No. of eligible children | Child Support Percentage |
|--------------------------|--------------------------|
| 1 | 18 % |
| 2 | 27 % |
| 3 | 32 % |
| 4 | 34 % |
| 5 or more | 36 % |

8. Disregarded income amount (for payees)

The amount of income the payee can receive before the assessment is reduced.

| Year | Disregarded income |
|-------------|---------------------------|
| 2003 | \$36 213 |
| 2002 | \$35 012 |

This means that for every dollar the payee receives above \$36 213, the adjusted income amount is reduced by 50c. The payee's disregarded income cannot reduce the child support they are entitled to by more than 75% of the assessed amount.

9. Excess income

The amount of the payee's income which is above the disregarded income level.

Changes to the basic formula

There are a number of modifications to the basic formula. They take into account care arrangements and incomes.

Minimum amount of \$260 per year

All payers are required to pay a minimum of \$260 a year. In some circumstances this amount can be reduced to nil, or if the formula is modified, the assessment may be assessed as lower than \$260 a year.

An income cap applies to the payer's child support income

If the payer's child support income exceeds 2.5 times Average Weekly Earnings (AWE), the child support income amount is taken to be 2.5 times AWE.

| Year | Income cap |
|-------------|-------------------|
| 2003 | \$119 470 |
| 2002 | \$113 542 |

Two or more child support liabilities

The basic formula is modified when the payer is liable to two or more payees. A different child support percentage will apply.

Care is shared or divided

If both parents share the care of one or more children, or one parent is an eligible carer of one or more children and the other parent is also an eligible carer of one or more children, then the child support formula is modified.

Changing the assessment

The child support formula aims to give an accurate and fair assessment of how much child support should be paid. Sometimes there may be special circumstances that the formula cannot take into account - in these cases, you can apply to change the child support assessment.

Objection rights

If parents do not agree with any of the particulars of a child support assessment, you may formally object, in writing, to ACSA. If you are not happy with the outcome of any objection, you can appeal to a court against the assessment.

CHANGE OF ASSESSMENT REASONS.

Reason 1. The costs of maintaining a child are significantly affected by either parent's high costs of contact with the child.

Reason 2. The costs of maintaining a child are significantly affected by high costs associated with the child's special needs.

Reason 3. The costs of maintaining a child are significantly affected by high costs of caring for, educating or training the child in the way both parents intended.

Reason 4. The child support assessment is unfair because of the child's income, earning capacity, property or financial resources.

Reason 5. The child support assessment is unfair because the payer has paid or transferred money, goods or property to the child, the payee, or a third party for the benefit of the child.

Reason 6. The costs of maintaining a child are significantly affected by the payee's high childcare costs for the child (and the child is under 12 years).

Reason 7. The parent's necessary expenses significantly affect their capacity to support the child.

Reason 8. The child support assessment is unfair because of the income, earning capacity, property or financial resources of one or both parents.

Reason 9. The parent's capacity to support the child is significantly affected by:

- ?? their legal duty to maintain another child or person,
- ?? their necessary expenses in supporting another child or person they have a legal duty to maintain
- ?? their high costs of contact with another child or person they have a legal duty to maintain.

Reason 10. The child support assessment is unfair because:

- ?? the payer earns additional income for the benefit of their resident child (who is not the payee's child), or
- ?? the payee earns additional income for the benefit of their resident child (who is not the payer's child).

If one of the 10 reasons for a change of assessment exist, ACSA must also consider whether changing the assessment would be 'just and equitable' and 'otherwise proper'.

ATTACHMENT D

Parentage disputes may be resolved using procedures set out in:

- ?? the Family Law Act 1975 (FLA); and/or
- ?? the Child Support legislation (only if an assessment has been made by the ACSA).

What is the procedure under the *FLA*?

Under the FLA the court is empowered to order a parentage testing procedure but the results of that procedure do not automatically result in a finding of parentage by the court. The court still has to determine that it is satisfied as to parentage.

Regulation 39B of the Family Law Regulations provides that in proceedings relating to an international agreement or arrangement to which Australia is a party, provisions relating to evidence of the results of parentage testing and presumptions of parentage apply.

There are standard procedures in place should paternity be disputed and parentage testing be required. Initially, a voluntary agreement from each party to undergo parentage testing would be sought. However, if a party does not consent to undergo paternity testing, there are set procedures in place. Proceedings can be commenced with a view to obtaining a court order that obliges the parties to undergo parentage testing.

What are the presumptions of parentage in Australia under the *FLA*?

In certain circumstances the law will accept as a fact something which has not been proven as a fact. The definition of presumption in the law of evidence is described as 'an inference which must or may be drawn from an established fact or set of facts'.

Can the FLA presumptions be rebutted?

Yes. Any presumptions are rebuttable by appropriate evidence as a matter of general legal principle. Regulation 39B(4) of the Family Law Regulations provides that, for the purposes of section 69S of the FLA, the presumption of parentage arising from a finding by an overseas court that a person is a parent of a child, is a presumption which is rebuttable by evidence that establishes that the person is not the parent.

Regulation 39B(4) provides that a court finding of parentage, where the person would otherwise be conclusively presumed to be the parent, under section 69S, can be rebutted.

Who is liable for the cost of testing under the *FLA*?

For the purpose of discouraging false denials of parentage (which may be made to delay the payment of child support or to raise a financial barrier to an overseas party obtaining support for a child), Family Law Regulations provide that the cost of parentage testing is to be paid by the person who contests parentage.

The Family Law Regulations provides that the Secretary of the Attorney-General's Department is to pay the cost of the testing if the testing establishes that the person contesting parentage is not the parent.

Who may commence paternity proceedings under the *FLA*?

Where the parentage of a child is a question in issue in proceedings section 69W (2) of the *FLA* provides that a party to proceedings, or a person representing the child under an order made under section 68L (separate representation of children), may commence paternity proceedings.

However, regulation 39B(5) of the Family Law Regulations provides that the Secretary may institute proceedings under section 69W of the *FLA* if it is 'necessary or convenient to do so for the purposes of an international agreement or arrangement'.

The effect of an order under section 107 is that the application is taken never to have been accepted. The remedy if the payer has paid money is to seek to recover it under section 143 of the *Child Support (Assessment) Act 1989* in a court with jurisdiction.

What if the payer disputes parentage and a liability has been registered with the CSA. How can the registered liability be challenged on parentage grounds?

The payer could seek a parentage testing order under the *FLA*.

What can a payee do if they fail to satisfy the presumptions?

A payee who has failed to meet the presumptions of parentage must first object under section 98X of the *Child Support (Assessment) Act 1989*. If the objection fails the payee applies to the court for an order under section 106. A successful application under section 106 would result in an order that the Registrar is taken to have accepted the application.

What happens if the payer rebuts the presumption?

Where an application for an administrative assessment has been accepted by the Registrar, the payer is advised by letter of their right to object to the assessment's registration.

In questions of dispute of parentage, the payer must also object under section 98X. Where the payer is dissatisfied with the outcome of that objection they can apply under section 107 to the court. A successful application under section 107 would result in an order that the Registrar is taken to have never accepted the application.

Are the testing procedures under the *FLA* different if an *ACSA* assessment has been made?

No. The process for the actual testing would be the same as set out above.

QUESTIONNAIRE CONCERNANT UN NOUVEL INSTRUMENT MONDIAL SUR LE RECOUVREMENT
INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBERS DE LA FAMILLE
- BULGARIE

PARTIE I PRATIQUE EN VERTU DES INSTRUMENTS INTERNATIONAUX EXISTANT

Le questionnaire sur les obligations alimentaires, transmis prealablement a la Commission speciale d'avril 1999, a deja fourni beaucoup d'informations sur la pratique en vertu des instruments internationaux existants. Les parties I a IV de ce questionnaire sont jointes en annexe I a ce document.

Les Etats et les organisations qui ont repondu au questionnaire en 1999 sont invites a fournir les reponses supplementaires aux parties I a IV de ce questionnaire concernant toute evolution pertinente survenue depuis avril 1999.1

Les Etats et les organisations qui ont ete dans l'impossibilite de repondre en 1999 sont invites a transmettre des reponses completes.

PARTIE II

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

Nature de la decision relative a des aliments

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

Les obligations alimentaires selon leur caracteristique generale sont des obligations legales de certaines membres de la famille d'assurer des moyens pour l'existence des membres de la famille qui ont besoin de cela. Ces obligations se manifestent comme droit de support des personnes autorisees. Le code de la famille reglemente dans un chapitre tous les rapports alimentaires, c'est a dire les obligations de fournir des aliments que la loi attache de plein droit a certaines rapports de famille. Fondees sur des rapports de famille, les obligations alimentaires naissent aussi bien du mariage que de la filiation hors mariage et d'une facon plus generale de la parente. En etablissant les obligations alimentaires en tant qu'obligations legales, le legislateur s'inspire du principe de la solidarite et de l'entraide familiale. Aussi les obligations alimentaires revetent-elles un caractere reciproque /art.81 et 82/. Chacun des sujets des rapports est creancier ou debiteur virtuel de l'autre selon l'etat de ses besoins et de ses ressources.

Eligibilite

2 Dans votre pays, qui est en droit de beneficier d'une decision relative a des aliments ? (par ex. :, l'enfant, l'epoux, un autre parent, etc.)

Le droit de beneficier d'une decision relative a des aliments selon le Code de la famille bulgare appartient a une personne frappee d'incapacite de travail et dont les ressources ne lui permettrait pas d'assurer sa subsistance. /art.79 du Code de la famille/. Les deux conditions sont cumulatives. Elles determinent le besoin de recouvrement des aliments. Le recouvrement des aliments est du par la personne qui a la possibilite de l'effectuer. Le code de la famille bulgare vise des cas specifiques: l'obligation alimentaire de la part des parents envers leurs enfants mineurs, envers leurs enfants majeurs qui sont etudiants, l'obligation alimentaire entre ex-epoux.

3 Quelle est votre definition d'un enfant « a charge » dans le contexte des aliments envers les enfants ?

Il existe deux hypotheses d'obligation alimentaire des parents envers leurs enfants , revetant certains aspects particuliers:

A/ les parents sont tenus de porvoir a l'entretien de leurs enfants jusqu'a l'age de la majorite independamment de toute condition d'ordre general apportant des restrictions a l'obligation alimentaires /art.88, al.1/. Aussi chaque parent doit-il entretenir son enfant mineur meme si celui-ci ne travaille pas tout en etant capable d'occuper un emploi meme si ses propres ressources pouvaient lui assurer la subsistance. Dans le cas d'une disproportion trop marquee entre les ressources de l'enfant et celles des parents, des ajustements pourraient etre entrepris quant a la fixation du montant de la pension alimentaire. Le pere et mere dechus de leurs droits de parents n'en sont pas moins tenus de fournir des aliments des aliments a leurs enfants.

Le Code de la famille etablit une regle d'ordre general selon laquelle "la personne ayant commis des fautes graves envers le debiteur des aliments ou envers son conjoint, son descendant ou ascendant, n'aura pas droit a une pension alimentaire". Or cette decheance ne concerne pas l'obligation alimentaire incombant aux parents des enfants mineurs de 16 ans, c'est a dire n'ayant pas encore atteint l'age donnant droit d'occuper certains emplois remunateurs /art.86, al.2/.

B/ En ce qui concerne la pension alimentaire due par les parents a leurs enfants majeurs le Code de la famille prevoit ce qui suit: les parents doivent pourvoir a l'entretien de leurs enfants jusqu'a l'accomplissement de l'age de 18 ans et jusqu'a l'age de 25 ans pour ceux qui poursuivent leurs etudes dans un etablissement d'enseignement superieur. /art.88, al.2/

Cette pension alimentaire ne provient pas directement par la loi mais a la base d'une decision judiciaire apres le dressement d'un recours de la part de l'enfant majeur.

C/ En ce qui concerne la pension alimentaire due par les parents a leurs enfants frappes dl'incapacite de travail et dont les ressources sont insuffisants a couvrir leur besoins - c'est le cas general de l'art.79 du Code.

4 Quelle est la loi applicable pour determiner l'eligibilite (a) des enfants (b) l'epoux ou d'autres membres de la famille a se voir octroyer des aliments ?

Le Code de la famille considere comme relevant d'une seule institution tous les rapports alimentaires, c'est a dire les obligations de fournir des aliments que la loi attache de plein droit a certains rapports de famille. Les obligations alimentaires revetent un caractere de reciprocite. Chacun des sujets de rapports alimentaires est creancier ou debiteur virtuel de l'autre selon l'etat de ses besoins et de ses ressources. /art.81 et 82/.

Les debiteurs et les creanciers alimentaires sont des personnes se trouvant dans des rapports de famille etroits : conjoints, descendants, ascendants, freres et soeurs. Le Code a range ces personnes en groupes familiaux dans l'ordre d'intensite decroissant du devoir moral. Il a attribue a l'obligation alimentaire un caractere non simultane mais successif. Ainsi dans le cas cas ou les debiteurs des aliments seraient dans l'impossibilite d'en fournir. L'obligation alimentaire passera a la charge des personnes figurant dans l'ordrequi suit immediatement / art.81,al.2/.

Procédure d'évaluation initiale des aliments

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

Les décisions en matière d'aliments envers les enfants sont rendues dans le cadre d'une procédure judiciaire.

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

Si le demandeur ou le défendeur vit à l'étranger, la procédure est différente et elle s'accomplit à la base d'une procédure de reconnaissance et d'exécution des décisions concernant les obligations alimentaires s'il existe une convention d'aide judiciaire ou à la base de réciprocité déterminée par le ministre de la justice /art.303-307 du Code de procédure civile/.

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

Non. La procédure relative à une demande en matière d'aliments envers l'époux ou d'autres membres de la famille ne diffère pas de celle envers les enfants?.

Méthodes de calcul des aliments

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

L'estimation des aliments envers les enfants est basée sur des critères relatifs. Selon l'art.84 le taux de la pension alimentaire est déterminé d'après les besoins du créancier alimentaires et les ressources de celui qui doit les aliments. Il s'agit donc d'un double critère /besoins et ressources/ qui se rapportent à la fois à l'existence même de l'obligation alimentaire et à son quantum. Le code laisse sur ce dernier point au tribunal un large pouvoir d'appréciation. Cette solution dont la souplesse est indéniable, est de nature à permettre la fixation du montant de la pension alimentaire de la façon la plus équitable.

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

Lorsque (a) le demandeur ou (b) le défendeur vit à l'étranger, les critères d'évaluation employés ne sont pas différents. Le tribunal accepte que (a) ou (b) peut assurer le salaire moyen pour le pays.

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

Non. La méthode de calcul des aliments envers l'époux ou d'autres membres de la famille ne diffère pas de celle envers les enfants.

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

L'art.85 du Code de la famille régit l'évaluation des aliments envers les enfants mineurs. Cette méthode d'évaluation de l'obligation alimentaire n'est valable que dans l'hypothèse de recouvrement des obligations alimentaires envers les enfants mineurs. Selon l'art.85, al.1 «Le taux de la pension alimentaire qu'un parent doit à ses enfants mineurs est déterminé d'après les besoins des enfants et les ressources des parents dans des limites, déterminées du Conseil

des ministres». A la base de cet article est adoptee une regulation du Conseil des ministres)38 du 1 juillet 1985, amende avec une nouvelle regulation de 1991 qui etablit les limites de l'obligation alimentaire.

Reevaluation / ajustement / modification des decisions ou des evaluations relatives aux aliments

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

Oui, avec une decision judiciaire, fondee sur l'art.86 du Code de la famille le montant et la frequence des versements de la pension alimentaire envers les enfants ou l'epoux et d'autres membres de la famille font l'objet d'une reevaluation automatique si le debiteur alimentaire demande la reduction ou la decharge complete de sa dette dans le cas ou ses ressources auraient diminue ou les besoins du creancier decru. «a la suite d'un changement des circonstances, elle peut etre modifiee ou meme interrompue.»

13 Ces versements font-ils l'objet d'une reevaluation automatique en fonction de criteres objectifs comme l'index du cout de la vie, et dans l'affirmative, quels en sont les mecanismes et la periodicite ?

«A la suite d'un changement des circonstances, l'obligation alimentaire peut etre modifiee ou meme interrompue".- selon l'art.86. Si le debiteur alimentaire demande la reduction ou la decharge complete de sa dette dans le cas ou ses ressources auraient diminue ou les besoins du creancier decru. Le creancier alimentaire serait de son cote fonde a reclamer une augmentation des aliments si ses besoins venaient a s'accroitre ou si les ressources du debiteurs venaient a augmenter.

14 Dans quelles circonstances la decision en matiere d'aliments envers les enfants ou l'epoux et d'autres membres de la famille ou l'evaluation de ces aliments peut-elle etre revue / modifiee a la hausse ou la baisse ? Cela se fait-il par la meme autorite ayant rendu la decision initiale ?

Voir la reponse a la question n 11. Cela se fait par la meme autorite ayant rendu la decision initiale ?

15 Dans quelles circonstances une decision ou une evaluation etrangere peut-elle etre revue / modifiee par la demande d'un debiteur resident ?

A la suite d'un changement des circonstances, l'obligation alimentaire peut etre modifiee ou meme interrompue".- selon l'art.86 du Code de la famille.

Determination de la paternite

16 Quelle est la loi applicable a la determination de la paternite dans le cadre des procedures en matiere d'aliments envers les enfants ?

Le Code de la famille est la loi applicable a la determination de la paternite dans le cadre des procedures en matiere d'aliments envers les enfants. En ce qui concerne le champ d'application de la presumption de paternite le Code de la famille / art.32, al. 1/ prevoit que « le mari de la mere est considere comme etant le pere de l'enfant ne pendant le mariage ou avant l'ecoulement de 300 jours depuis sa dissolution ». Le Code s'attache a resoudre la confusion eventuelle des paternites qui decoulerait d'une application integrale de la presumption en question dans le cas ou la femme divorcee se serait remariee et aurait mis au monde un enfant avant l'expiration d'un delai du delai de 300 jours a compter de la date de la dissolution du mariage precedent. Dans une

telle hypothese le Code prevoit que le second mari sera cense etre le pere de l'enfant. /art.32, al.2/.

17 Veuillez resumer les exigences administratives et judiciaires relatives a la determination de la paternite dans le cadre de procedures en matiere d'aliments envers les enfants ?- Des exigences administratives n'existent pas.

18 Veuillez preciser les procedures judiciaires et les methodes (y compris les procedes scientifiques) par lesquelles la paternite peut etre etablie dans le cadre des procedures en matieres d'aliments envers les enfants. Veuillez indiquer egalement : les couts generalement induits ; qui devrait les assumer ; si ces couts peuvent etre couverts par une aide judiciaire ; et, si une distinction est faite sur cette question entre les residents et les non-residents ?

Afin de permettre que la paternite effective puisse etre constatee lorsque les epoux vivent en etat de separation de fait et le mari ne se soucie guere de sa famille , le Code attribue a la mere la qualite de contester la paternite de son conjoint dans le delai d'un an a compter de la naissance de l'enfant / art. 33, al.2./.

Au cas ou la mere aura ete fecondee artificiellement avec le consentement de son epoux le dernier ne pourrait pas desavouer sa paternite. / art.33, al.4/.

/

Expertise de sang du pere et expertise gynecologique. Art.31 du code de la famille.

19 La reconnaissance et l'execution d'une decision etrangere relative a des aliments envers les enfants peuvent-elles etre refusees (a) si une recherche en paternite est un element necessaire ou (b) si une loi ou une methode employee pour cette recherche est differente de celle utilisee dans votre pays ? Dans l'affirmative, veuillez en expliquer les raisons.

Non. Le tribunal bulgare ne peut pas contester la methode employee pour cette recherche en paternite a l'etranger. Il accepte la decision etrangere a la base d'une procedure de reconnaissance et execution d'une decision etrangere concernant les obligations alimentaires s'il existe une convention d'aide judiciaire ou a la base de reciprocite determinee par le ministre de la justice /art.303-307 du Code de procedure civile/.

Aide juridique et assistance judiciaire et administrative

20 QUELS TYPES D'ASSISTANCE (Y COMPRIS L'ASSISTANCE ADMINISTRATIVE, L'AIDE JURIDIQUE ET L'ASSISTANCE JUDICIAIRE) SONT DISPONIBLES DANS VOTRE PAYS POUR :

- a un resident requerant des aliments envers des enfants ;- dispose d'assistance judiciaire et aide juridique.
- b un requerant d'aliments envers des enfants residant a l'etranger. dispose d'assistance judiciaire et aide juridique.

21 Veuillez specifier les principales conditions d'eligibilite, y compris tous les tests relatifs aux moyens (financiers), pour les differentes formes d'assistance disponibles.

Non. Des conditions pareilles n'existent pas.

22 Les regles et procedures concernant l'aide juridique ou l'assistance judiciaire ou administrative sont-elles differentes pour les demandes d'aliments envers l'epoux ou d'autres membres de la famille ?

Non.

Frais de justice et autres depenses

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

Selon le Code de procedure civile bulgare la procedure est gratuite en ce qui concerne une demande pour des aliments envers les enfants ou l'epoux et d'autres membres de la famille. Les honoraires d'avocats sont determines a la base d'un contrat parmi les parties.

Les frais de justice concernant l'execution de la decision judiciaire selon l'art.69 du Code de procedure civile sont a la chgarge du debiteur.

Est-il possible de recouvrer les frais de justice et autres depenses a travers les versements d'une pension alimentaire ?

Non. D'apres l'art.90 du Code de la famille il est interdit de compenser la dette alimentaire et une creance.

Accords relatifs au recouvrement et transfert et executions des decisions

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

Le paiement et le recouvrement des aliments envers les enfants, l'epoux ou d'autres membres de la famille sont organises par deux voies: volontairement par voie bancaire et a la base de la procedure executive, le debiteur effectue le paiement en transferant de l'argent au compte bancaire du huissier.

26 Quels accords particuliers, le cas echeant, sont appliques lorsque les paiements sont effectues ou recouvres depuis l'etranger ?

27 Quelle sont les procedures en vigueur pour faire executer des decisions relatives a des aliments envers (a) les enfants (b) l'epoux ou d'autres membres de la famille ? .

Il accepte la decision etrangere a la base d'une procedure de reconnaissance et execution d'une decision etrangere concernant les obligations alimentaires s'il existe une convention d'aide judiciaire ou a la base de reciprocite determinee par le ministre de la justice /art.303-307 du Code de procedure civile/. L'execution de cette decision judiciaire s'etablit volontairement ou par la voie d'execution obligatoire.

28 Veuillez dresser une liste des methodes disponibles pour l'execution de decisions relatives a des aliments envers (a) les enfants (b) l'epoux ou d'autres membres de la famille ? Veuillez indiquer les methodes d'execution / de

prelevement qui, parmi celles listees ci-dessous et en plus de celles-ci, sont disponibles dans votre pays :

- saisie sur salaire ;
- prelevement sur remboursement d'impot ;
- saisie arret de comptes bancaires ou d'autres sources ;
- deduction sur versement de securite sociale ;
- vente publique ;
- partage des revenus de pension ; et
- incarceration.

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

Les frais bancaires types engages dans le transfert et les paiements des aliments de / vers votre pays sont assez eleves et determines par chaque banque.

30 Des accords sont-ils mis en place dans votre pays, par le secteur public ou prive, afin de faciliter les virements au moindre cout de / vers l'etranger ?
Non.

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

31 Veuillez enumerer toutes les lacunes du processus actuel, pour l'obtention ou le recouvrement a l'etranger, par des personnes residant dans votre ressort, d'aliments envers les enfants ou d'autres membres de la famille, auxquelles on pourrait remedier ou qui pourraient etre ameliorees dans le nouvel instrument.

32 Veuillez enumerer toutes les lacunes du processus actuel, en vertu duquel un requerant etranger cherche a obtenir ou a recouvrir, aupres d'une personne residant dans votre ressort, des aliments envers les enfants ou d'autres membres de la famille, auxquelles on pourrait remedier ou qui pourraient etres ameliorees dans le nouvel instrument.

33 Gardant a l'esprit que le nouvel instrument doit etre « complet et fonde sur les meilleurs aspects des Conventions existantes », et que sa structure exacte n'a pas encore ete determinee, veuillez indiquer vos points de vue preliminaires sur les elements clefs qui doivent y etre pris en compte. A cette fin, il pourra vous etre utile d'utiliser la liste suivante et d'indiquer l'importance que vous attachez a chacun des points enumeres :

- a dispositions relatives a la cooperation administrative ;
- b dispositions pour la reconnaissance et l'execution des decisions etrangeres ;
- c principes de loi applicable ;
- d regles uniformes de competence directe applicables pour determiner et modifier la decision relative a des aliments ;
- e dispositions specifiques d'aide qui doit etre fournie a un requerant provenant d'une autre partie contractante ;
- f dispositions concernant l'aide et l'assistance judiciaires qui doivent etre fournies a un requerant provenant d'une autre partie contractante ;
- g dispositions relatives a la cooperation pour la recherche en paternite ;
- h dispositions concernant la cooperation en matiere de virement international de fonds au moindre cout ;

i dispositions permettant aux parties contractantes d'éviter d'octroyer des services au requérant étranger lorsque ceux-ci ne sont pas disponibles sur une base réciproque ;
j formules modèles ;
k dispositions visant à assurer le respect des obligations en vertu de l'instrument ;
l dispositions relatives aux institutions publiques qui poursuivent le remboursement de prestations fournies au créancier d'aliments ;
m autres. Merci de bien vouloir préciser.

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

a quels éléments parmi ceux que vous avez mentionnés sous la question No 33 devraient être introduits comme éléments « centraux », dans le sens où toutes les Parties contractantes devraient sans exception s'y soumettre - ; b ; c ; d ; j
b quels sont, parmi ces éléments, ceux qui devraient être facultatifs, dans le sens où les Parties Contractantes devraient avoir la liberté de s'y soumettre ou non ; et
c êtes-vous en faveur d'un principe général par lequel, la reconnaissance d'une décision existante n'étant pas possible dans le pays où le débiteur réside, les autorités de ce pays devraient être obligées de fournir assistance au créancier pour obtenir une nouvelle décision ? - non

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

PART IV PARTENAIRES DE NEGOCIATION ET DIVERS

36 Hormis les États membres de la Conférence de La Haye et les États parties à la Convention de New York de 1956 (une liste complète est fournie en Annexe II) quels autres États souhaiteriez-vous inviter à prendre part aux négociations du nouvel instrument ?
La Pologne, La République Tchéque, Arménie, Kazakhstan, Kirgistan, Moldovie. Ukraine, Turkménie.

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

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

Note: Les personnes interrogées sont également invitées à faire part de leurs observations sur tout autre sujet qu'elles considèrent essentiel au développement de ce nouvel instrument.

1 Voir extraits des reponses au Questionnaire sur les obligations alimentaires,
Doc. prel. N° 3 a l'intention de la Commission speciale d'avril 1999
(<http://www.hcch.net/f/workprog/maint.html>).

Hague Conference Special Commission on Maintenance Obligations
(The Hague, Spring 2003)

Canadian Responses to the Questionnaire in preparation of the Special Commission

An attached document gives an overview of the Canadian interjurisdictional support establishment and enforcement system and particularly, of the provincial and territorial legislation on inter-jurisdictional support orders (ISO).

In general, this system is based on reciprocity and bilateral arrangements between foreign states and individual provinces and territories.

PART I PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS

Canada is not a party to any of the Hague Conference conventions on maintenance obligations or to the 1956 New York Convention.

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

Form of maintenance decision

1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

A support order for either a child or spouse or other family member may require support to be paid in periodic payments or as a lump sum, or both. Most payments are periodic, especially for child support. Lump sum payments and property transfers are available but not common. In certain jurisdictions, support in kind may also be available.

Eligibility

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

In common law provinces and territories:

Child*: spouse; common law partners, dependant parents and, in some jurisdictions, domestic partners and same sex partners.

In the civil law province of Quebec:

Spouses, civil union spouses, relatives in the direct line in the first degree (parent and child*) (Article 585 Civil Code of Quebec).

*For the purposes of the Divorce Act, the term “child” means biological and adopted children and a child to whom a person stands in *loco parentis*. Under provincial legislation, the term “child” means biological and adopted children and, includes, in some jurisdictions, a child to whom a person stands in *loco parentis*.

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

In general a “dependent” child is:

- under the age of majority*/ and has not withdrawn from parental care;
- at the age of majority* or over and under the charge of a parent, and unable, by reason of illness, disability, or other cause (for example, enrolled in a full time program of education), to support himself.

* The age of majority in Canada may be 18 or 19 years of age depending on the jurisdiction where the child lives.

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

For divorce matters, the law applicable to the question of eligibility of a child or a spouse to obtain maintenance is the Divorce Act.

Under provincial interjurisdictional support legislation in the common law provinces and territories:

- (a) For child support, the law of the jurisdiction in which the child is ordinarily resident, but if under that law the child is not entitled to support, the law of the forum;
- (b) For spouse support, the forum law. But if under the law of the forum, the spouse is not entitled to support, the law of the jurisdiction in which the parties last maintained a common habitual residence.

Under the private international rules of the civil law province of Quebec:

- (a)(b) The obligation of support is governed by the law of the domicile of the creditor. However, where the creditor cannot obtain support from the debtor under that law, the applicable law is that of the domicile of the debtor (Article 3094 Civil Code of Quebec).
- (b) The obligation of support between spouses who are divorced or separated from bed and board or whose marriage has been declared null is governed by the law applicable to the divorce, separation from bed and board or declaration of nullity (Article 3096 of the Civil Code of Quebec). No claim of support of a collateral relation or a person connected by marriage is admissible if, under the law of his domicile, there is no obligation for the debtor to provide support to the plaintiff (Article 3095 of the Civil Code of Quebec).

Procedures for the initial assessment of maintenance

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

In Canada, child support is determined through a judicial process.

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

When the Divorce Act applies: the entire process is judicial and takes place before a Canadian Court in a province in which the respondent has ordinarily resided for at least one year.

When the Divorce Act does not apply:

When the foreign applicant resides in a reciprocating jurisdiction:

In general, the process is similar in both cases, i.e., an applicant residing in a foreign reciprocating jurisdiction could make an application from abroad (administrative process) that would be placed before a Canadian court for judicial determination (judicial process). The applicant who resides in Canada could commence an application in Canada (administrative process) to be forwarded to the respondent's jurisdiction for determination in accordance with that jurisdiction's law. The administrative process is arranged by the designated authorities.

When the foreign applicant resides in a non reciprocating State:

The entire process is judicial and would take place before a Canadian court having jurisdiction.

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

In common law provinces and territories:

There are no differences and the two processes can be joined in one application.

In the civil law province of Quebec:

Yes, there are specific procedural rules applying for the determination of child support (Article 825.8 and following of the Code of Civil Procedure of Quebec). The two processes can be joined in one application.

Methods of calculating maintenance

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

All the provinces and territories apply child support guidelines. The child support guidelines include tables which fix an amount of support based on the following factors:

In common law provinces and territories:

- The income of the payer;
- The number of children;
- The place of residence of the payer;
- Adjustment to the table amounts may be made to account for the following:
 - Undue hardship;
 - Special expenses such as day care or medical expenses;
 - Shared or split custody;
 - Exceptionally high income;
 - Children over the age of majority.

In the civil law province of Quebec:

- Parents' income;
- Number of children;
- Custody arrangements;
- Certain additional expenses relating to the children's needs, if applicable (custody fees, study fees, medical fees, extracurricular activities' fees);
- The amount of child support can be increased or decreased depending on undue hardship.

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

a) When the applicant resides abroad, there are no differences in the assessment criteria employed and response to question 8 applies.

b) When the respondent resides abroad:

i. When the Canadian court makes a decision:

- Under the Divorce Act, the federal child support guidelines apply (see question 8);
- In common law provinces and territories, under provincial legislation, the child support guidelines apply (see question 8);
- In the civil law province of Quebec, the court will apply the Quebec child support guidelines.

ii. When the respondent resides in a foreign reciprocating jurisdiction and the applicant has started the process under the ISO Act, the foreign court will make the assessment in accordance with its own legislation.

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

Yes. There are no guidelines for calculating maintenance of a spouse or other family member. The most important elements for assessment of support are the following:

- Nature and length of the relationship between the parties;
- Means of each party;
- Needs of each party;
- Time necessary to acquire economic self-sufficiency; and
- Other circumstances of each party.

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

(a) The law applicable is the forum law.

(b) Same as in Question 4 for the spouse.

Reassessment / adjustment / modification of maintenance decisions or assessments

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

No generally. There must be a new application to change the existing order. However, Canadian provinces and territories have legislative authority to provide for annual automatic reassessment in their legislation. The Western part of the province of Newfoundland and Labrador has put in place a child support service providing for an automatic annual reassessment based on income information.

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

In Common Law provinces and territories:

No, there is no automatic adjustment in legislation but the court may order a cost of living increase to provide for automatic annual adjustment. However, in the Western part of the

province Newfoundland and Labrador, if the payor does not provide evidence of his financial situation, there is an annual automatic adjustment based on the cost of living index.

In the Civil Law province of Quebec:

Yes. The Civil Code of Quebec provides that support orders are indexed by operation of law in accordance with the annual Pension Index. However, where the application of the index brings about a serious imbalance between the needs of the creditor and the means of the debtor, the court may either fix another basis of indexation or order that the claim not be indexed (Article 590).

- 14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?

A maintenance decision made in favour of a spouse or other family member may be varied if a *material change* is proved. Child support variations are based on any change in circumstances outlined in question 8 that would result in a different order being made. A variation may be ordered by any authority having jurisdiction.

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

A foreign decision may be varied on the application of a resident debtor where both parties attorn to the jurisdiction of the Canadian court or where both parties reside in the jurisdiction of the Canadian court. Forum law will apply and, therefore, the circumstances set out in question 14 will apply to the variation.

Where the foreign creditor does not attorn to the jurisdiction of the Canadian court or where both parties do not reside in the Canadian jurisdiction, the Canadian court has no jurisdiction to vary a foreign decision. However, the resident debtor may submit an application to vary or modify the order to the foreign court or other competent authority in accordance with interjurisdictional support orders legislation.

In the Civil Law province of Quebec:

A Quebec authority has jurisdiction to review a foreign judgement which may be recognised in Quebec respecting support when one of the parties has his domicile or residence in Quebec. (Article 3143 of the Civil Code of Quebec).

Establishing paternity

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

In Common Law provinces,

The law most favourable to the child, either the law of its place of residence or the law of the forum. In most Common Law provinces, the laws governing inter-jurisdictional support proceedings provide that a determination of paternity (parentage) within the context of an inter-jurisdictional child support proceeding has effect only for the purposes of that support proceeding.

In the Civil Law province of Quebec:

Filiation is established in accordance with the law of the domicile or nationality of the child or of one of his parents, at the time of the child's birth, whichever is the more beneficial to the child (Article 3091 of the Civil Code of Quebec).

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

In Common Law provinces and territories:

The applicant must provide prima facie evidence of paternity. Refutable presumptions of paternity are presumptions as set out in legislation. If no presumption applies, or the presumption is rebutted, biological evidence of paternity, most often DNA testing, may be required. A DNA test may be ordered by a judge or agreed on by the parties.

In the Civil Law province of Quebec:

In order to ask for a support order, paternity must first be established. Paternity may be established by the act of birth or by the presumption of paternity of the husband or of the civil union spouse of opposite sex.

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

In Common Law provinces and territories:

Where the claimant and child are resident abroad in a reciprocating jurisdiction and the claimant submits a child support application to a Canadian court through the inter-jurisdictional process, the respondent may or may not contest paternity. If the respondent does not contest paternity, then a determination of paternity ("parentage") for the purpose of the support proceeding can be made. That determination can also be made by consent.

If the respondent contests paternity and indicates that he is willing to participate in a paternity test (DNA most commonly), the claimant will be asked if she is willing to participate in the test. If she indicates she is willing to participate and arrangements for payment for the test can be agreed upon, the test can simply be arranged by the parties without a court order.

If payment arrangements for the test cannot be agreed upon, the respondent will have to make an application to the court seeking leave to have a paternity test and requesting that the court make an order with respect to payment for the test. In some Canadian jurisdictions where the respondent is eligible for legal aid, the legal aid authorities will agree to pay all or part of the cost of the test. In other Canadian jurisdictions, legal aid will not be available and payment for the test will be the responsibility of the respondent and/or claimant (unless other specific arrangements have been made with the particular reciprocating jurisdiction). Once payment arrangements are in place, an application will be forwarded to the testing facility. The paternity testing facility usually contacts the parties to make arrangements for them to provide samples. Currently, there are a few Canadian testing facilities that can make arrangements to obtain samples from persons that are resident abroad. The approximate cost for a paternity test for where mother and child reside outside Canada (samples taken from the mother, putative father, and 1 child) is \$500 to \$800 Canadian funds. If the paternity test confirms that the respondent is the father, the child support hearing will proceed.

The process may be slightly different in each Canadian province and territory.

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

a. The lack of evidence of paternity may be a reason to set aside a registration or to refuse the recognition or enforcement of the foreign order;

b. A foreign decision may not be recognised if the method that is applied for the determination of paternity is contrary to public policy. In Common Law provinces and territories, if recognition is refused, the order can be still treated as an application to establish a child support order and a determination of paternity can be made as part of this application.

Legal and administrative aid and assistance

- 20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:

a a resident claimant for child support;

b a claimant for child support who is resident abroad.

a. Availability of legal and administrative assistance varies from one province to another (for example, assistance of a duty counsel or a government lawyer, legal aid, mediation, family law information centres, enforcement programs);

b. Some legal and administrative assistance is available depending on the provinces (legal aid, assistance of a government lawyer, for example). In cases there is a reciprocating agreement, all provinces and territories provide the assistance of their designated authority that will arrange for the establishment, recognition and enforcement of the support order. Once the order is established or registered, enforcement is made by the employees of the maintenance enforcement program at no cost to the creditor.

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

For claimants resident in foreign reciprocating jurisdictions, there is no means test for administrative assistance and advice. In Canadian jurisdictions where legal assistance is provided, there may be no means test. For claimants resident in foreign non-reciprocating jurisdictions, there is no legal assistance available unless there is a specific agreement on legal aid and only limited administrative assistance in certain Canadian jurisdictions.

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

No, the answer to this question is the same as the one provided for question 21.

Legal costs and expenses

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

If the ISO legislation applies, the process, including the processing of the application through the judicial process, does not involve any costs when the applicant is resident of a reciprocating jurisdiction, unless a private lawyer or a paternity test are required.

For applicants resident in a non reciprocating jurisdiction or where the parties are attorning to the jurisdiction of a Canadian court, the costs involved are the standard costs in family law matters. They are dependent on the jurisdiction for the court costs, and the experience and the expertise of the lawyer retained for the lawyers' fees. Costs will vary based on the complexity of the issues and the level of acrimony between the parties.

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

If the question refers to the possibility of assigning maintenance to pay court costs or lawyers fees, the response is negative.

Collection and transfer arrangements and enforcement of decisions

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

There is an administrative program in place in each province or territory that is responsible for the collection, accounting for and distribution of support payments at no cost to the recipient.

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

There are no particular arrangements to convert and transmit funds between reciprocating jurisdiction. Provinces apply the same procedures to payments received from abroad to those received from within Canada. Arrangements for currency conversion of payments may be carried out by maintenance enforcement programs.

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

Where the decision is received from a reciprocating jurisdiction, the procedures for enforcing child support decisions and maintenance decisions in respect of a spouse or other family member are the following:

- Location of the debtor;
- Registration of the certified order with relevant documents;
- Notice of registration to the debtor;
- The debtor has limited time to apply to set aside registration on limited grounds (Common Law provinces) or to oppose the enforcement of the decision (Quebec);
- If registration is set aside, the opportunity is given to the foreign claimant to provide additional documentation to allow for a hearing to establish a new support order in the Canadian jurisdiction (Common Law provinces);
- If registration is not set aside or the opposition is unsuccessful, the order is enforced.

In Common Law provinces and territories:

Each province and territory has a separate enforcement system that will enforce and collect money owing to a support recipient. The money collected will be paid to the support recipient whether he or she lives inside or outside of the enforcing province or territory. The support recipient will not require a lawyer in Canada as all enforcement is undertaken by the governments.

In the Civil Law province of Quebec, in addition to what is stated above:

The claimant may, at his/her own costs, ask for recognition and enforcement of a foreign decision before the competent court (Articles 785 and 786 of the Civil Code of Procedure).

28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:

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

Enforcement methods are available for all support obligations at no cost to the recipient residing in a reciprocating jurisdiction. In addition to the above list of enforcement / collection methods, the following methods are available in all or some jurisdictions:

- Federal License denial (Passport, Aviation and Marine licences);
- Driver license denial and suspension;
- Attachment of pension benefits or pension credits;
- Registration of lien against property;
- Credit Bureau reporting;
- Deductions from specified social security payments;
- Attachment of lottery winnings;
- Court imposed fines;
- Demanding information from government and other sources;
- Denial of ability to sponsor a new immigrant.

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

Banking costs vary from one jurisdiction to another.

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

No concrete arrangement is in place on this question. Some options are being explored in partnership with the US.

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

- 31 Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.
- Difficulties to obtain complete information on the contact persons in the other jurisdiction to be able to communicate with them and to obtain information on active cases taking in consideration confidentiality issues;
 - Need to be regularly updated on the status of the Contracting States and on the update of their co-ordinates;
 - Reciprocal obligations are unclear with some jurisdictions;
 - Problems with the enforcement of orders;
 - Adequate or lack of translation of documents;
 - No sufficient details on required information or lack of relevant documents;
 - No commitment to locate the respondent;
 - Termination dates for child support unclear (age of emancipation or child attained his or her majority);
 - Inconsistency in enforcement tools;
 - Rules for recognition and enforcement of judgement are not clear in certain jurisdictions.
 - Lack of information on certain aspect of the application (rules on recovery of arrears of support, applicable due date and indexation rules).
- 32 Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.
- Translation of the documents;
 - Lack of forms to be used uniformly;
 - Funds transfer costs;
 - Lack of supporting material or evidence;
 - Delays which mean original information is out of date by the time case gets to court and lack of tools to follow the status of the application;
 - Termination dates for child support unclear (age of emancipation or child attained his or her majority);
 - Inconsistency in enforcement tools;
 - Possibility of using teleconferencing or video conferences where available
- 33 Bearing in mind that the new instrument is to be “comprehensive in nature, building on the best features of the existing Conventions”, and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:
- a* provisions concerning administrative co-operation;
 - b* provisions for the recognition and enforcement of foreign decisions;
 - c* applicable law principles;
 - d* uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;

- e* provisions specifying the assistance to be provided to an applicant from another Contracting Party;
- f* provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;
- g* provisions concerning co-operation in the establishment of paternity;
- h* provisions concerning co-operation in the international transfer of funds at low cost;
- i* provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;
- j* standard forms;
- k* provisions aimed at securing compliance with obligations under the instrument;
- l* provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;
- m* others. Please specify.

- There should be a preamble stating the main goals and principles of the instruments, including reciprocity principle and co-operation;
 - The items are given priority according to the following list: a) (+ to put in place an administrative program to enforce the orders and collect and disburse monies); b); c); d) (need more information on the exact nature of these rules – discuss at next call); e); f) (flexibility necessary in the application of this item); g); h) (to be an option depending on the jurisdiction); j); k); and l);
 - Federal State Clause / Interpretation Clause;
 - Provision on translation of documents
 - The Hague Conference needs to play a strong role in the comprehension and application of the instrument;
 - A reciprocity basis in certain areas of the instrument.
- 34 With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should “combine the maximum efficiency with the flexibility necessary to achieve widespread ratification”,
- a* which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,
 - b* which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them, and
 - c* do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?
- a) The core elements to figure in the new instrument shall be a); b); c); d); e); g); i); k); and l).
 - b) Elements that would depend on the availability or the resources in the State in question are: f); h) and j).
 - c) Yes.

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

- The important reciprocity aspect of bilateral arrangements and possibility to withdraw service to residents of States that do not apply the arrangements co-operatively;
- Clarity and details in the reciprocal obligations;
- Transition clause for existing bilateral arrangements;
- Possibility to keep whole or part of the existing bilateral arrangements in the framework of the new instrument.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

36 Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?

- Costa Rica
- Honduras
- El Salvador

37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?

38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

The following Internet sites of the Federal government provide information about Canadian child support system and the enforcement programs:

<http://canada.justice.gc.ca/en/ps/sup/index.html>

<http://canada.justice.gc.ca/en/ps/flas/index.html>

Brochures on legal information and government services are also available in some jurisdictions.

AN OVERVIEW OF THE CANADIAN INTER-JURISDICTIONAL SUPPORT ESTABLISHMENT AND ENFORCEMENT SYSTEM

Canada is a federal State, composed of a number of separate legal units or jurisdictions, each with its own government and power to make laws. These legal units consist of ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan) and three territories (Northwest Territories, Yukon Territory and Nunavut), in addition to a federal government.

The Canadian Constitution divides the power to govern and make laws between the federal and the provincial and territorial governments, including family law matters. Furthermore, the foundation of the law is not the same throughout the country. The province of Quebec has a civil law system. The rest of the Canadian provinces and territories apply the common law.

This document gives a summary of the Canadian approach to obtaining and enforcing family support orders.

1. Federal Law – Divorce Act

The federal government has legislative power over marriage and divorce. Therefore, a couple seeking a divorce would have their support order dealt with under the federal *Divorce Act*.

2. Provincial/Territorial Law – Family Support Legislation

Support matters are also governed by provincial and territorial law. An unmarried party or a person who is married but separated from their spouse, may seek a support order under provincial or territorial law.

Provincial and territorial laws differ in relation to support obligations for spouses or other family members, particularly between unmarried parties. However a child is entitled to support no matter what the marital status of his or her parents is.

Orders made under provincial or territorial law continue to be governed by that law if a variation is sought.

3. Provincial/territorial Law – Interjurisdictional Support Legislation and Reciprocity Arrangements

Interjurisdictional support legislation

Each Canadian province and territory has enacted their own interjurisdictional reciprocal enforcement of support legislation. All family support orders made pursuant to provincial and territorial law can be both recognized and enforced under this interjurisdictional legislation. The same is true for support orders from other countries with which the province or territory has a reciprocal arrangement. Foreign jurisdictions are designated as reciprocating states in accordance with these laws.

The provinces and territories are in the process of implementing new interjurisdictional support (ISO) legislation. Responses to the questionnaire are based on this new legislation. While each province and territory will enact substantially similar legislation, there will be some differences to meet the unique needs of each province or territory. This new model reciprocal legislation will replace the existing two stage provisional / confirmation procedure with a more streamlined application process to establish or vary a support order . However, the new legislation does provide for the continued use of the provisional/confirmation order process for those reciprocating states that require such orders. A series of situation-specific forms will be completed and sent to the jurisdiction where the respondent resides. The court in the respondent's jurisdiction will conduct a hearing and make the order to be enforced.

It is anticipated that these changes will improve the timeliness in obtaining family support. As part of the implementation process of these laws across Canada, each province or territory will have a designated authority for the purposes of transmitting and receiving applications.

Reciprocity Arrangements

Canada is not a party to any existing multilateral treaty dealing with support. We proceed through a system of reciprocity arrangements used for the purpose of enforcing foreign judgments. Reciprocity arrangements are negotiated between the provincial or territorial government and a foreign government. The establishment of such reciprocal arrangements depends upon whether the recognition and enforcement laws of the two jurisdictions are substantially similar. Usually laws will be regarded as similar enough to Canadian provincial or territorial recognition and enforcement laws if they, in particular: (a) provide for adequate, no-cost enforcement of established orders; (b) permit persons seeking support, an opportunity to obtain an order against someone in another jurisdiction, when no order previously existed; and (c) allow for variation of an existing order.

All of these differences cause a patchwork of reciprocity arrangements across the country. A chart attached to this document illustrates those countries with which Canadian provinces and territories presently have support enforcement reciprocity arrangements.

Under interjurisdictional support legislation, Canadian provinces and territories are able to recognize and enforce a support order from a foreign reciprocating State. If recognition is not possible, the order will be treated as an application to establish an enforceable support obligation in the Canadian jurisdiction for the benefit of the foreign applicant. If no order exists, the foreign applicant can send an application to establish a support order in the province or territory in which the respondent resides. This process can also be used to vary or modify a support order.

In the common law provinces and territories, support orders from outside a province or territory will only be enforced if that province or territory has a mutual reciprocal enforcement arrangement with the jurisdiction seeking enforcement.

Options for establishment and enforcement of support orders available to residents in non-reciprocating States

In the civil law province of Quebec, in addition to this "reciprocity system", support creditors may also obtain, on their own and at their expense, the recognition of a foreign support order through the application of the rules of private international law contained in the *Civil Code of Quebec*. They benefit from the free enforcement system in place in Quebec.

Although some common-law provinces and territories have limited options to assist in the enforcement of final orders from non-reciprocating States, there is no available administrative co-operation to establish an order. However the foreign applicant may attorn to a Canadian jurisdiction, by retaining counsel in a province or territory and applying to a court in that province or territory to establish an order.

4. Enforcement of support orders

Enforcement of all support orders is primarily within the authority of the provinces and territories.

Once an order is recognized or established, each province and territory has a separate enforcement system that will enforce and collect money owing to a family support recipient. The money collected will be paid to the support recipient whether he or she resides inside or outside of the enforcing province or territory. The support recipient will not require a lawyer in the Canadian jurisdiction as enforcement is free for the recipient and done by government funded enforcement programs.

Although the federal government does not directly enforce support orders, the collection of family support is a stated priority of this government. A federal office has been established to assist and support the provinces and territories in their enforcement activities by searching for debtor addresses, garnishing designated federal monies such as income tax refunds and denying specified federal licences to certain support payors, who are in persistent arrears.

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| USA | AB | BC | MB | NB | NF | NT | NS | ON | PE | PQ | SK | YK | NU |
|----------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| FEDERAL ARRANGEMENT | F | F | F | | F | | F | F | | | | | |
| ALABAMA | F | F | F | | F | | F | F | | | X | | |
| ALASKA | F | F | F | X | F | | F | F | X | | X | X | |
| ARIZONA | F | F | F | X | F | | F | F | X | | X | | |
| ARKANSAS | F | F | F | | F | | F | F | X | | X | | |
| CALIFORNIA | F | F | F | X | F | X | F | F | X | X | X | X | X |
| COLORADO | F | F | F | X | F | | F | F | X | | X | X | |
| CONNECTICUT | F | F | F | X | F | | F | F | X | | X | | |
| DELAWARE | F | F | F | X | F | | F | F | X | | X | X | |
| DISTRICT OF COLUMBIA | F | F | F | | F | | F | F | | | X | | |
| FLORIDA | F | F | F | X | F | X | F | F | X | X | X | X | X |
| GEORGIA | F | F | F | | F | | F | F | X | | X | | |
| HAWAII | F | F | F | X | F | X | F | F | X | | X | X | |
| IDAHO | F | F | F | X | F | X | F | F | X | | X | X | |
| ILLINOIS | F | F | F | | F | | F | F | X | | X | X | |
| INDIANA | F | F | F | X | F | | F | F | | | X | | |
| IOWA | F | F | F | X | F | X | F | F | | | X | X | X |
| KANSAS | F | F | F | | F | | F | F | | | X | | |
| KENTUCKY | F | F | F | | F | | F | F | X | | X | | |
| LOUISIANA | F | F | F | X | F | | F | F | X | | X | | |
| MAINE | F | F | F | X | F | | F | F | X | X | X | | |
| MARYLAND | F | F | F | X | F | X | F | F | X | | X | | |
| MASSACHUSETTS | F | F | F | X | F | X | F | F | | X | X | X | |
| MICHIGAN | F | F | F | X | F | | F | F | X | | X | | |

**“CANADIAN OVERVIEW OF RECIPROCITY WITH
FOREIGN JURISDICTIONS UNDER REMO PROVISIONS”**

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| USA - continued | AB | BC | MB | NB | NF | NT | NS | ON | PE | PQ | SK | YK | NU |
|------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| MINNESOTA | F | F | F | X | F | | F | F | X | | X | | |
| MISSISSIPPI | F | F | F | | F | | F | F | | | X | | |
| MISSOURI | F | F | F | X | F | X | F | F | X | | X | | X |
| MONTANA | F | F | F | X | F | | F | F | X | | X | X | |
| NEBRASKA | F | F | F | | F | | F | F | | | X | | |
| NEVADA | F | F | F | X | F | | F | F | X | | X | X | |
| NEW HAMPSHIRE | F | F | F | X | F | | F | F | | | X | X | |
| NEW JERSEY | F | F | F | X | F | X | F | F | X | X | X | X | |
| NEW MEXICO | F | F | F | | F | | F | F | | | X | | |
| NEW YORK | F | F | F | X | F | X | F | F | X | X | X | X | |
| NORTH CAROLINA | F | F | F | X | F | | F | F | | | X | | |
| NORTH DAKOTA | F | F | F | | F | | F | F | X | | X | X | |
| OHIO | F | F | F | X | F | | F | F | | | X | X | |
| OKLAHOMA | F | F | F | X | F | | F | F | X | | X | | |
| OREGON | F | F | F | X | F | | F | F | X | | X | X | |
| PENNSYLVANIA | F | F | F | X | F | | F | F | | X | X | | |
| RHODE ISLAND | F | F | F | X | F | | F | F | | | X | | |
| SOUTH CAROLINA | F | F | F | | F | | F | F | | | X | | |
| SOUTH DAKOTA | F | F | F | X | F | X | F | F | X | | X | X | X |
| TENNESSEE | F | F | F | X | F | X | F | F | X | | X | X | |
| TEXAS | F | F | F | X | F | | F | F | X | | X | X | |
| UTAH | F | F | F | | F | | F | F | X | | X | | |
| VERMONT | F | F | F | | F | | F | F | X | | X | X | |
| VIRGINIA | F | F | F | | F | X | F | F | X | | X | | |

**“CANADIAN OVERVIEW OF RECIPROCITY WITH
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| USA - continued | AB | BC | MB | NB | NF | NT | NS | ON | PE | PQ | SK | YK | NU |
|---------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| WASHINGTON | F | F | F | X | F | | F | F | X | | X | X | |
| WEST VIRGINIA | F | F | F | X | F | | F | F | | | X | X | |
| WISCONSIN | F | F | F | | F | | F | F | X | | X | X | |
| WYOMING | F | F | F | X | F | | F | F | X | | X | | |
| USA Protectorates | | | | | | | | | | | | | |
| AMERICAN SAMOA | F | F | F | | F | | F | F | | | | | |
| GUAM | F | F | F | | F | | F | F | | | | | |
| NORTHERN MARIANA ISLANDS | | | | | | | | | | | X | | |
| PUERTO RICO | F | F | F | | F | | F | F | | | X | | |
| US VIRGIN ISLANDS | F | F | F | | F | | F | F | | | X | | |
| SOUTH PACIFIC | | | | | | | | | | | | | |
| AUSTRALIA | X | X | X | | | X | | X | | | X | X | X |
| CAPITAL TERRITORY OF AUSTRALIA | X | X | | | X | | X | X | X | | | | |
| FIJI | X | X | X | X | | | | X | | | X | X | |
| NEW SOUTH WALES | X | | | X | X | | X | X | X | | | | |
| NEW ZEALAND | X | X | X | X | X | | X | X | X | | X | | X |
| NEW ZEALAND & COOK ISLANDS | | | | | | X | X | X | | | | X | |
| NORTHERN TERRITORY OF AUSTRALIA | X | X | | | X | | X | X | X | | | | |
| PAPUA | | | | | X | | | | | | | | |
| PAPUA AND NEW GUINEA | X | X | X | | X | | X | X | X | | X | | |
| QUEENSLAND | X | | | X | X | | | X | X | | | | |

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| <i>SOUTH PACIFIC - continued</i> | <i>AB</i> | <i>BC</i> | <i>MB</i> | <i>NB</i> | <i>NF</i> | <i>NT</i> | <i>NS</i> | <i>ON</i> | <i>PE</i> | <i>PQ</i> | <i>SK</i> | <i>YK</i> | <i>NU</i> |
|---|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|
| SOUTH AUSTRALIA | X | X | | X | X | | X | X | X | | | | |
| TASMANIA | X | X | | X | X | | X | X | X | | | | |
| VICTORIA | X | X | | X | X | | X | X | X | | | | |
| WESTERN AUSTRALIA | X | X | | X | X | | X | X | X | | | | |
| <i>EUROPE</i> | | | | | | | | | | | | | |
| ALDERNEY | | | X | | X | | | X | X | | | | |
| AUSTRIA | X | X | X | X | X | X | X | X | X | | X | X | X |
| CZECH REPUBLIC | X | | | | X | | | | | | X | X | |
| FINLAND | | | | | | | | X | | | | | |
| GERMANY | X | X | X | X | X | X | X | X | X | | X | X | |
| GIBRALTAR | | X | | | | | X | X | | | | | |
| GUERNSEY | | X | X | | X | X | X | X | X | | X | | |
| ISLE OF MAN | X | X | X | X | X | X | X | X | X | | X | X | X |
| MALTA | X | | X | | X | | | X | X | | | | |
| MALTA & DEPENDENCIES | | | | | | X | | X | | | | | |
| NORWAY | X | X | X | | X | | X | | | | X | | |
| POLAND | X | | X | X | X | | X | X | X | | X | X | |
| REPUBLIC OF IRELAND | | | | | | | | | | | X | | |
| SARK | | | X | | X | | | X | X | | | | |
| SLOVAK REPUBLIC | X | | | | | | | | | | | | |
| STATE OF JERSEY | X | X | X | | X | X | | X | X | | X | X | |
| SWEDEN | | | | | | | | | | | X | | |

“CANADIAN OVERVIEW OF RECIPROCITY WITH FOREIGN JURISDICTIONS UNDER REMO PROVISIONS”

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| EUROPE - continued | AB | BC | MB | NB | NF | NT | NS | ON | PE | PQ | SK | YK | NU |
|---------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| SWITZERLAND | | | | | | | | | | | X | | |
| UNITED KINGDOM | X | X | X | X | X | X | X | X | X | | X | X | X |
| CARIBBEAN | | | | | | | | | | | | | |
| BAHAMAS | | | | | | | | | | | X | | |
| BARBADOS | X | X | X | | | X | | | | | X | | |
| BERMUDA | | | | X | | | | | | | | | |
| CAYMAN ISLANDS | | | | | | | | | | | | X | |
| TRINIDAD | | | | X | | | | | | | | | |
| AFRICA | | | | | | | | | | | | | |
| REPUBLIC OF GHANA | | | X | | | | | X | | | | | |
| SOUTH AFRICA | X | X | X | | | X | | X | | | | | |
| ZIMBABWE | | X | X | | X | X | | X | X | | | X | |
| ASIA | | | | | | | | | | | | | |
| HONG KONG | | X | X | | | | | X | | | X | | |
| REPUBLIC OF SINGAPORE | X | X | X | X | X | X | X | | | | | X | X |

Prepared by: Linda Levells-Hince

KEY:

F – indicates federal arrangement with the United States of America, including the fifty states, American Samoa, District of Columbia, Guam, Puerto Rico and United States Virgin Islands

X – indicates state with reciprocity agreement in effect

Abbreviations:

USA = United States of America

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Provinces and Territories of Canada:

AB = Alberta
BC = British Columbia
MB = Manitoba
NB = New Brunswick
NF = Newfoundland
NS = Nova Scotia
NU = Nunavut
NT = Northwest Territories
ON = Ontario
PE = Prince Edward Island
PQ = Quebec
SK = Saskatchewan
YK = Yukon

Hague Conference Special Commission on Maintenance Obligations
(The Hague, Spring 2003)

Canadian Responses to the Questionnaire in preparation of the Special Commission

An attached document gives an overview of the Canadian interjurisdictional support establishment and enforcement system and particularly, of the provincial and territorial legislation on inter-jurisdictional support orders (ISO).

In general, this system is based on reciprocity and bilateral arrangements between foreign states and individual provinces and territories.

PART I PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS

Canada is not a party to any of the Hague Conference conventions on maintenance obligations or to the 1956 New York Convention.

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

Form of maintenance decision

1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

A support order for either a child or spouse or other family member may require support to be paid in periodic payments or as a lump sum, or both. Most payments are periodic, especially for child support. Lump sum payments and property transfers are available but not common. In certain jurisdictions, support in kind may also be available.

Eligibility

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

In common law provinces and territories:

Child*: spouse; common law partners, dependant parents and, in some jurisdictions, domestic partners and same sex partners.

In the civil law province of Quebec:

Spouses, civil union spouses, relatives in the direct line in the first degree (parent and child*) (Article 585 Civil Code of Quebec).

*For the purposes of the Divorce Act, the term “child” means biological and adopted children and a child to whom a person stands in *loco parentis*. Under provincial legislation, the term “child” means biological and adopted children and, includes, in some jurisdictions, a child to whom a person stands in *loco parentis*.

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

In general a “dependent” child is:

- under the age of majority*/ and has not withdrawn from parental care;
- at the age of majority* or over and under the charge of a parent, and unable, by reason of illness, disability, or other cause (for example, enrolled in a full time program of education), to support himself.

* The age of majority in Canada may be 18 or 19 years of age depending on the jurisdiction where the child lives.

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

For divorce matters, the law applicable to the question of eligibility of a child or a spouse to obtain maintenance is the Divorce Act.

Under provincial interjurisdictional support legislation in the common law provinces and territories:

- (a) For child support, the law of the jurisdiction in which the child is ordinarily resident, but if under that law the child is not entitled to support, the law of the forum;
- (b) For spouse support, the forum law. But if under the law of the forum, the spouse is not entitled to support, the law of the jurisdiction in which the parties last maintained a common habitual residence.

Under the private international rules of the civil law province of Quebec:

- (a)(b) The obligation of support is governed by the law of the domicile of the creditor. However, where the creditor cannot obtain support from the debtor under that law, the applicable law is that of the domicile of the debtor (Article 3094 Civil Code of Quebec).
- (b) The obligation of support between spouses who are divorced or separated from bed and board or whose marriage has been declared null is governed by the law applicable to the divorce, separation from bed and board or declaration of nullity (Article 3096 of the Civil Code of Quebec). No claim of support of a collateral relation or a person connected by marriage is admissible if, under the law of his domicile, there is no obligation for the debtor to provide support to the plaintiff (Article 3095 of the Civil Code of Quebec).

Procedures for the initial assessment of maintenance

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

In Canada, child support is determined through a judicial process.

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

When the Divorce Act applies: the entire process is judicial and takes place before a Canadian Court in a province in which the respondent has ordinarily resided for at least one year.

When the Divorce Act does not apply:

When the foreign applicant resides in a reciprocating jurisdiction:

In general, the process is similar in both cases, i.e., an applicant residing in a foreign reciprocating jurisdiction could make an application from abroad (administrative process) that would be placed before a Canadian court for judicial determination (judicial process). The applicant who resides in Canada could commence an application in Canada (administrative process) to be forwarded to the respondent's jurisdiction for determination in accordance with that jurisdiction's law. The administrative process is arranged by the designated authorities.

When the foreign applicant resides in a non reciprocating State:

The entire process is judicial and would take place before a Canadian court having jurisdiction.

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

In common law provinces and territories:

There are no differences and the two processes can be joined in one application.

In the civil law province of Quebec:

Yes, there are specific procedural rules applying for the determination of child support (Article 825.8 and following of the Code of Civil Procedure of Quebec). The two processes can be joined in one application.

Methods of calculating maintenance

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

All the provinces and territories apply child support guidelines. The child support guidelines include tables which fix an amount of support based on the following factors:

In common law provinces and territories:

- The income of the payer;
- The number of children;
- The place of residence of the payer;
- Adjustment to the table amounts may be made to account for the following:
 - Undue hardship;
 - Special expenses such as day care or medical expenses;
 - Shared or split custody;
 - Exceptionally high income;
 - Children over the age of majority.

In the civil law province of Quebec:

- Parents' income;
- Number of children;
- Custody arrangements;
- Certain additional expenses relating to the children's needs, if applicable (custody fees, study fees, medical fees, extracurricular activities' fees);
- The amount of child support can be increased or decreased depending on undue hardship.

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

a) When the applicant resides abroad, there are no differences in the assessment criteria employed and response to question 8 applies.

b) When the respondent resides abroad:

i. When the Canadian court makes a decision:

- Under the Divorce Act, the federal child support guidelines apply (see question 8);
- In common law provinces and territories, under provincial legislation, the child support guidelines apply (see question 8);
- In the civil law province of Quebec, the court will apply the Quebec child support guidelines.

ii. When the respondent resides in a foreign reciprocating jurisdiction and the applicant has started the process under the ISO Act, the foreign court will make the assessment in accordance with its own legislation.

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

Yes. There are no guidelines for calculating maintenance of a spouse or other family member. The most important elements for assessment of support are the following:

- Nature and length of the relationship between the parties;
- Means of each party;
- Needs of each party;
- Time necessary to acquire economic self-sufficiency; and
- Other circumstances of each party.

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

(a) The law applicable is the forum law.

(b) Same as in Question 4 for the spouse.

Reassessment / adjustment / modification of maintenance decisions or assessments

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

No generally. There must be a new application to change the existing order. However, Canadian provinces and territories have legislative authority to provide for annual automatic reassessment in their legislation. The Western part of the province of Newfoundland and Labrador has put in place a child support service providing for an automatic annual reassessment based on income information.

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

In Common Law provinces and territories:

No, there is no automatic adjustment in legislation but the court may order a cost of living increase to provide for automatic annual adjustment. However, in the Western part of the

province Newfoundland and Labrador, if the payor does not provide evidence of his financial situation, there is an annual automatic adjustment based on the cost of living index.

In the Civil Law province of Quebec:

Yes. The Civil Code of Quebec provides that support orders are indexed by operation of law in accordance with the annual Pension Index. However, where the application of the index brings about a serious imbalance between the needs of the creditor and the means of the debtor, the court may either fix another basis of indexation or order that the claim not be indexed (Article 590).

- 14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?

A maintenance decision made in favour of a spouse or other family member may be varied if a *material change* is proved. Child support variations are based on any change in circumstances outlined in question 8 that would result in a different order being made. A variation may be ordered by any authority having jurisdiction.

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

A foreign decision may be varied on the application of a resident debtor where both parties attorn to the jurisdiction of the Canadian court or where both parties reside in the jurisdiction of the Canadian court. Forum law will apply and, therefore, the circumstances set out in question 14 will apply to the variation.

Where the foreign creditor does not attorn to the jurisdiction of the Canadian court or where both parties do not reside in the Canadian jurisdiction, the Canadian court has no jurisdiction to vary a foreign decision. However, the resident debtor may submit an application to vary or modify the order to the foreign court or other competent authority in accordance with interjurisdictional support orders legislation.

In the Civil Law province of Quebec:

A Quebec authority has jurisdiction to review a foreign judgement which may be recognised in Quebec respecting support when one of the parties has his domicile or residence in Quebec. (Article 3143 of the Civil Code of Quebec).

Establishing paternity

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

In Common Law provinces,

The law most favourable to the child, either the law of its place of residence or the law of the forum. In most Common Law provinces, the laws governing inter-jurisdictional support proceedings provide that a determination of paternity (parentage) within the context of an inter-jurisdictional child support proceeding has effect only for the purposes of that support proceeding.

In the Civil Law province of Quebec:

Filiation is established in accordance with the law of the domicile or nationality of the child or of one of his parents, at the time of the child's birth, whichever is the more beneficial to the child (Article 3091 of the Civil Code of Quebec).

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

In Common Law provinces and territories:

The applicant must provide prima facie evidence of paternity. Refutable presumptions of paternity are presumptions as set out in legislation. If no presumption applies, or the presumption is rebutted, biological evidence of paternity, most often DNA testing, may be required. A DNA test may be ordered by a judge or agreed on by the parties.

In the Civil Law province of Quebec:

In order to ask for a support order, paternity must first be established. Paternity may be established by the act of birth or by the presumption of paternity of the husband or of the civil union spouse of opposite sex.

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

In Common Law provinces and territories:

Where the claimant and child are resident abroad in a reciprocating jurisdiction and the claimant submits a child support application to a Canadian court through the inter-jurisdictional process, the respondent may or may not contest paternity. If the respondent does not contest paternity, then a determination of paternity ("parentage") for the purpose of the support proceeding can be made. That determination can also be made by consent.

If the respondent contests paternity and indicates that he is willing to participate in a paternity test (DNA most commonly), the claimant will be asked if she is willing to participate in the test. If she indicates she is willing to participate and arrangements for payment for the test can be agreed upon, the test can simply be arranged by the parties without a court order.

If payment arrangements for the test cannot be agreed upon, the respondent will have to make an application to the court seeking leave to have a paternity test and requesting that the court make an order with respect to payment for the test. In some Canadian jurisdictions where the respondent is eligible for legal aid, the legal aid authorities will agree to pay all or part of the cost of the test. In other Canadian jurisdictions, legal aid will not be available and payment for the test will be the responsibility of the respondent and/or claimant (unless other specific arrangements have been made with the particular reciprocating jurisdiction). Once payment arrangements are in place, an application will be forwarded to the testing facility. The paternity testing facility usually contacts the parties to make arrangements for them to provide samples. Currently, there are a few Canadian testing facilities that can make arrangements to obtain samples from persons that are resident abroad. The approximate cost for a paternity test for where mother and child reside outside Canada (samples taken from the mother, putative father, and 1 child) is \$500 to \$800 Canadian funds. If the paternity test confirms that the respondent is the father, the child support hearing will proceed.

The process may be slightly different in each Canadian province and territory.

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

a. The lack of evidence of paternity may be a reason to set aside a registration or to refuse the recognition or enforcement of the foreign order;

b. A foreign decision may not be recognised if the method that is applied for the determination of paternity is contrary to public policy. In Common Law provinces and territories, if recognition is refused, the order can be still treated as an application to establish a child support order and a determination of paternity can be made as part of this application.

Legal and administrative aid and assistance

- 20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:

a a resident claimant for child support;

b a claimant for child support who is resident abroad.

a. Availability of legal and administrative assistance varies from one province to another (for example, assistance of a duty counsel or a government lawyer, legal aid, mediation, family law information centres, enforcement programs);

b. Some legal and administrative assistance is available depending on the provinces (legal aid, assistance of a government lawyer, for example). In cases there is a reciprocating agreement, all provinces and territories provide the assistance of their designated authority that will arrange for the establishment, recognition and enforcement of the support order. Once the order is established or registered, enforcement is made by the employees of the maintenance enforcement program at no cost to the creditor.

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

For claimants resident in foreign reciprocating jurisdictions, there is no means test for administrative assistance and advice. In Canadian jurisdictions where legal assistance is provided, there may be no means test. For claimants resident in foreign non-reciprocating jurisdictions, there is no legal assistance available unless there is a specific agreement on legal aid and only limited administrative assistance in certain Canadian jurisdictions.

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

No, the answer to this question is the same as the one provided for question 21.

Legal costs and expenses

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

If the ISO legislation applies, the process, including the processing of the application through the judicial process, does not involve any costs when the applicant is resident of a reciprocating jurisdiction, unless a private lawyer or a paternity test are required.

For applicants resident in a non reciprocating jurisdiction or where the parties are attorning to the jurisdiction of a Canadian court, the costs involved are the standard costs in family law matters. They are dependent on the jurisdiction for the court costs, and the experience and the expertise of the lawyer retained for the lawyers' fees. Costs will vary based on the complexity of the issues and the level of acrimony between the parties.

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

If the question refers to the possibility of assigning maintenance to pay court costs or lawyers fees, the response is negative.

Collection and transfer arrangements and enforcement of decisions

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

There is an administrative program in place in each province or territory that is responsible for the collection, accounting for and distribution of support payments at no cost to the recipient.

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

There are no particular arrangements to convert and transmit funds between reciprocating jurisdiction. Provinces apply the same procedures to payments received from abroad to those received from within Canada. Arrangements for currency conversion of payments may be carried out by maintenance enforcement programs.

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

Where the decision is received from a reciprocating jurisdiction, the procedures for enforcing child support decisions and maintenance decisions in respect of a spouse or other family member are the following:

- Location of the debtor;
- Registration of the certified order with relevant documents;
- Notice of registration to the debtor;
- The debtor has limited time to apply to set aside registration on limited grounds (Common Law provinces) or to oppose the enforcement of the decision (Quebec);
- If registration is set aside, the opportunity is given to the foreign claimant to provide additional documentation to allow for a hearing to establish a new support order in the Canadian jurisdiction (Common Law provinces);
- If registration is not set aside or the opposition is unsuccessful, the order is enforced.

In Common Law provinces and territories:

Each province and territory has a separate enforcement system that will enforce and collect money owing to a support recipient. The money collected will be paid to the support recipient whether he or she lives inside or outside of the enforcing province or territory. The support recipient will not require a lawyer in Canada as all enforcement is undertaken by the governments.

In the Civil Law province of Quebec, in addition to what is stated above:

The claimant may, at his/her own costs, ask for recognition and enforcement of a foreign decision before the competent court (Articles 785 and 786 of the Civil Code of Procedure).

28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:

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

Enforcement methods are available for all support obligations at no cost to the recipient residing in a reciprocating jurisdiction. In addition to the above list of enforcement / collection methods, the following methods are available in all or some jurisdictions:

- Federal License denial (Passport, Aviation and Marine licences);
- Driver license denial and suspension;
- Attachment of pension benefits or pension credits;
- Registration of lien against property;
- Credit Bureau reporting;
- Deductions from specified social security payments;
- Attachment of lottery winnings;
- Court imposed fines;
- Demanding information from government and other sources;
- Denial of ability to sponsor a new immigrant.

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

Banking costs vary from one jurisdiction to another.

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

No concrete arrangement is in place on this question. Some options are being explored in partnership with the US.

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

- 31 Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.
- Difficulties to obtain complete information on the contact persons in the other jurisdiction to be able to communicate with them and to obtain information on active cases taking in consideration confidentiality issues;
 - Need to be regularly updated on the status of the Contracting States and on the update of their co-ordinates;
 - Reciprocal obligations are unclear with some jurisdictions;
 - Problems with the enforcement of orders;
 - Adequate or lack of translation of documents;
 - No sufficient details on required information or lack of relevant documents;
 - No commitment to locate the respondent;
 - Termination dates for child support unclear (age of emancipation or child attained his or her majority);
 - Inconsistency in enforcement tools;
 - Rules for recognition and enforcement of judgement are not clear in certain jurisdictions.
 - Lack of information on certain aspect of the application (rules on recovery of arrears of support, applicable due date and indexation rules).
- 32 Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.
- Translation of the documents;
 - Lack of forms to be used uniformly;
 - Funds transfer costs;
 - Lack of supporting material or evidence;
 - Delays which mean original information is out of date by the time case gets to court and lack of tools to follow the status of the application;
 - Termination dates for child support unclear (age of emancipation or child attained his or her majority);
 - Inconsistency in enforcement tools;
 - Possibility of using teleconferencing or video conferences where available
- 33 Bearing in mind that the new instrument is to be “comprehensive in nature, building on the best features of the existing Conventions”, and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:
- a* provisions concerning administrative co-operation;
 - b* provisions for the recognition and enforcement of foreign decisions;
 - c* applicable law principles;
 - d* uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;

- e* provisions specifying the assistance to be provided to an applicant from another Contracting Party;
- f* provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;
- g* provisions concerning co-operation in the establishment of paternity;
- h* provisions concerning co-operation in the international transfer of funds at low cost;
- i* provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;
- j* standard forms;
- k* provisions aimed at securing compliance with obligations under the instrument;
- l* provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;
- m* others. Please specify.

- There should be a preamble stating the main goals and principles of the instruments, including reciprocity principle and co-operation;
 - The items are given priority according to the following list: a) (+ to put in place an administrative program to enforce the orders and collect and disburse monies); b); c); d) (need more information on the exact nature of these rules – discuss at next call); e); f) (flexibility necessary in the application of this item); g); h) (to be an option depending on the jurisdiction); j); k); and l);
 - Federal State Clause / Interpretation Clause;
 - Provision on translation of documents
 - The Hague Conference needs to play a strong role in the comprehension and application of the instrument;
 - A reciprocity basis in certain areas of the instrument.
- 34 With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should “combine the maximum efficiency with the flexibility necessary to achieve widespread ratification”,
- a* which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,
 - b* which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them, and
 - c* do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?
- a) The core elements to figure in the new instrument shall be a); b); c); d); e); g); i); k); and l).
 - b) Elements that would depend on the availability or the resources in the State in question are: f); h) and j).
 - c) Yes.

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

- The important reciprocity aspect of bilateral arrangements and possibility to withdraw service to residents of States that do not apply the arrangements co-operatively;
- Clarity and details in the reciprocal obligations;
- Transition clause for existing bilateral arrangements;
- Possibility to keep whole or part of the existing bilateral arrangements in the framework of the new instrument.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

36 Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?

- Costa Rica
- Honduras
- El Salvador

37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?

38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

The following Internet sites of the Federal government provide information about Canadian child support system and the enforcement programs:

<http://canada.justice.gc.ca/en/ps/sup/index.html>

<http://canada.justice.gc.ca/en/ps/flas/index.html>

Brochures on legal information and government services are also available in some jurisdictions.

APERÇU DU SYSTÈME INTERJURIDICTIONNEL CANADIEN D'ÉTABLISSEMENT ET D'EXÉCUTION DES ORDONNANCES ALIMENTAIRES

Le Canada est un État fédéral formé de juridictions autonomes, chacune d'elles possédant son propre gouvernement et ayant le pouvoir de légiférer. Ces juridictions comprennent dix provinces (l'Alberta, la Colombie-Britannique, le Manitoba, le Nouveau-Brunswick, Terre-Neuve et le Labrador, la Nouvelle-Écosse, l'Ontario, l'Île-du-Prince-Édouard, le Québec et la Saskatchewan) et trois territoires (les Territoires du Nord-Ouest, le Yukon et le Nunavut), en plus du gouvernement fédéral.

La Constitution canadienne divise le pouvoir de gouverner et de légiférer, dans le domaine du droit de la famille, entre le gouvernement fédéral et les gouvernements des provinces et des territoires. De plus, le fondement du droit n'est pas le même partout au pays. Le Québec a un système de droit civil. Le reste des provinces et des territoires canadiens ont des systèmes de common law.

Le présent document résume la situation qui règne au Canada en matière d'établissement et d'exécution d'ordonnances alimentaires.

1. Droit fédéral – Loi sur le divorce

Le gouvernement fédéral a le pouvoir de légiférer en matière de mariage et de divorce. Ainsi, lorsqu'un couple divorce, la *Loi sur le divorce* fédérale régit les obligations alimentaires accessoires au divorce.

2. Droit provincial et territorial – Lois en matière de pension alimentaires

Les questions de pensions alimentaires sont aussi régies par le droit des provinces et des territoires. Une personne célibataire ou une personne mariée qui se sépare de son conjoint peut tenter d'obtenir une ordonnance alimentaire en vertu du droit provincial ou territorial.

Les lois provinciales et territoriales diffèrent les unes des autres en ce qui concerne les obligations alimentaires entre époux et à l'égard des autres membres de la famille, en particulier en ce qui concerne les personnes non mariées. Toutefois, un enfant a droit à une pension alimentaire quel que soit l'état matrimonial de ses parents.

Les ordonnances rendues conformément aux lois provinciales ou territoriales continuent d'être régies par ces lois lorsqu'une modification est demandée.

3. Droit provincial et territorial – Lois interjuridictionnelles et accords de réciprocité

Lois interjuridictionnelles en matière d'obligations alimentaires

Chaque province ou territoire du Canada a sa législation concernant l'établissement et l'exécution réciproque des ordonnances alimentaires. Toutes les ordonnances alimentaires rendues conformément aux lois provinciales et territoriales peuvent être reconnues et exécutées suivant ces lois. Il en est de même des ordonnances alimentaires

émanant d'États étrangers avec lesquels la province ou le territoire a conclu un accord de réciprocité. Suivant ces lois, ces États étrangers sont des États désignés.

Les provinces et les territoires procèdent actuellement à la mise en œuvre d'une nouvelle législation concernant l'établissement et l'exécution réciproque des ordonnances alimentaires. Les réponses au questionnaire sont fondées sur cette nouvelle législation. Cette législation sera essentiellement semblable d'une province ou territoire à l'autre, mis à part quelques distinctions ayant pour but de répondre aux besoins particuliers de chaque province ou territoire. La nouvelle législation basée sur la réciprocité remplacera l'ancienne procédure en deux étapes, d'une ordonnance provisoire à être confirmée, par un processus de demande simplifié. Toutefois, il sera encore possible d'utiliser la procédure en deux étapes lorsque celle-ci est requise par un État avec lequel il existe un accord de réciprocité. Une série de formulaires applicables à des situations particulières seront complétés et transmis dans la juridiction où réside le défendeur. Le tribunal de cette juridiction tiendra une audience et rendra l'ordonnance à être exécutée.

On prévoit que ces changements accéléreront le recouvrement des aliments. Pour l'application de cette législation, la responsabilité de transmettre et de recevoir les demandes sera attribuée à une autorité désignée.

Accords de réciprocité

Le Canada n'est partie à aucun traité multilatéral en matière d'obligations alimentaires. C'est plutôt sur la base d'accords de réciprocité que les ordonnances alimentaires étrangères sont exécutées. Ces accords de réciprocité sont négociés entre le gouvernement de la province ou du territoire concerné et l'État étranger. Leur conclusion dépend du degré de similitude de leurs lois respectives en matière de reconnaissance et d'exécution des ordonnances alimentaires. En général, ces lois seront considérées comme étant suffisamment similaires aux lois canadiennes relatives à la reconnaissance et l'exécution lorsque, notamment, les conditions suivantes sont respectées : a) elles prévoient une exécution adéquate et sans frais des ordonnances existantes; b) elles permettent aux personnes qui demandent une pension alimentaire d'obtenir une ordonnance à l'encontre d'une personne qui demeure dans un autre ressort lorsque aucune ordonnance n'a déjà été rendue; c) et elles permettent la révision d'une ordonnance existante.

En raison de ces différences, il existe une véritable mosaïque d'accords de réciprocité au Canada. Dans le document ci-joint, on retrouve une liste des pays avec lesquels les provinces et les territoires canadiens ont conclu des accords d'exécution réciproque des ordonnances alimentaires.

En vertu des lois sur l'établissement et l'exécution réciproques des ordonnances alimentaires, les provinces et les territoires du Canada peuvent reconnaître et exécuter une ordonnance alimentaire provenant d'un État étranger avec lequel il existe un accord de réciprocité. Si l'ordonnance ne peut être reconnue, elle sera traitée comme une demande en vue de l'établissement d'une ordonnance alimentaire pouvant être exécutée sur le territoire canadien au profit du demandeur étranger. S'il n'existe aucune ordonnance alimentaire, le demandeur étranger peut demander qu'une telle ordonnance

soit prononcée dans la province ou le territoire où réside le défendeur. On peut recourir à cette même procédure pour faire modifier une ordonnance alimentaire.

Dans les provinces et les territoires de common law, les ordonnances alimentaires provenant de l'étranger ne seront exécutées que si cette province ou ce territoire a conclu un accord de réciprocité avec la juridiction qui demande l'exécution de l'ordonnance.

Recours en vue de l'établissement et de l'exécution d'ordonnances alimentaires ouverts aux résidents d'États avec lesquels il n'existe aucun accord de réciprocité

Dans la province de droit civil du Québec, en plus du système basé sur les accords de réciprocité, les créanciers pourront obtenir, de leur propre initiative et à leurs frais, la reconnaissance d'une ordonnance alimentaire étrangère grâce à l'application des règles de droit international privé prévues au *Code civil du Québec*. Si l'ordonnance est reconnue, ils bénéficient gratuitement du système de perception des pensions alimentaires existant au Québec.

Même si certaines provinces et territoires de common law disposent de recours limités pour obtenir l'exécution d'ordonnances finales provenant d'États avec lesquels aucun accord de réciprocité n'a été conclu, il n'y existe aucune coopération administrative aux fins de l'établissement d'une ordonnance alimentaire. Cependant, le demandeur étranger peut s'adresser à un tribunal canadien en retenant les services d'un avocat dans une province ou un territoire donné, en vue d'obtenir une ordonnance alimentaire.

4. Exécution des ordonnances alimentaires

L'exécution de toutes les ordonnances alimentaires relève en premier lieu de la compétence des provinces et territoires.

Dès lors qu'une ordonnance est reconnue ou établie, chaque province et territoire dispose d'un système distinct d'exécution de l'ordonnance qui permettra la perception des sommes dues au créancier alimentaire. Ces sommes seront versées au créancier, qu'il réside ou non dans la province ou le territoire où l'ordonnance est exécutée. Le créancier n'aura pas à retenir les services d'un avocat dans la juridiction en question, étant donné que l'exécution de l'ordonnance est gratuite pour le créancier et est faite par le biais de programmes d'exécution financés par le gouvernement.

Même si le gouvernement fédéral n'exécute pas directement les ordonnances alimentaires, la perception des pensions alimentaires est une de ses priorités. Un bureau fédéral a été créé afin d'aider les provinces et les territoires dans leurs activités d'exécution, en recherchant les adresses des débiteurs, en saisissant les sommes fédérales désignées, comme les remboursements d'impôt fédéral, et en refusant l'octroi de permis fédéraux à certains payeurs de pensions alimentaires qui sont constamment en retard.

**« VUE D'ENSEMBLE DES ENTENTES DE RÉCIPROCITÉ CONCLUES AVEC
DES ADMINISTRATIONS ÉTRANGÈRES CONFORMÉMENT AUX DISPOSITIONS EROA »**

Mise à jour : 6 novembre 2002

| É-U | ALB | CB | MAN | NB | TN | TNO | NÉ | ONT | ÎPÉ | QC | SASK | TY | NUN |
|----------------------------|------------|-----------|------------|-----------|-----------|------------|-----------|------------|------------|-----------|-------------|-----------|------------|
| ARRANGEMENT FÉDÉRAL | F | F | F | | F | | F | F | | | | | |
| ALABAMA | F | F | F | | F | | F | F | | | X | | |
| ALASKA | F | F | F | X | F | | F | F | X | | X | X | |
| ARIZONA | F | F | F | X | F | | F | F | X | | X | | |
| ARKANSAS | F | F | F | | F | | F | F | X | | X | | |
| CALIFORNIE | F | F | F | X | F | X | F | F | X | X | X | X | X |
| CAROLINE DU NORD | F | F | F | X | F | | F | F | | | X | | |
| CAROLINE DU SUD | F | F | F | | F | | F | F | | | X | | |
| COLORADO | F | F | F | X | F | | F | F | X | | X | X | |
| CONNECTICUT | F | F | F | X | F | | F | F | X | | X | | |
| DAKOTA DU NORD | F | F | F | | F | | F | F | X | | X | X | |
| DAKOTA DU SUD | F | F | F | X | F | X | F | F | X | | X | X | X |
| DELAWARE | F | F | F | X | F | | F | F | X | | X | X | |
| DISTRICT DE COLUMBIA | F | F | F | | F | | F | F | | | X | | |
| FLORIDE | F | F | F | X | F | X | F | F | X | X | X | X | X |
| GÉORGIE | F | F | F | | F | | F | F | X | | X | | |
| HAWAII | F | F | F | X | F | X | F | F | X | | X | X | |
| IDAHO | F | F | F | X | F | X | F | F | X | | X | X | |
| ILLINOIS | F | F | F | | F | | F | F | X | | X | X | |
| INDIANA | F | F | F | X | F | | F | F | | | X | | |
| IOWA | F | F | F | X | F | X | F | F | | | X | X | X |
| KANSAS | F | F | F | | F | | F | F | | | X | | |
| KENTUCKY | F | F | F | | F | | F | F | X | | X | | |
| LOUISIANE | F | F | F | X | F | | F | F | X | | X | | |

**« VUE D'ENSEMBLE DES ENTENTES DE RÉCIPROCITÉ CONCLUES AVEC
DES ADMINISTRATIONS ÉTRANGÈRES CONFORMÉMENT AUX DISPOSITIONS EROA »**

Mise à jour : 6 novembre 2002

| É-U - suite | ALB | CB | MAN | NB | TN | TNO | NÉ | ONT | ÎPÉ | QC | SASK | TY | NUN |
|--------------------|------------|-----------|------------|-----------|-----------|------------|-----------|------------|------------|-----------|-------------|-----------|------------|
| MAINE | F | F | F | X | F | | F | F | X | X | X | | |
| MARYLAND | F | F | F | X | F | X | F | F | X | | X | | |
| MASSACHUSETTS | F | F | F | X | F | X | F | F | | X | X | X | |
| MICHIGAN | F | F | F | X | F | | F | F | X | | X | | |
| MINNESOTA | F | F | F | X | F | | F | F | X | | X | | |
| MISSISSIPPI | F | F | F | | F | | F | F | | | X | | |
| MISSOURI | F | F | F | X | F | X | F | F | X | | X | | X |
| MONTANA | F | F | F | X | F | | F | F | X | | X | X | |
| NEBRASKA | F | F | F | | F | | F | F | | | X | | |
| NEVADA | F | F | F | X | F | | F | F | X | | X | X | |
| NEW HAMPSHIRE | F | F | F | X | F | | F | F | | | X | X | |
| NEW JERSEY | F | F | F | X | F | X | F | F | X | X | X | X | |
| NOUVEAU MEXIQUE | F | F | F | | F | | F | F | | | X | | |
| NEW YORK | F | F | F | X | F | X | F | F | X | X | X | X | |
| OHIO | F | F | F | X | F | | F | F | | | X | X | |
| OKLAHOMA | F | F | F | X | F | | F | F | X | | X | | |
| ORÉGON | F | F | F | X | F | | F | F | X | | X | X | |
| PENNSYLVANIE | F | F | F | X | F | | F | F | | X | X | | |
| RHODE ISLAND | F | F | F | X | F | | F | F | | | X | | |
| TENNESSEE | F | F | F | X | F | X | F | F | X | | X | X | |
| TEXAS | F | F | F | X | F | | F | F | X | | X | X | |
| UTAH | F | F | F | | F | | F | F | X | | X | | |
| VERMONT | F | F | F | | F | | F | F | X | | X | X | |
| VIRGINIE | F | F | F | | F | X | F | F | X | | X | | |

**« VUE D'ENSEMBLE DES ENTENTES DE RÉCIPROCITÉ CONCLUES AVEC
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Mise à jour : 6 novembre 2002

| <i>É-U – suite</i> | <i>ALB</i> | <i>CB</i> | <i>MAN</i> | <i>NB</i> | <i>TN</i> | <i>TNO</i> | <i>NÉ</i> | <i>ONT</i> | <i>ÎPÉ</i> | <i>QC</i> | <i>SASK</i> | <i>TY</i> | <i>NUN</i> |
|------------------------------------|-------------------|------------------|-------------------|------------------|------------------|-------------------|------------------|-------------------|-------------------|------------------|--------------------|------------------|-------------------|
| VIRGINIE-OCCIDENTALE | F | F | F | X | F | | F | F | | | X | X | |
| WASHINGTON | F | F | F | X | F | | F | F | X | | X | X | |
| WISCONSIN | F | F | F | | F | | F | F | X | | X | X | |
| WYOMING | F | F | F | X | F | | F | F | X | | X | | |
| <i>PROTECTORATS DES É-U</i> | | | | | | | | | | | | | |
| GUAM | F | F | F | | F | | F | F | | | | | |
| ÎLES MARIANNES DU NORD | | | | | | | | | | | X | | |
| ÎLES VIERGES DES É-U | F | F | F | | F | | F | F | | | X | | |
| PORTO RICO | F | F | F | | F | | F | F | | | X | | |
| SAMOA AMÉRICAINNE | F | F | F | | F | | F | F | | | | | |
| <i>PACIFIQUE SUD</i> | | | | | | | | | | | | | |
| AUSTRALIE | X | X | X | | | X | | X | | | X | X | X |
| AUSTRALIE-MÉRIDIONALE | X | X | | X | X | | X | X | X | | | | |
| AUSTRALIE-OCCIDENTALE | X | X | | X | X | | X | X | X | | | | |
| FIDJI | X | X | X | X | | | | X | | | X | X | |
| NOUVELLE-ZÉLANDE | X | X | X | X | X | | X | X | X | | X | | X |
| NOUVELLE-ZÉLANDE ET ÎLES COOK | | | | | | X | X | X | | | | X | |
| NOUVELLES-GALLES DU SUD | X | | | X | X | | X | X | X | | | | |
| PAPOUASIE | | | | | X | | | | | | | | |
| PAPOUASIE ET NOUVELLE- GUINÉE | X | X | X | | X | | X | X | X | | X | | |
| QUEENSLAND | X | | | X | X | | | X | X | | | | |
| TASMANIE | X | X | | X | X | | X | X | X | | | | |

**« VUE D'ENSEMBLE DES ENTENTES DE RÉCIPROCITÉ CONCLUES AVEC
DES ADMINISTRATIONS ÉTRANGÈRES CONFORMÉMENT AUX DISPOSITIONS EROA »**

Mise à jour : 6 novembre 2002

| PACIFIQUE SUD - suite | ALB | CB | MAN | NB | TN | TNO | NÉ | ONT | ÎPÉ | QC | SASK | TY | NUN |
|---|------------|-----------|------------|-----------|-----------|------------|-----------|------------|------------|-----------|-------------|-----------|------------|
| TERRITOIRE DE LA CAPITALE DE L'AUSTRALIE | X | X | | | X | | X | X | X | | | | |
| TERRITOIRE DU NORD DE L'AUSTRALIE | X | X | | | X | | X | X | X | | | | |
| VICTORIA | X | X | | X | X | | X | X | X | | | | |
| EUROPE | | | | | | | | | | | | | |
| ALLEMAGNE | X | X | X | X | X | X | X | X | X | | X | X | |
| AURIGNY | | | X | | X | | | X | X | | | | |
| AUTRICHE | X | X | X | X | X | X | X | X | X | | X | X | X |
| ÉTAT DU JERSEY | X | X | X | | X | X | | X | X | | X | X | |
| FINLANDE | | | | | | | | X | | | | | |
| GIBRALTAR | | X | | | | | X | X | | | | | |
| GUERNESEY | | X | X | | X | X | X | X | X | | X | | |
| ÎLE DE MAN | X | X | X | X | X | X | X | X | X | | X | X | X |
| MALTE | X | | X | | X | | | X | X | | X | | |
| MALTE ET COLONIES | | | | | | X | | X | | | | | |
| NORVÈGE | X | X | X | | X | | X | | | | X | X | |
| POLOGNE | X | | X | X | X | | X | X | X | | X | X | |
| RÉPUBLIQUE DE L'IRLANDE | | | | | | | | | | | X | | |
| RÉPUBLIQUE SLOVAQUE | X | | | | | | | | | | | | |
| RÉPUBLIQUE TCHÈQUE | X | | | | X | | | | | | X | X | |
| ROYAUME-UNI | X | X | X | X | X | X | X | X | X | | X | X | X |
| SERCQ | | | X | | X | | | X | X | | | | |

**« VUE D'ENSEMBLE DES ENTENTES DE RÉCIPROCITÉ CONCLUES AVEC
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Mise à jour : 6 novembre 2002

| EUROPE – suite | ALB | CB | MAN | NB | TN | TNO | NÉ | ONT | ÎPÉ | QC | SASK | TY | NUN |
|-------------------------|------------|-----------|------------|-----------|-----------|------------|-----------|------------|------------|-----------|-------------|-----------|------------|
| SUÈDE | | | | | | | | | | | X | | |
| SUISSE | | | | | | | | | | | X | | |
| CARAÏBES | | | | | | | | | | | | | |
| BAHAMAS | | | | | | | | | | | X | | |
| BARBADE | X | X | X | | | X | | | | | X | | |
| BERMUDES | | | | X | | | | | | | | | |
| ÎLES CAYMAN | | | | | | | | | | | | X | |
| TRINIDAD | | | | X | | | | | | | | | |
| AFRIQUE | | | | | | | | | | | | | |
| AFRIQUE DU SUD | X | X | X | | | X | | X | | | | | |
| RÉPUBLIQUE DU GHANA | | | X | | | | | X | | | | | |
| ZIMBABWE | | X | X | | X | X | | X | X | | | X | |
| ASIE | | | | | | | | | | | | | |
| HONG KONG | | X | X | | | | | X | | | X | | |
| RÉPUBLIQUE DE SINGAPOUR | X | X | X | X | X | X | X | | | | | X | X |

Préparé par : Linda Levells-Hince

LÉGENDE :

F – indique qu'un arrangement fédéral existe avec les États-Unis d'Amérique, incluant les cinquante états, la Samoa américaine, le District de Colombia, le Guam, le Porto Rico et les Îles vierges des États-Unis
X – indique qu'une entente de réciprocité est en vigueur

Abbreviations :

É-U = États-Unis d'Amérique

**« VUE D'ENSEMBLE DES ENTENTES DE RÉCIPROCITÉ CONCLUES AVEC
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Mise à jour : 6 novembre 2002

Provinces et territoires du Canada :

ALB = Alberta
CB = Colombie-Britannique
ÎPÉ = Îles-du-Prince-Édouard
MAN = Manitoba
NB = Nouveau-Brunswick
NÉ = Nouvelle-Écosse
NUN = Nunavut
ON = Ontario
QC = Québec
SASK = Saskatchewan
TN = Terre-Neuve
TNO = Territoires du Nord-Ouest
TY = Territoire du Yukon

Îles

Îles

**NOTE D'INFORMATION ET QUESTIONNAIRE CONCERNANT
UN NOUVEL INSTRUMENT MONDIAL SUR LE RECOUVREMENT INTERNATIONAL
DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE**

établi par William Duncan
Secrétaire général adjoint

* * *

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

drawn up by William Duncan
Deputy Secretary General

*Document préliminaire No 1 de juin 2002
à l'intention de la Commission spéciale sur les Obligations Alimentaires*

*Preliminary Document No 1 of June 2002
for the attention of the Special Commission on Maintenance Obligations*

Permanent Bureau of the Conference, Scheveningsweg 6, 2517 KT The Hague, Netherlands

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**NOTE D'INFORMATION ET QUESTIONNAIRE CONCERNANT UN NOUVEL
INSTRUMENT MONDIAL SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS
ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE**

I HISTORIQUE

La Commission spéciale sur les obligations alimentaires de la Conférence de La Haye de droit international privé d'avril 1999 s'est réunie pour « examiner le fonctionnement des Conventions de La Haye sur les obligations alimentaires et de la Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger [ainsi que ...] l'opportunité de réviser ces Conventions de La Haye et l'inclusion dans un nouvel instrument de dispositions sur la coopération judiciaire et administrative »¹.

La Commission spéciale a adopté unanimement les recommandations suivantes concernant la réforme du système :

« La Commission spéciale sur le fonctionnement des Conventions de La Haye relatives aux obligations alimentaires et de la Convention de New York sur le recouvrement des aliments à l'étranger,

- après avoir examiné le fonctionnement pratique de ces Conventions et tenu compte d'autres instruments et arrangements régionaux et bilatéraux,*
- constatant le besoin de moderniser et d'améliorer le système international de recouvrement des aliments pour enfants et pour d'autres personnes à charge,*
- recommande que la Conférence de La Haye entame des travaux en vue de l'établissement d'un nouvel instrument mondial.*

Ce nouvel instrument devrait :

- prévoir comme l'un de ses éléments essentiels des dispositions en matière de coopération administrative,*
- être complet et s'inspirer des meilleurs aspects des Conventions existantes, en particulier des dispositions en matière de reconnaissance et d'exécution des obligations alimentaires,*
- prendre en considération les besoins futurs, les développements survenant dans les systèmes nationaux et internationaux de recouvrement d'obligations alimentaires et les possibilités offertes par les progrès des techniques d'information,*
- être structuré de manière à combiner l'efficacité maximale avec la flexibilité nécessaire pour assurer une large ratification.*

Ces travaux devraient être menés en coopération avec d'autres organisations internationales, en particulier les Nations Unies.

La Conférence de La Haye, tout en s'acquittant de cette tâche, devrait continuer à aider à promouvoir le fonctionnement efficace des Conventions existantes et la ratification de la Convention de New York et des deux Conventions de La Haye de 1973.

¹ Rapport et Conclusions de la Commission spéciale sur les obligations alimentaires d'avril 1999, établi par le Bureau Permanent en décembre 1999, par. 1 (<http://www.hcch.net/f/workprog/maint.html>).

La Commission spéciale rappelle et souligne l'importance des recommandations pratiques contenues dans les Conclusions générales de la Commission spéciale de novembre 1995, qui ont été établies par le Bureau Permanent (Affaires générales, Doc. pré-l. No 10, mai 1996) ».

La Commission spéciale sur les affaires générales de mai 2000 a conclu, suivant cette recommandation, que l'ordre du jour de la Conférence devrait inclure en priorité « l'établissement d'une nouvelle convention exhaustive en matière d'obligations alimentaires, qui devrait améliorer les Conventions de La Haye existantes en la matière et inclure des dispositions sur la coopération judiciaire et administrative. Les Etats non membres de la Conférence de La Haye, notamment les Etats parties à la Convention de New York de 1956 devraient être invités à participer à ce futur travail »².

La Commission I sur les affaires générales et la politique de la Dix-neuvième Session diplomatique de la Conférence de La Haye de droit international privé, qui s'est réunie du 22 au 24 avril 2002, a réaffirmé la conclusion de la Commission spéciale sur les affaires générales et la politique de mai 2000 et a ajouté que « tous les efforts devraient être faits pour s'assurer d'un processus inclusif, comprenant si possible la traduction des documents principaux et l'interprétation en espagnol des réunions plénières »³.

II PLAN D'ACTION

Actuellement, le Bureau Permanent effectue des recherches et des consultations afin de préparer le terrain des négociations, au sein de la Conférence de La Haye, sur le nouvel instrument mondial relatif aux obligations alimentaires. Un rapport sera préparé par le Bureau permanent afin de fournir aux Membres et aux autres Etats des informations de fond sur les développements aux niveaux national et international, et d'identifier certaines des questions susceptibles de susciter débat lorsque les négociations relatives à ce nouvel instrument commenceront. Il est prévu que le rapport sera disponible pour les Etats avant la fin de l'année 2002, et qu'une première Commission spéciale se tiendra dans la première partie de l'année 2003, afin d'entamer les négociations.

III LE QUESTIONNAIRE

En vue de recueillir des informations pertinentes et de tester les opinions, dans un premier temps sur les éléments principaux qui devraient être inclus dans le nouvel instrument, le Bureau Permanent a établi le questionnaire ci-dessous. Celui-ci est envoyé à tous les Etats membres de la Conférence de La Haye, aux Etats parties à la Convention de New York de 1956 et aux organisations internationales gouvernementales et non-gouvernementales concernées. Le questionnaire sera aussi disponible sur le site Internet de la Conférence de La Haye à : <http://www.hcch.net>.

Le questionnaire est divisé en quatre parties qui abordent, premièrement, la pratique en vertu des instruments internationaux existants, deuxièmement, la pratique en vertu des différents systèmes nationaux, troisièmement, les éléments à inclure dans le nouvel instrument et, quatrièmement, les partenaires de la négociation.

Le projet d'établir un nouvel instrument relatif aux obligations alimentaires peut potentiellement bénéficier à des milliers de personnes, enfants et adultes, dans plusieurs Etats de par le monde, et contribuer également à la réduction de la dépendance à l'aide sociale publique. Le questionnaire est un élément important dans l'établissement de fondations solides sur lesquelles le nouvel instrument pourra

² Conclusions de la Commission spéciale de mai 2000 sur les affaires générales et la politique de la Conférence, Doc. pré-l. N°10 de juin 2000, page 17, par. 9 (<http://www.hcch.net/f/workprog/genaff.html>)

³ Document de travail N°4 de la Commission I, distribué le 24 avril 2002.

s'appuyer. Les Etats et les organisations auxquels le questionnaire est transmis sont invités à transmettre leurs réponses au Bureau Permanent, si possible pour **la fin septembre 2002**

PARTIE I PRATIQUE EN VERTU DES INSTRUMENTS INTERNATIONAUX EXISTANT

Le questionnaire sur les obligations alimentaires, transmis préalablement à la Commission spéciale d'avril 1999, a déjà fourni beaucoup d'informations sur la pratique en vertu des instruments internationaux existants. Les parties I à IV de ce questionnaire sont jointes en annexe I à ce document.

Les Etats et les organisations qui ont répondu au questionnaire en 1999 sont invités à fournir les réponses supplémentaires aux parties I à IV de ce questionnaire concernant toute évolution pertinente survenue depuis avril 1999.⁴

Les Etats et les organisations qui ont été dans l'impossibilité de répondre en 1999 sont invités à transmettre des réponses complètes.

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

Nature de la décision relative à des aliments

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

Réponse :

a) Concernant les enfants, il peut y avoir une ~~décision judiciaire~~ fixant des aliments

- ?? **en connexion avec une procédure de paternité, en vertu de l'art. 280 al. 3 du Code civil suisse (CC ; cf. extraits annexe 1),**
- ?? **suite à une action tendant à obtenir une contribution d'entretien proprement dite (art. 279 ss. CC),**
- ?? **dans une procédure de divorce (art. 111 ss. CC), de séparation (art. 117 s. CC) ou dans le cadre des mesures judiciaires visant à protéger l'union conjugale des parents (art. 173 CC), y compris les éventuelles mesures provisoires y relatives (art. 137 CC et 281 al. 1 CC).**

Une autre forme de « décision » relative à des aliments envers l'enfant est la ~~convention relative aux contributions d'entretien approuvée par l'autorité tutélaire~~ compétente, soit une autorité administrative, en vertu de l'art. 287 CC. Ces conventions peuvent également être approuvées par le juge dans le cadre d'une procédure judiciaire.

b) La décision fixant des aliments au bénéfice de l'époux est régulièrement une décision (judiciaire) de divorce ou de séparation, une mesure judiciaire de protection de l'union conjugale ou encore une mesure provisoire dans une procédure de divorce ou de séparation (cf. les articles du CC cités sous a)

En revanche, des décisions administratives ne sont pas connues par le droit suisse dans ce domaine.

S'agissant des autres membres de la famille, il peut y avoir une décision

⁴ Voir extraits des réponses au Questionnaire sur les obligations alimentaires, Doc. prélim. N° 3 à l'intention de la Commission spéciale d'avril 1999 (<http://www.hcch.net/f/workprog/maint.html>).

judiciaire fixant des aliments aux parents en ligne directe ascendante et descendante – l'obligation d'entretien des père et mère et du conjoint étant réservée - , dans la mesure où la personne débitrice vit dans l'aisance, alors que la personne créancière tomberait autrement dans le besoin (art. 328 s. CC). Enfin, la mère non mariée peut, devant le juge compétent, demander au père de l'indemniser des frais d'entretien pour un certain nombre de semaines avant et après la naissance de l'enfant (art. 295 CC).

Il s'agit dans la très grande majorité des cas d'un paiement périodique. Toutefois, lorsque des circonstances particulières le justifient, le juge peut imposer un règlement définitif en capital dans le cadre d'un divorce (art. 126 al. 2 CC). Les parties d'une convention relative aux contributions d'entretien pour un enfant peuvent également convenir ; à titre exceptionnel, d'un versement d'une indemnité unique (art. 288 CC). Une circonstance particulière peut être le fait que les paiements périodiques et réguliers futurs ne sont durablement pas garantis. Exemple : départ du débiteur dans un pays où le recouvrement d'aliments est aléatoire (!), développement futur hautement incertain de sa situation financière etc.

Eligibilité

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

Réponse :

Sont en droit de bénéficier d'aliments

- ?? les enfants mineurs,
- ?? les enfants majeurs en formation selon certaines conditions (rapports non perturbés avec les parents, formation à achever dans des délais normaux, moyens économiques des parents, art. 277 CC),
- ?? les époux,
- ?? les parents en ligne directe ascendante et descendante selon certaines conditions (cf. réponse ad 1, art. 328 CC),
- ?? la mère non mariée pour une période limitée avant (et après) la naissance d'un enfant (art. 295 CC), indépendamment des droits de l'enfant né.

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

Réponse :

La notion « à charge » est plutôt utilisée dans le droit fiscal. Dans le contexte des aliments il faut sans doute entendre par enfant « à charge » un enfant qui ne peut pas subvenir à son entretien par le produit de son travail ou par ses autres ressources et qui, de ce fait, doit être entretenu par ses parents (art. 276 CC).

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

Réponse :

S'agissant de l'obligation alimentaire, la loi fédérale sur le droit international privé (LDIP) renvoie expressément, tant pour les prétentions de l'enfant que pour celles des époux, à la convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires (art. 49 et 83 LDIP). L'application par analogie de la dite convention est également prévue pour les prétentions de la mère non mariée (art. 83 al. 2 LDIP).

De manière plus générale, les effets du mariage sont en principe régis par le droit de l'Etat dans lequel les époux sont domiciliés (art. 48 al. 1 LDIP) et les effets de la filiation par le droit de l'Etat de la résidence habituelle de l'enfant (art. 82 al.1 LDIP). La loi applicable peut être différente dans des cas particuliers (si les époux ne sont pas domiciliés dans le même Etat respectivement si aucun des parents n'est domicilié dans l'Etat de résidence de l'enfant, art. 48 al. 2 LDIP et 82 al. 2 LDIP).

Procédure d'évaluation initiale des aliments

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

Réponse :

Comme il a été dit plus haut (cf. réponse ad 1 a), les deux sont possibles.

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

Réponse :

Non. Si l'enfant a sa résidence habituelle en Suisse et que la procédure pour fixer les contributions d'entretien se déroule en Suisse, la procédure n'est pas différente, que le parent débiteur vive à l'étranger ou non.

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

Réponse :

La seule différence est qu'il y a une procédure en plus pour la fixation des contributions d'entretien envers les enfants, à savoir la possibilité de conclure une convention approuvée par l'autorité de tutelle (cf. réponse ad 1 a).

Méthodes de calcul des aliments

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

Réponse :

En Suisse, chaque cas est en principe traité individuellement. Pour les enfants mineurs, l'art. 285 al. 1 CC est déterminant: « La contribution d'entretien doit correspondre aux besoins de l'enfant ainsi qu'à la situation et aux ressources des père et mère, compte tenu de la fortune et des revenus de l'enfant ».

Il n'existe pas de formule prédéfinie ou de table de calcul contraignante. Les recommandations de l'office de jeunesse du canton de Zurich pour le calcul des contributions d'entretien destinées aux enfants (cf. « *Empfehlungen des Jugendamtes des Kantons Zürich zur Bemessung von Unterhaltsbeiträgen für Kinder* », janvier 2000, annexe 2) ont bien une certaine influence dans la pratique et donnent des pistes aux juges. Toutefois, les besoins des enfants peuvent différer en fonction du lieu de domicile (milieu citadin ou rural), de la santé, de la formation, du milieu social etc. S'agissant de la situation et des ressources des parents, elles ne peuvent qu'être prises en compte individuellement. Outre les revenus et les dépenses, il y a lieu de tenir compte également de la fortune d'une part et du revenu hypothétique que le parent débiteur pourrait raisonnablement percevoir d'autre part.

Pour les enfants majeurs, « les père et mère doivent, dans la mesure où les circonstances permettent de l'exiger d'eux, continuer à subvenir à leur entretien jusqu'à la fin de cette formation pour autant qu'elle soit achevée dans les délais normaux » (art. 277 al. 2 CC). En plus des critères qui sont pris en compte pour les enfants mineurs s'ajoutent donc des critères liés à la formation et aux rapports entretenus entre parents et enfants majeurs. De plus, si on peut laisser au parent d'un enfant mineur tout juste le minimum vital, les parents d'un enfant majeur ont droit à un peu plus de souplesse et d'égard au niveau financier.

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

Réponse :

Non, si la procédure se déroule en Suisse dans les deux cas.

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

Réponse :

Oui.

- S'agissant du calcul des aliments envers l'époux, les critères sont énumérés de manière détaillée à l'art. 125 al. 2 CC. Cette disposition est très explicite et justifie qu'elle soit citée in extenso (cf. annexe 1):

"Art. 125

Entretien après le divorce

I. Conditions

¹ **Si l'on ne peut raisonnablement attendre d'un époux qu'il pourvoie lui-même à son entretien convenable, y compris à la constitution d'une prévoyance vieillesse appropriée, son conjoint lui doit une contribution équitable.**

² **Pour décider si une contribution d'entretien est allouée et pour en fixer, le cas échéant, le montant et la durée, le juge retient en particulier les éléments**

suivants:

- 1. la répartition des tâches pendant le mariage;**
- 2. la durée du mariage;**
- 3. le niveau de vie des époux pendant le mariage;**
- 4. l'âge et l'état de santé des époux;**
- 5. les revenus et la fortune des époux;**
- 6. l'ampleur et la durée de la prise en charge des enfants qui doit encore être assurée;**
- 7. la formation professionnelle et les perspectives de gain des époux, ainsi que le coût probable de l'insertion professionnelle du bénéficiaire de l'entretien;**
- 8. les expectatives de l'assurance-vieillesse et survivants et de la prévoyance professionnelle ou d'autres formes de prévoyance privée ou publique, y compris le résultat prévisible du partage des prestations de sortie.**

³ **L'allocation d'une contribution peut exceptionnellement être refusée en tout ou en partie lorsqu'elle s'avère manifestement inéquitable, en particulier parce que le créancier:**

- 1. a gravement violé son obligation d'entretien de la famille;**
- 2. a délibérément provoqué la situation de nécessité dans laquelle il se trouve;**
- 3. a commis une infraction pénale grave contre le débiteur ou un de ses proches."**

- S'agissant du calcul des aliments envers d'autres membres de la famille, la personne tenue à fournir ces aliments à ses parents en ligne directe ascendante et descendante doit vivre dans l'aisance. La conférence suisse des institutions d'action sociale (CSIAS) a développé quelques recommandations chiffrées à ce sujet (cf. *Aide sociale: concepts et normes de calcul, CSIAS, 3 édition décembre 2000, pt. F.4 et H.4, annexe 3*). L'autre condition est que la personne à aider tomberaient dans le besoin à défaut de cette assistance.

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

Réponse :

La loi applicable à l'évaluation des aliments est la même qui détermine l'éligibilité (cf. réponse ad 4).

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

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

Réponse :

- **L'obligation alimentaire envers les enfants :** L'art. 286 al. 1 CC stipule que le juge peut ordonner que la contribution d'entretien peut automatiquement être augmentée ou réduite dès que des changements déterminés interviennent dans les besoins de l'enfant, les ressources des père et mère ou le coût de la vie. Dans la pratique, il est ordonné que la contribution augmente d'office par tranche d'âge déterminée de l'enfant (une augmentation est fixée par exemple à partir de 6 ans, puis à partir de 12 ans) et/ou est liée à l'augmentation de l'indice suisse des prix à la consommation (une augmentation proportionnelle est ordonnée par exemple à chaque fois que cet indice augmente de 10 points) ou peut être réduite automatiquement dès l'instant où l'enfant quitte la Suisse pour un pays donné ou que le père débiteur annonce à l'avance un salaire inférieur pour une date déterminée.

- **L'obligation alimentaire envers l'époux :** En vertu de l'art. 128 CC, le juge peut

décider que la contribution d'entretien sera augmentée ou réduite d'office en fonction de variations déterminées du coût de la vie.

- L'obligation alimentaire envers d'autres membres de la famille : une réévaluation automatique en fonction de l'indice suisse des prix à la consommation n'est pas exclue non plus.

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

Réponse :

cf. réponse ad 12. L'indice suisse des prix à la consommation est réévalué et publié chaque mois (cf. *Indice suisse des prix à la consommation, annexe 4*). La réévaluation automatique des contributions d'entretien dans les jugements s'effectue en revanche une fois par année. L'augmentation valable à partir du 1er janvier se calcule alors généralement en fonction de l'indice du mois de novembre de l'année écoulée, divisé par l'indice de base indiqué dans le jugement ; la formule exacte de ce calcul y figure également.

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

Réponse :

- S'agissant de la décision concernant les enfants, le juge peut modifier ou supprimer la contribution d'entretien si la situation change notablement (art. 286 al. 2 CC). Les contributions d'entretien fixées par convention peuvent également être modifiées pour ces raisons (art. 287 al. 2 CC). La modification notable chez l'enfant peut par exemple découler de son placement dans une institution ou du fait qu'il peut seul subvenir à ses besoins. Chez le parent débiteur, une modification notable peut être par exemple le fait qu'il doit subvenir aux besoins de plusieurs enfants ou que son salaire s'est sensiblement et durablement amoindri (chômage ou maladie de longue durée).

- S'agissant de la décision concernant l'époux (divorce), l'art. 129 CC citée ci-après est éclairant (cf. *annexe 1*):

„Art. 129

3. Modification par le juge

¹ *Si la situation du débiteur ou du créancier change notablement et durablement, la rente peut être diminuée, supprimée ou suspendue pour une durée déterminée; une amélioration de la situation du créancier n'est prise en compte que si une rente permettant d'assurer son entretien convenable a pu être fixée dans le jugement de divorce.*

² *Le créancier peut demander l'adaptation de la rente au renchérissement pour l'avenir, lorsque les revenus du débiteur ont augmenté de manière imprévisible après le divorce.*

³ *Dans un délai de cinq ans à compter du divorce, le créancier peut demander l'allocation d'une rente ou son augmentation lorsque le jugement de divorce constate qu'il n'a pas été possible de fixer une rente permettant d'assurer l'entretien convenable du créancier, alors que la situation du débiteur s'est améliorée depuis lors."*

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

Réponse :

Il s'agit ici d'abord d'une question de compétence. Selon la Convention de Lugano du 16.9.1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, le débiteur d'aliments peut être attiré devant le Tribunal du lieu de son domicile ou de celui du domicile ou de la résidence habituelle du créancier d'aliments (art. 2 al. 1 et art. 5 ch. 2 de ladite Convention). Le créancier d'aliments quant à lui ne peut pas être contraint à participer à une procédure dans l'Etat de domicile du débiteur d'aliments. Ces règles de compétences valent également pour la modification d'une décision fixant les contributions d'entretien. Dans les cas où l'Etat concerné n'est pas membre de la Convention de Lugano, la LDIP prévoit des règles de compétences semblables, à savoir que pour l'entretien de l'enfant, les tribunaux suisses de la résidence habituelle de l'enfant ou ceux du domicile, et, à défaut, ceux de la résidence habituelle du parent défendeur sont compétents (art. 79 LDIP). Un for subsidiaire d'origine, si l'enfant ou le parent défendeur est suisse, est également prévu (art. 80 LDIP).

Dans ces circonstances bien précises et si la situation a notablement changé depuis la date du prononcé de la décision étrangère, celle-ci peut être modifiée par un tribunal suisse.

Détermination de la paternité

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

Réponse :

En Suisse, la question se pose différemment, à savoir que généralement, la paternité est constatée avant qu'une procédure en matière d'aliments ne soit mise en route. Il est cependant possible que la demande d'aliments soit déposée simultanément avec l'action en paternité, respectivement dans le cadre de la procédure visant à déterminer la paternité (art. 280 al. 3 CC). Le droit applicable pour l'établissement, la constatation et la contestation de la filiation sont régis par le droit de l'Etat de la résidence habituelle de l'enfant au moment de sa naissance, à moins qu'un intérêt prépondérant n'exige que le droit de l'Etat de la résidence habituelle de l'enfant au moment de la date de l'action soit appliqué. Toutefois, si aucun des parents n'est domicilié dans cet Etat et si les trois personnes concernées ont la même nationalité, le droit de l'Etat d'origine s'appliquera (art. 68 et 69 LDIP). Le droit applicable pour l'obligation alimentaire peut être différent dans ce contexte, dans la mesure où il s'agira généralement du droit de l'Etat de la résidence habituelle actuelle de l'enfant, et non de celle au moment de sa naissance.

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

Réponse :

Encore une fois, la paternité n'est pas déterminée dans le cadre d'une procédure en matière d'aliments, mais l'inverse. Si la paternité n'a pas été établie par le mariage avec la mère ou par reconnaissance, la mère et l'enfant peuvent intenter action en paternité. Tant que l'enfant est mineur, soit son curateur, soit son tuteur peut agir pour lui. Si une assistance judiciaire pour la prise en charge des frais de justice, et au besoin pour les honoraires d'avocat peut être octroyée en fonction de la situation économique, une aide administrative particulière n'est pas prévue, étant donné que l'enfant a un curateur (si sa mère à l'autorité parentale) ou un tuteur (si personne d'autre n'a l'autorité parentale).

- 18 Veuillez préciser les procédures judiciaires et les méthodes (y compris les procédés

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

Réponse :

La procédure judiciaire est une procédure civile ordinaire, régie par les art. 261 ss. CC et par les codes cantonaux de procédure. S'agissant des méthodes scientifiques, le test ADN est celui qui, depuis une dizaine d'années, est utilisé pratiquement de manière exclusive en Suisse.

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

Réponse :

Une décision relative à des aliments envers un enfant ne peut pas être reconnue si la paternité n'a pas été établie préalablement. Si la paternité a été établie à l'étranger conformément à la loi applicable et à la méthode généralement admise dans ce pays, la Suisse ne refusera la reconnaissance que si cette méthode est manifestement incompatible avec l'ordre public (par exemple établissement de la paternité sur la base de l'audition d'un témoin et non sur la base d'une méthode scientifique telle que le test ADN ou l'analyse sanguin).

Aide juridique et assistance judiciaire et administrative

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

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

Réponse :

Le représentant légal d'un enfant (mineur) bénéficie des aides suivantes s'il n'a pas les moyens financiers d'agir lui-même, avec les services d'un avocat :

- ?? a) L'art. 290 CC prévoit une aide adéquate et gratuite pour obtenir l'exécution des prestations d'entretien. Cette aide étatique est fournie par un office désigné par le droit cantonal. Il s'agit d'une assistance administrative et d'une aide juridique, dans la mesure où cet office s'occupe le cas échéant d'entamer une procédure de poursuite contre le débiteur.
- b) Les créanciers résidant dans un Etat signataire de la Convention de New York du 20.6.1956 sur le recouvrement des aliments à l'étranger bénéficient de cette aide.
- ?? a) Selon l'art. 293 al. 2 CC, il est possible que la collectivité publique avance les contributions d'entretien. Dans ce cas, la prétention passe à celle-ci qui en devient la créancière.
- b) Cette possibilité n'est ouverte qu'aux créanciers qui résident en Suisse.
- ?? a) Le représentant légal de l'enfant peut aussi mandater un avocat en vue d'engager une procédure même s'il n'a pas les moyens financiers pour payer ses honoraires. Le Tribunal abordé peut en effet le faire bénéficier partiellement ou totalement de l'assistance judiciaire, en fonction de la situation économique. L'assistance judiciaire est réglée par les cantons.
- b) Tous les créanciers résidant à l'étranger qui ne disposent pas de ressources suffisantes peuvent bénéficier d'une assistance judiciaire minimale, pour autant que leur cause ne soit pas dépourvue de toute chance de succès.

21 Veuillez spécifier les principales conditions d'éligibilité, y compris tous les tests relatifs aux moyens (financiers), pour les différentes formes d'assistance disponibles.

Réponse :

- S'agissant de l'aide découlant de l'art. 290 CC, la condition pour les créanciers résidant en Suisse est l'existence d'un titre respectivement d'une décision préalable fixant la contribution d'entretien. Les moyens financiers ne jouent aucun rôle pour bénéficier de cette aide. Pour les créanciers résidant dans un Etat signataire de la Convention de New York, l'étendue de l'aide est tracée par l'art. 6 de la Convention. En particulier, l'office compétent peut tenter de trouver un arrangement avec le débiteur même sans décision préalable fixant les aliments.

- Par contre, des avances effectuées sur la base de l'art. 293 al. 2 CC ne sont

octroyées qu'après une analyse de la situation financière de l'enfant et du parent qui en a la charge. Les limites de revenu diffèrent d'un canton à l'autre.
- Pour l'octroi de l'assistance judiciaire, les conditions sont la faiblesse de la situation économique d'une part et les chances minimales de gagner le procès d'autre part.

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

Réponse :

Non, pour ce qui a trait aux demandes d'aliments envers l'époux. S'agissant des demandes d'aliments envers d'autres membres de la famille, seule la possibilité de l'assistance judiciaire subsiste. Les autres aides ne sont pas prévues, sauf pour les créanciers résidant dans un Etat signataire de la Convention de New York, dans les limites tracées par l'art. 6 de la Convention.

Frais de justice et autres dépenses

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

Réponse :

En règle générale et pour toute procédure civile y compris l'action visant à fixer des contributions d'entretien, les types de frais sont d'une part les frais de tribunaux et d'autre part les honoraires d'avocat. Ces dépenses varient en fonction des difficultés de la cause et de la longueur de la procédure. S'il s'agit d'exécuter une décision dans une procédure de poursuite, les frais sont minimes et sont généralement pris en charge par l'Etat pour les créanciers résidant dans un Etat signataire de la Convention de New York.

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

Réponse :

Non. La partie qui perd un procès doit payer ces frais indépendamment et en sus des pensions alimentaires.

Accords relatifs au recouvrement et transfert et exécutions des décisions

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

Réponse :

Si le débiteur d'aliments ne remplit pas ses obligations alimentaires fixées par une décision, le représentant légal de l'enfant respectivement l'époux peut agir en privé (éventuellement en mandatant un avocat) ou peut bénéficier des aides mentionnés sous chiffre 20 ci-dessus. Que ce soit la voie privée ou la voie étatique utilisée, les procédures de recouvrement décrites sous chiffres 27 et 28 ci-après sont les mêmes.

- 26 Quels accords particuliers, le cas échéant, sont appliqués lorsque les paiements

sont effectués ou recouvrés depuis l'étranger ?

Réponse :

Sont à citer en particulier la Convention de Lugano précitée, qui prévoit une procédure d'exequatur rapide (cf. art. 31 ss. de ladite Convention), la Convention de la Haye de 1973 sur la reconnaissance et l'exécution de décisions en matière alimentaire et la Convention de New York également précitée. Si les deux premières conventions nommées sont applicables indépendamment de l'implication d'une autorité étatique, une requête déposée dans le cadre de la Convention de New York n'est généralement traitée que par un organe étatique.

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

Réponse :

La procédure principale est fédérale et se fonde sur la Loi fédérale sur la poursuite pour dettes et la faillite (LP). Elle s'applique pour toute exécution forcée ayant pour objet une somme d'argent ou des sûretés à fournir.

Tant pour les décisions relatives à des aliments envers les enfants qu'envers les époux, le Code civil prévoit deux procédures particulières, à savoir d'une part l'avis directe du juge aux débiteurs (très souvent, il s'agit de l'employeur), d'opérer tout ou partie de leurs paiements entre les mains du représentant légal de l'enfant (art. 291 CC) respectivement de l'époux créancier (art. 132 al. 1 CC);

d'autre part, le juge peut astreindre le débiteur à fournir des sûretés si ce dernier se prépare à fuir ou à dilapider sa fortune (art. 292 CC pour l'obligation envers l'enfant respectivement art. 132 al. 2 CC pour celui envers l'époux) . Ces deux procédures ne sont pas prévues pour les obligations envers les autres membres de la famille.

Il existe également une procédure pénale qui peut faire pression sur le débiteur d'aliments afin de le forcer de payer, les buts civils et pénaux n'étant cependant pas similaires. L'art. 217 du Code pénal suisse (CP) prévoit en effet une condamnation à une peine d'emprisonnement si le débiteur d'aliments viole ses obligations d'entretien.

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

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

Réponse :

Si des paiements volontaires ne sont pas possibles, les méthodes de recouvrement suivantes sont prévues :

- poursuite pour dettes selon les art. 89 ss. LP (cf. réponse ad 27 ci-dessus), avec pour conséquence la saisie de salaire, la saisie de biens mobiliers, ou à

défaut une vente publique de biens immobiliers ;

- avis directe du juge aux débiteurs et ordre du juge de fournir des sûretés (cf. réponse ad 27 ci-dessus) ;

- poursuite pénale (cf. réponse ad 27 ci-dessus).

Enfin, si certaines conditions sont remplies, soit lorsque le débiteur n'habite pas en Suisse mais y possède des biens, le créancier peut requérir le séquestre de ces biens (par exemple de comptes bancaires, du contenu d'un safe etc.), conformément aux art. 271 ss. LP.

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

Réponse :

Lors de paiements d'aliments d'une banque à l'autre, des frais sont engagés tant par la banque qui transmet les fonds que par la banque à l'étranger qui les reçoit. Le montant de ces frais dépend des éléments suivants :

- ?? **les frais de la banque suisse à qui le débiteur donne l'ordre de paiement. Il n'existe pas de tarif uniforme y relatif en Suisse ;**
- ?? **le moyen de virement: le transfert en papier est plus cher que le transfert électronique (e-banking) ;**
- ?? **la somme du montant transféré ;**
- ?? **le pays vers lequel le montant est viré ;**
- ?? **les frais demandés par la banque qui reçoit le montant, frais qui sont assez élevés en général. Ils peuvent être réduits sur la base de conventions entre cette banque et le créancier ;**
- ?? **le fait qu'il y a virement direct ou indirect (système « clearing ») ;**
- ?? **la monnaie transférée ;**
- ?? **la précision des indications (les frais se réduisent si l'on indique le numéro du compte international du créancier).**

Le fait qu'il s'agisse d'aliments ne modifie en rien le montant des frais. Les frais ne sont pas non plus influencés par la personne qui donne l'ordre de paiement. Cela dépend plutôt des accords conclus entre la banque et le client, que ce dernier soit une personne privée ou une autorité.

Les frais peuvent être partagés de différentes manières entre le débiteur et le créancier. Souvent, le débiteur prend en charge les frais de la banque qui tranfert les fonds et le créancier les frais de sa propre banque. Mais on peut très bien imaginé aussi que le débiteur prenne en charge l'ensemble des frais. La solution inverse ne saurait être recommandée, dans la mesure où elle désavantage les créanciers.

En résumé, les frais dépendent beaucoup du cas individuel. En Europe, la politique du virement international des fonds est en mutation. L'on tend à harmoniser les frais (cf. *Ingeborg Schwan, Europäischer Zahlungsverkehr : Preispolitik im Umbruch, dans : ClearIT, Ausgabe 12, Februar 2002, pages 7ss., annexe 5*).

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

Réponse :

Non. Il arrive cependant dans la pratique que le débiteur ou l'autorité en charge de l'encaissement fassent des virements groupés pour plusieurs mois, au lieu de transférer les aliments mensuellement, ce afin de réduire les frais. Pour le reste, nous renvoyons au chiffre 29 ci-dessus.

Les virements par la poste dépendent également de plusieurs facteurs, à savoir:

- ?? du fait que les parties ont un compte postal ;**
- ?? du moyen de transfert (électronique ou autre) ;**
- ?? du type de paiement au créancier (en argent comptant, sur un compte postal ou bancaire) ;**
- ?? du pays où réside le créancier ;**
- ?? des frais élevés de la banque qui reçoit le montant ;**
- ?? de la vitesse de paiement demandée (par ex. express).**

Un montant viré sur un compte postal en Suisse n'engendre pas de frais. Le paiement en argent comptant par la poste coûte Fr. 4.-.

En résumé, les frais d'un virement postal dépendent fortement des frais engendrés à l'étranger.

Enfin, il existe la possibilité de transférer des fonds par Western Union (pour les pays où cette institution est implantée). Le débiteur connaît alors par avance le montant total des frais et les prend d'emblée en charge. Le créancier n'a pas de frais (hormis un impôt à payer dans certains pays). Seules des personnes privées peuvent utiliser ce moyen, à l'exception des autorités en tant que telles.

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

Réponse :

Dans le processus actuel, nous voyons les lacunes suivantes :

- coopération administrative

- ?? manque de possibilité pour les institutions publiques ayant fait des avances d'agir en leur propre nom (cf. chiffre 33 l ci-après);
- ?? manque de dispositions contraignant les Etats à informer et à agir dans des délais raisonnables (cf. ch. 33 k);
- ?? manque de dispositions contraignant les Etats à utiliser, dans des délais raisonnables, tous les moyens d'exécution disponibles si le débiteur n'est pas coopératif (cf. ch. 33 b, e + k) ;
- ?? assistance judiciaire insatisfaisante dans certains Etats, ne tenant pas compte de la situation économique des créanciers en Suisse (cf. ch. 33 f);
- ?? frais élevés de traduction, à réduire au stricte minimum (cf. ch. 33 a + e) ;
- ?? liste parfois trop longue de documents nécessaires à produire pour un dossier de recouvrement, à réduire au stricte minimum pour l'affaire en cause (cf. ch. 33 a + e) ;
- ?? dans quelques Etats, manque de possibilité de faire une demande préalable pour localiser un débiteur (cf. ch. 33 a + e);
- ?? manque de possibilité de déposer une demande préalable pour obtenir des informations sur la situation économique du débiteur (cf. ch. 33 a + e);
- ?? manque de possibilité de traiter directement avec une autorité régionale ou locale après la transmission de la demande (cf. ch. a) .

- droit applicable

- ?? manque de clarté sur le droit applicable sur des questions spécifiques telles que la prescription d'une prétention d'aliments / l'étendue d'une prétention d'aliments d'un enfant majeur / la prétention d'aliments d'un époux / l'obligation ou non de traiter une demande uniquement pour des arriérés, sans obligation alimentaire courante ;
- ?? l'art. 8 de la Convention de la Haye du 2 octobre 1973 ne correspond plus à une conception moderne des couples divorcés qui souhaitent modifier une décision de divorce.

- reconnaissance et exécution des décisions

- ?? révision au fond à exclure, indépendamment des requêtes en modification d'une décision (cf. ch. 33 b)

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

- coopération administrative

- ?? manque de clarté des règles de coopération en vue d'obtenir une nouvelle décision judiciaire (en Suisse) : possibilité de mandater un avocat à évoquer et conditions (éventuelle subsidiarité ?) à préciser.

- 33 Gardant à l'esprit que le nouvel instrument doit être « complet et fondé sur les

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

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

Réponse :

- m (questions préalables, éligibilité) :

?? **définition de l'obligation alimentaire et des créanciers (enfants mineurs, majeurs, époux, autres parents)**

- n (éléments complémentaires, dans la mesure où ils ne sont pas contenus dans les points a et e) :

?? **Possibilité de demander la localisation du débiteur d'une part et des éléments concernant sa situation financière d'autre part, cela en préalable à toute requête de recouvrement d'aliments. On éviterait ainsi de déposer des requêtes dénuées de toute chance de succès.**

?? **Il serait également souhaitable que des autorités régionales ou locales puissent correspondre directement entre elles et suivre le cas de recouvrement, une fois que la requête initiale a été déposée et transmise par l'autorité centrale.**

- Tous les points énumérés dans la liste ainsi que les points m et n susmentionnés devraient être pris en compte dans la nouvelle Convention, à l'exception de :

?? **la coopération pour la recherche en paternité (point g) qui nous semble introduire un élément dépassant le cadre spécifique du recouvrement de pensions alimentaires et qui compliquerait la coopération en matière d'aliments, notamment par l'implication d'autres autorités;**

?? **le point i (réciprocité) qui va à l'encontre de l'intérêt des créanciers d'aliments.**

- Le degré d'importance de ces points est à notre avis le suivant :

?? **éléments clefs : points a (coopération administrative), b (reconnaissance/exécution de décisions), c (principe et questions spécifiques de loi applicable concernant le recouvrement d'aliments), d (règles de compétence) e et f (aide spécifique et assistance judiciaire), k**

(contraintes à respecter la convention), l (collectivités publiques), m (définitions, créanciers) ;

?? **« nice to have » : points h (virement international), j (formule modèle), n (demande de renseignement préalable, collaboration directe) ;**

?? **peu favorable (voir ci-dessus) : points g et i.**

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

- a quels éléments parmi ceux que vous avez mentionnés sous la question No 33 devraient être introduits comme éléments « centraux », dans le sens où toutes les Parties contractantes devraient sans exception s'y soumettre ;
- b quels sont, parmi ces éléments, ceux qui devraient être facultatifs, dans le sens où les Parties Contractantes devraient avoir la liberté de s'y soumettre ou non ; et
- c êtes-vous en faveur d'un principe général par lequel, la reconnaissance d'une décision existante n'étant pas possible dans le pays où le débiteur réside, les autorités de ce pays devraient être obligées de fournir assistance au créancier pour obtenir une nouvelle décision ?

Réponse :

a) Tous les points mentionnés sous « éléments clefs », peut être sans les points concernant la compétence (d), la loi applicable (c) et la liste des bénéficiaires d'aliments (m).

b) Les autres éléments.

c) Oui, c'est dans l'intérêt des créanciers.

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

Réponse :

Un accord avec une province canadienne est sur le point d'être conclu. Des pourparlers assez avancés pourraient faire aboutir d'autres accords bilatéraux. Aucun élément supplémentaire qui ne soit déjà contenu dans la liste sous chiffres 31 ss. ne peut être mentionné.

PART IV PARTENAIRES DE NEGOCIATION ET DIVERS

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

Réponse :

La Thaïlande, vu que plusieurs débiteurs suisses y résident.

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

Réponse :

Oui.

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

Réponse :

La partie du site Internet de l'Office fédéral de la justice (<http://www.ofj.admin.ch/f/index.html>) qui concerne spécifiquement ce domaine est actuellement en préparation, de même qu'une brochure du Service Social International à Genève (adresse E-mail : ssi@freesurf.ch). Il existe en outre plusieurs brochures cantonales dont nous transmettons celles du canton de Berne (en extraits, cf. annexe 6).

Note: Les personnes interrogées sont également invitées à faire part de leurs observations sur tout autre sujet qu'elles considèrent essentiel au développement de ce nouvel instrument.

Rien de plus à signaler.

~~Annexes 1 – 6 ment. (cf. réponses ad ch. 1, 8, 10, 13, 29 et 38).~~

La Suisse avait déjà répondu au questionnaire de 1999 et n'a rien à ajouter à ce propos.

ANNEXE I**Document préliminaire No 1 à l'attention de
La Commission spéciale d'avril 1999****QUESTIONNAIRE SUR LES OBLIGATIONS ALIMENTAIRES****(Parties I à III seulement)****PARTIE I LA CONVENTION DE NEW YORK DU 20 JUIN 1956 SUR LE RECOUVREMENT DES ALIMENTS A
L'ETRANGER***Section A – Questions adressées aux Etats Parties*

- 1 Les autorités de votre pays considèrent-elles la Convention de New York comme complémentaire (c'est-à-dire à utiliser en combinaison avec) d'autres traités internationaux telles les Conventions de La Haye de 1958 et de 1973 concernant l'exécution des décisions relatives aux obligations alimentaires ou les Conventions de Bruxelles et de Lugano?
- 2 Lorsqu'elles agissent en tant qu'Etat requis, les autorités de votre pays exigent-elles une « décision » de l'Etat d'origine avant de prendre des mesures de recouvrement des aliments?
- 3 Quels documents exigez-vous d'une Autorité expéditrice? Quels sont les documents requis en original?
- 4 Quelle est la procédure type qui suit la réception d'un dossier d'une Autorité expéditrice?
- 5 Des questions se sont-elles présentées au sujet des catégories de personnes en droit d'être considérées comme « dans le besoin » ou « dépendantes »?
- 6 Utilisez-vous des formulaires standards, que vous agissiez en tant qu'institution intermédiaire ou Autorité expéditrice? (Si oui, merci de nous adresser des copies.)
- 7 Vos autorités permettent-elles à des organes/agences publics de recourir aux procédures de la Convention pour le recouvrement d'aliments au nom du créancier ou pour le recouvrement des montants qu'ils ont déjà versés au créancier? Si oui, à quelles conditions (y a-t-il, par exemple, nécessité d'une procuration)?
- 8 L'aide judiciaire:
 - (a) Fournissez-vous une aide judiciaire au demandeur?
 - (b) Si oui, sous quelle forme?
 - (c) Des conditions ou des limitations sont-elles imposées?
 - (d) Est-ce que les demandes d'aliments pour un époux ou un enfant sont traitées différemment?
- 9 Lorsqu'elles agissent comme institution intermédiaire, quels coûts encourus par vos autorités sont mis à la charge de l'Etat d'origine (ou du demandeur)?
- 10 Quelles sont vos exigences concernant la traduction des documents soumis par une Autorité expéditrice?
- 11 Quelles sont les langues que le personnel de votre autorité (a) utilise, et (b)

accepte?

- 12 Est-ce que votre autorité assume la responsabilité des transferts/réceptions de paiements d'aliments effectués au nom du créancier?
- 13 Quelles sont les règles/procédures applicables à la conversion des paiements d'aliments dans la monnaie de l'Etat du créancier?
- 14 Quelles sont les méthodes de transfert de fonds les moins coûteuses pour le créancier d'aliments?
- 15 Avez-vous eu connaissance de cas où des membres du personnel des Nations Unies, d'une autre organisation internationale ou d'une ambassade ont invoqué leur immunité dans le cadre de la Convention? Si oui, comment ces cas ont-ils été résolus?
- 16 Quels sont les pouvoirs ou procédures dont dispose votre autorité pour localiser le lieu où se trouve ou travaille le débiteur de l'obligation alimentaire?
- 17 Quelle est votre politique face à un débiteur d'une obligation alimentaire dont les revenus proviennent exclusivement d'une aide des pouvoirs publics?
- 18 Votre autorité, a-t-elle le pouvoir de prendre ou de demander des mesures provisoires ou conservatoires?
- 19 Quels sont les pouvoirs ou les procédures dont dispose votre autorité pour déterminer l'étendue des avoirs du débiteur de l'obligation alimentaire?
- 20 Quels sont les principaux problèmes que vous rencontrez (a) en tant qu'Autorité expéditrice, et (b) en tant qu'institution intermédiaire?
- 21 Avez-vous des statistiques indiquant le nombre et l'issue des affaires traitées en application de la Convention de New York? Si oui, veuillez nous les communiquer. Si possible, veuillez distinguer entre les cas où vous agissez en tant qu'Autorité expéditrice et les cas où vous agissez en tant qu'Autorité intermédiaire et indiquer l'autre/les autres Etat(s) impliqué(s).
- 22 Y a-t-il des Etats avec lesquels vous rencontrez régulièrement des difficultés au sujet du fonctionnement de la Convention?

Section B – Questions adressées aux Etats non parties

- 1 Y a-t-il des raisons particulières pour lesquelles votre Etat n'a pas ratifié la Convention de New York?
- 2 Y a-t-il des modifications/améliorations de la Convention de New York qui rendraient sa ratification plus attrayante pour votre Etat?
- 3 Lors des négociations d'un accord bilatéral ou de tout autre traité auquel votre Etat est ou sera partie, lesquelles des questions soulevées à la Section A ont été d'un intérêt particulier? Y a-t-il d'autres questions non soulevées à la Section A qui présentent un intérêt?

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

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

- 1 Faut-il respecter un délai de prescription pour engager une action en exequatur d'une obligation alimentaire? De quelle loi cette prescription relève-t-elle?
- 2 Faut-il respecter un délai de prescription à l'exécution forcée du recouvrement d'une obligation alimentaire? De quelle loi cette prescription relève-t-elle?
- 3 Vos procédures d'exécution permettent-elles à un débiteur de faire valoir son incapacité à payer?
- 4 Vos procédures permettent-elles de modifier le contenu d'une décision enregistrée en application de la Convention de 1973?
- 5 Le débiteur a-t-il le droit d'intenter une action en modification de la décision étrangère? Si oui, sur quelle base juridictionnelle et sur quels fondements?

Section B – Questions adressées aux Etats non parties

- 1 Y a-t-il des raisons particulières pour lesquelles votre Etat n'a pas ratifié/adhéré à l'une ou l'autre des Conventions de La Haye?
- 2 Y a-t-il des modifications/améliorations des Conventions de La Haye qui rendraient leur ratification/adhésion plus attrayante pour votre Etat?

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

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

- 1 Quelle loi vos tribunaux appliquent-ils aux questions préalables/incidentales (concernant, par exemple, la paternité d'un enfant) soulevées dans le cadre d'une demande d'aliments en application des Conventions de La Haye?
- 2 Dans une décision du 21 février 1997 (Nederlandse Jurisprudentie 1998, No 416), la Cour Suprême des Pays-Bas a décidé que l'article 8 de la Convention de La Haye de 1973, à la lumière de son histoire et de la Convention dans son entier, n'était pas incompatible avec le choix par les époux divorcés de la loi applicable, la loi choisie étant celle du pays de leur résidence habituelle pendant une longue période et, en même temps, la loi du for. (La loi néerlandaise, choisie par les parties, a été appliquée plutôt que la loi iranienne qui régissait le divorce.)

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

- 3 Vos tribunaux considèrent-ils la Convention de 1973 comme étant applicable aux obligations d'un époux envers les enfants de l'autre époux et en faveur desquels il ou elle agit in loco parentis?
- 4 Des difficultés particulières se sont-elles posées lorsque vos tribunaux ont eu à appliquer ou à interpréter les Conventions de 1956 ou de 1973?

Section B – Questions adressées aux Etats non parties

- 1 Y a-t-il des raisons particulières pour lesquelles votre Etat n'a pas ratifié/adhéré aux Conventions de 1956 et de 1973?
- 2 Y a-t-il des modifications/améliorations des Conventions de La Haye de 1956 et de 1973 qui rendraient leur ratification/adhésion plus attrayante pour votre Etat?
- 3 Selon le droit de votre Etat, les époux (ou toute autre catégorie de personnes) sont-ils libres de choisir la loi qui régira leurs obligations alimentaires?

ANNEXE II

***Liste des États non-membres de
la Conférence de La Haye de droit international privé
Parties à la Convention de New York du 20 juin 1956
sur le recouvrement des aliments à l'étranger***

États Parties

Algérie
Barbade
Burkina Faso
Cap-Vert
République Centrafricaine
Colombie
Equateur
Guatemala
Haïti
Niger
Pakistan
Philippines
Saint-Siège
Tunisie

OFFICIAL TRANSLATION

I-1008/02

LEGAL AID CORPORATION

FOR THE METROPOLITAN REGION

Official Letter No. 6575/2002

Re.: Information Note and Questionnaire
concerning a new global instrument
for the recovery of maintenance.

Matter: Answers are transmitted.

Santiago, October 4, 2002

TO: MR. WILLIAM DUNCAN
DEPUTY SECRETARY GENERAL
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

FROM: BEATRIZ PALACIOS DIEZ, LAWYER
INTERNATIONAL PROCESSING OFFICE
LEGAL AID CORPORATION FOR THE METROPOLITAN REGION

The Legal Aid Corporation for the Metropolitan region has
the honor of addressing you, in its capacity and Transmitting

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Agency and Receiving Agency for the application of the New York Convention of 06.20.1956, on the Recovery Abroad of Maintenance, in relation to your letter dated June 20, 2002 and Annex thereto, Prel. Doc. No. 1 of June 2002, for the attention of the Special Commission on Maintenance Obligations, the content of which has come to our knowledge only by the end of September 2002.

As per your request, the following are the answers supplementing Part I to IV, since the Legal Aid Corporation already answered the Questionnaire in 1999.

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

FORM OF MAINTENANCE DECISION

Answer to question No. 1.- The forms it may take are: 1) An agreement between the parties, called "**Transacción**" which is submitted to the Court for ratification and approval; 2) "**Avenimiento**", which is an agreement reached by the parties during the maintenance proceedings and 3) the rendering of a Court decision, "**Resolución Judicial**".

Yes, decisions are confined to monthly payments of money.

It is not possible to make a Court order for payment of a lump sum.

However, the Judge may decree or approve that certain benefits provided by the maintenance provider on account of education health, food, clothing, recreation and other maintenance recipient's needs be imputed, wholly or partly, to payment of maintenance allowances.

The Judge may also determine or approve that the

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maintenance allowance be imputed, wholly or partly, to rights of usufruct, use or habitation respect of property belonging to the maintenance provider, who shall not dispose of or encumber the same without the Judge's authorization. In the case of real property, the Court decision shall entitle the beneficiary to register the in rem rights and the prohibition to dispose of or encumber such property in the relevant registers of the Real Estate Registry. The maintenance recipient himself/herself may request said registrations. Constitution of said in rem rights shall not impair the rights of the maintenance provider's creditors whose credits have a cause preceding such registration.

Should the maintenance provider fail to pay the maintenance allowance so decreed or agreed, he/she shall incur the penalties established by the law.

ELEGIBILITY

Answer to question No. 2. The following persons are eligible: the spouse, descendants, ascendants, brothers/sisters and anyone who made a substantial donation, if not terminated or revoked.

Answer to question No. 3. In Chile, in order for a child to be entitled to child support, he/she must be legally recognized by the person from whom support is claimed. This may be by matrimonial or non-matrimonial filiation. As regards adoption, the rights between adopter and adopted and the filiation that may be established between them are governed by the respective law.

Answer to question No. 4. The applicable law is: the Civil Code, Law No. 19,585, amending the Civil Code and other legal

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texts in the matter of Filiation, and Law No. 19,741, amending Law No. 14,908 on family abandonment and payment of maintenance.

PROCEDURES FOR THE INITIAL ASSESSMENT OF MAINTENANCE

Answer to question No. 5. Child support is determined through a judicial process.

Answer to question No. 6. The process is not different.

Answer to question No. 7. Matters regarding maintenance for children, the maintenance provider's spouse, when so requested by the latter jointly with the minor children, or for other adult or minor family members jointly requesting maintenance, shall be heard by the Juvenile Court Judge of the maintenance provider's or maintenance recipient's domicile, at the election of the latter. If maintenance is requested for adults only, the matter shall be heard by the Civil Court Judge.

Answer to question 8. For the purpose of decreeing child support when requested by a minor child from his/her mother or father, the maintenance provider shall be presumed to have the means to provide the same. By virtue of this presumption, the minimum maintenance allowance amount decreed in favor of a minor child shall not be less than 40% of the minimum remuneration applicable according to the maintenance provider's age. In case of two or more minor children, said amount shall not be less than 30% for each.

Answer to question No. 9. No.

Answer to question No. 10. Yes. In order to decree maintenance for adults, the Judge takes into consideration the economic needs of claimant and respondent, and the economic means to satisfy them, the economic means of the claimant, socio-economic situation of the parties, health, age of the

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maintenance recipient, etc.

Answer to question No. 11. Law No. 19,741 amending Law No. 14,908 on family abandonment and payment of maintenance.

REASSESSMENT/ ADJUSTMENT / MODIFICATION OF MAINTENANCE
DECISIONS OR ASSESSMENTS

Answer to questions Nos. 12 and 13. When maintenance allowance is not fixed in a percentage of the maintenance provider's income, or in the minimum wages or other automatically adjustable values, but rather in a determined amount, the allowance shall be semi-annually adjusted according to the increase experienced by the Consumer Price Index as established by the National Institute of Statistics, or any body that may replace it, from the month following that on which the decision determining the maintenance allowance amount has become final.

This adjustment, however, must be requested directly by the maintenance recipient to the Court, and will be made by the Court Clerk. The Court will not do so ex officio.

Answer to question No. 14. When the economic circumstances of the parties and the children's needs have changed. Yes, the same Judge who made the original determination of maintenance shall be competent to hear claims for maintenance increase, reduction or cessation.

Answer to question No. 15. It may be revised or modified if there are prescribed maintenance allowances.

ESTABLISHING PATERNITY

Answer to question No. 16. Civil Code and Law No. 19,585, amending the Civil Code and other legal texts in the matter of Filiation.

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Answer to question No. 17. I will send you by mail a copy of Law No. 19,585, amending the Civil Code and other legal texts in the matter of Filiation, for further information on this matter in Chile.

Answer to question No. 18. Expert proofs consisting of biological tests are taken by the Forensic Service or by suitable laboratories designated by the Judge to such effect. The parties shall, always and only once, be entitled to request a new biological expert report. The party requesting such test must bear the cost thereof, unless holder of a Legal Aid Benefit. No distinction is made between residents and non-residents.

Answer to question No. 19. In Chile, in order for a child to claim child support, paternity must have been previously determined. That is, if the child has not been recognized, an action to determine filiation must be previously initiated, in ordinary proceedings. Once the filiation judgment has become final, then a claim for maintenance may be filed.

Answer to question No. 20. (a) and (b). There is access to legal aid and assistance available.

Answer to question No. 21. A resident in Chile is entitled to free legal aid if earning less than US\$134.00 per month.

Answer to question No. 22. No.

LEGAL COSTS AND EXPENSES

Answer to question No. 23. It depends. If the maintenance recipient is legally advised and represented by a private lawyer, then the lawyer stipulates his/her fees with the client. If the person is poor, he/she is legally advised and represented by the Legal Aid Corporation, who will grant him/her a

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Certificate of Free Legal Aid Benefit, without any costs, these being assumed by the State.

Answer to question No. 24. Normally, in matter of maintenance Chilean Courts do not sentence to payment of costs.

COLLECTION AND TRANSFER ARRANGEMENTS AND ENFORCEMENT OF DECISIONS

Answer to question No. 25. The following distinction should be made:

1. Juvenile Courts have concluded an Agreement with BancoEstado de Chile, by virtue of which when maintenance is decreed, the Court issues an Official Letter to the claimant for him/her to open an at sight savings account (without cost) with BancoEstado. After this has been done, the claimant notifies the account number to the Court, and the latter, in turn, instructs the respondent to deposit the maintenance payments monthly in such account.
2. Likewise, the Court may order the employer to withhold the maintenance payment from the respondent's salary and to deliver the same directly to the claimant, legal representative or person in whose care the child is.
3. Another possibility is ordering that the maintenance payment be deposited in the Court's current account.
4. Furthermore, the parties may agree that the maintenance payment be deposited monthly in the claimant's current account.

Answer to question No. 26. The special arrangements are: payments are to be remitted through the Remittances Department of the Ministry of Foreign Affairs to Chilean Consulates accredited in the country where the payment is sent, or payment

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is to be remitted by the respondent directly to the claimant, giving the Court evidence of the remittances made.

Answer to question No. 27. Requesting the Court the incidental execution of the judgment.

Answer to question No. 28. Arrest and ne exeat. Wage withholding, garnishment from bank accounts or real estate, withholding of pensions received by the respondent on any account, such as retirement pensions, etc.

Answer to question No. 29. By way of example: Austria must send a maintenance payment to Chile for a monthly amount of 346 Euros, Austrian banks withhold 8 Euros and Chilean banks an additional sum of 55 Euros; therefore, the claimant receives a net sum of 283 Euros.

No arrangements have been made in our country to facilitate transfer of maintenance payments.

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

Answer to question No. 31. Establishing arrangements to facilitate transfers of maintenance payments at a minimum cost to/from foreign countries.

Answer to question No. 32. There are no shortcomings. The problem is that we are dealing with human beings and most men refuse to assume their responsibilities; therefore, they hide themselves, cease working, etc.

Answer to question No. 33. (a) Extremely important; (b) the existing law for recognition and enforcement of foreign decisions is excellent; (c) important; (d) important; (e) important; (g) extremely important; (h) extremely important}; (i) extremely important; (j) very important; (k) extremely

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important; (i) important.

Answer to question No. 34. (a) All. (b) None. (c) Yes.

Answer to question No. 35. Chile has not entered into any bilateral or regional arrangements.

PART IV - NEGOTIATING PARTNERS AND MISCELLANEOUS

Answer to question No. 36. USA, Canada, Peru, Bolivia, Colombia, South Africa, Paraguay, in general, all States.

Answer to question No. 37. Unfortunately, the Legal Aid Corporation is not in a position to express an opinion in this regard, it would be advisable for you to consult this with the Ministry of Foreign Affairs of Chile.

Answer to question No. 38. Yes. I will mail you a Report on maintenance in Chile, prepared by the National Service for Women (Sernam).

Sincerely,

Beatriz Palacios (signed)

BEATRIZ PALACIOS DIEZ

LAWYER

LEGAL AID CORPORATION

Seal: LEGAL AID CORPORATION FOR THE METROPOLITAN REGION -
INTERNATIONAL PROCESSING OFFICE

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IN WITNESS WHEREOF, I have hereunto set my hand and seal in
SANTIAGO, CHILE, on this 14th day of October, 2002.

THE OFFICIAL TRANSLATOR

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

Form of maintenance decision

1. What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

The Law does not specify. In practice, however, maintenance takes the form of periodical payments, though, in special circumstances, provided that all the parties concerned consent, a lump sum or a similar order may be made to satisfy a maintenance obligation.

Eligibility

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

Eligible is a child, the parents and the spouse.

3. What is your definition of a “dependent” child for child support purposes?

There is no definition in the Law of the word “dependent”

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

By s. 2 of L. 216/90 “child” “means the person who has not reached the eighteenth year of his age but does not include a married person who has not completed the aforesaid age.” By s. 33(2) of the same Law “[t]he obligation [of parents to provide maintenance to their minor child] may continue especially in case of disability of the child and after the majority of the child by a decision and by a relative arrangement from the Court.” By s. 34 of the same Law “[t]he child who has reached the age of majority has an obligation for the maintenance of his parents, provided the parents are not able to maintain themselves for their property or incomes or from the job which is appropriate to their age, their health condition and other living conditions of them.” By s. 2 of L. 232/91 “spouse” means the relation created between a male and female as a result of a marriage recognised by the State. By s. 3 of the same Law, the spouses have according to their abilities reciprocal obligation to maintain each other. After divorce, for an ex spouse to

claim maintenance from the other ex spouse, there must be special circumstances as provided in s. 5 of the same Law.

Procedures for the initial assessment of maintenance

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

A judicial process.

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

No.

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

No, it is not different. The two processes are dealt with, by two different Laws, however, there seems to be no prohibition for the two processes to be joined, though this does not happen in practice.

Methods of calculating maintenance

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

Under s. 37 of L. 216/90 “(1) The maintenance shall be prescribed according to the needs of the beneficiary, as they result from his living conditions and the financial possibilities that exist for the maintenance of a person. (2) The maintenance includes all that is necessary for the maintenance and welfare of the beneficiary and in addition, as the case may be, the expenses for his general education.” The principle of equality and the principle of analogy are applied as regards the obligation of the parents to maintain their children.

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

No.

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

No.

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

As regards children see 8 above. As regards maintenance between spouses, s. 7 of L. 232/91 provides that maintenance is determined on the basis of the needs of the beneficiary, as they result from his living conditions and it includes all that is necessary for the maintenance of the beneficiary. However, the maintenance obligation may be excluded or limited if this is imposed by serious reasons, some of which are mentioned in the said section.

Reassessment/adjustments/modification of maintenance decisions or assessments

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

No.

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

No.

14. In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied/modified upwards or downwards? Is this done by the same authority that made the original determination?

When the terms of the decision, which fixes the maintenance have changed, i.e. the needs and expenses of the beneficiary have changed or the abilities of the persons obliged to provide maintenance have changed. (S. 38 of 216/90 and s. 10 of L. 232/91).

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

Same as a domestic decision provided that the foreign decision is first registered in Cyprus.

Establishing paternity

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

Same as for children born in wedlock.

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

From the time a child is recognised as a natural child of its father, no matter whether by a judicial process or voluntary process, the duty for its maintenance is created.

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

By the judicial contested process or by the voluntary process (by affidavit of both parents before the Registrar of the Family Court), as provided by L. 187/91, or by subsequent marriage as provided by s.10 of European Convention on the Legal Status of the Children Born Out of Wedlock.

19. May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

If there is no Convention between Cyprus and the foreign state, the rules of the English private international law applied in England before 1960, are applicable in Cyprus as part of the received common law. Usually the recognition or enforcement of a foreign decision is not refused unless it is contrary to the Cyprus public policy.

Legal and administrative aid and assistance

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

Legal Aid assistance. Law 165(I)/02, Regulations No. 3/03.

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

Financial state of beneficiary.

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

No.

Legal costs and expenses

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

Different scales depending on the amount of maintenance determined by the Court.

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

No.

Collection and transfer arrangements and enforcement of decisions

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

The orders of maintenance are executed as penalties in accordance with the provisions of the Criminal Procedure Law or any other Law, which repeals or amends it. (S. 40 of L. 216/90 and s. 12 of L. 232/91).

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

It depends on whether there is a Convention between Cyprus and the foreign country. See for example the United Nations Convention on the Recovery Abroad of Maintenance ratified in Cyprus by L. 50/78.

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

The procedure is laid down by L. 121(I)/00. Filing of summons supported by affidavit, save in the case where the defendant did not appear in the foreign court procedure, in which case the procedure before Cyprus Court commences by an ex-parte application.

28. Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement/collection methods are available in your jurisdiction:

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

Wage withholding, garnishment from bank accounts or other sources, forced sale of property and committal to prison.

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

It depends. It varies on the amount and the bank regulations.

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

Not yet.

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

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

No shortcomings.

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

No shortcomings.

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

- a. provisions concerning administrative co-operation;
- b. provisions for the recognition and enforcement of foreign decisions;
- c. applicable law principles;
- d. uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;
- e. provisions specifying the assistance to be provided to an applicant from another Contracting Party;
- f. provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;
- g. provisions concerning co-operation in the establishment of paternity;
- h. provisions concerning co-operation in the international transfer of funds at low cost;

- i. provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;
- j. standard forms;
- k. provisions aimed at securing compliance with obligations under the instrument;
- l. provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;
- m. others. Please specify.

- a. very important.
- b. very important.
- c. important.
- d. very important.
- e. important.
- f. very important.
- g. very important.
- h. important.
- i. not important
- j. important
- k. important.
- l. important.
- m. -----

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

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

- a. the ones we listed as very important.

b. none.

c. yes.

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

The registration of Foreign judgment prerequisites/conditions.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

36. Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex li) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?

Not, at the moment.

37. Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?

Not at the moment.

38. Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

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

No.

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

Section A - Questions addressed to States Parties

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

No.

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

Yes, certified copy of the maintenance Order which is enforceable in the State of origin.

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

- i. Certified true copy of the maintenance Order, enforceable in the transmitting Country.
- ii. Copies of: photos of the child/children
birth certificates of them
marriage certificate (if any).
- iii. Certified copy of the writ of summons concerning the service of the application of maintenance to the respondent – father or certified copy of the certificate of service of the bailiff of the competent Court concerning the service.

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

The documents are forwarded to the Attorney General’s Office for the preparation of the relevant application and its filing before the competent Court. A Counsel of the Republic appears in the proceedings representing the Minister and hence the applicant.

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

No.

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

No.

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

No.

8. Legal assistance:

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

- (a) Free legal assistance through the Attorney General.

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

In Cyprus an applicant, under the relevant Convention, is not charged with any legal expenses or costs because the Minister of Justice and Public Order – Transmitting Agency designated under article 2 of the Convention is acting on his/her behalf in the Court proceedings, therefore a Counsel of the Republic from the Office of the Attorney General appears in the proceedings.

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

Apart from Greek we accept English.

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

Greek and English.

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

Yes, as long as it is sent through our authority.

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

Same days value.

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

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

No.

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

Through the Cyprus Police.

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

No existing policy.

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

In principle yes.

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

Examination on his affidavit.

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

As a receiving agency. As far as the execution of the Order is concerned we face the problem that the respondent does not correspond with his order obligations and refuses to pay the sums due by the Order. Also the respondent may deny that he is the father.

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

No.

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

No.

22 April 2003

MK/AC/Conventions (general)/questionnaire2003-04-22-03MK1

Responses of the Czech Republic to the Questionnaire concerning a new global instrument on the international recovery of child support and other forms of family maintenance

I.

Czech Republic has no supplementary information to Sections I and IV of the April 1999 Questionnaire concerning the family maintenance obligation.

II.

Form of maintenance decision

Maintenance decisions concerning obligations toward child, spouse or parent are issued by Czech courts as judgments. In the judgment, the court specifies regular alimony payments and/or in what manner the due alimony debt is to be paid (by one-time amount paid or in several installments at due dates stipulated by the court). Parents may agree on the alimony for a minor child. The parents' written agreement is examined by the court in respect to its being in compliance with minor child's interest and needs and shall be approved by the same; the court approval is released as a judgment. The court judgment regarding the maintenance obligation satisfaction by means of a one-time amount settlement or property transfer is not governed by Czech Laws. Only spouses being parties of divorce proceedings may, pursuant to Family Act #94/1963 Coll. Sec. 94 para 2 in its current version, enter into a written agreement concerning a one-time maintenance settlement in an agreed amount once for ever.

Eligibility

Pursuant to Family Act #94/1963 Coll. in its current version are eligible for maintenance in the Czech Republic children, spouses and parents. A maintenance allocation is due, under Sec. 95 of said Act, to unmarried mother of the child, for the period of 2 years. Under Sec. 85 para 1 of the Act, children are entitled to maintenance as long as they are incapable of earning their own living (e.g. until they complete a study preparing for performing certain occupation).

Procedures for the initial assessment of maintenance

As stated hereabove, maintenance is established in court proceedings. The procedure in a Czech court in such proceedings is not affected by circumstances that the applicant or the respondent live abroad or that the application for maintenance judgment pertains to a spouse or a parent, to the difference to a child. Proceedings for maintenance of a child or a person specified here may not be combined.

Methods of calculating maintenance

The calculation of maintenance for a child/spouse/parent is not being made on the basis of a formula, directions or firmly defined criteria. The Family Act #94/1963 Coll. in its current version sets forth that, in determining the alimony amount, the court shall take into consideration the justified needs of the beneficiary (i.e. the person entitled to maintenance) and the liable person's (i.e. person liable to provide for maintenance) abilities, capacity and

property as well. This method shall be used for determining the maintenance also in cases when the beneficiary or the liable person is living abroad.

Reassessment (adjustment) modification of maintenance decisions or assessments

If the material standing of the beneficiary or the liable person, being the basis for determining the maintenance for a minor child, change, the court may, even without a motion, modify the original court judgment or parents' agreement on the maintenance. However, if the child is of lawful age already, a motion for change or revocation of a judgment on the maintenance must be filed. Maintenance is not automatically valorized in the Czech Republic.

Maintenance may be modified up or down due to reasons quoted hereabove (change of material standing on beneficiary's or liable person's part) only. A decision concerning maintenance or maintenance amount made by a foreign authority may be changed following a motion filed by liable person abroad (in the country where the liable person has his/her residence), however, the beneficiary must not be deprived of his/her rights as a party to the proceedings in such proceedings (any and all documents must be duly delivered to him/her or his/her legal counsel, he/she must have the opportunity to take position in the proceedings etc.), a decision of a foreign court must not collide with the public order of the Czech Republic. The enforcement of a foreign decision concerning maintenance is possible in the Czech Republic based on reciprocity, usually warranted by a bilateral or multilateral international treaty.

Establishing paternity

Paternity and alimony proceedings for a child may be combined in the Czech Republic. Czech courts proceed in such proceedings in accordance with quoted Family Act and Civil Proceedings Order – Act #99/1963 Coll. in their current versions. An application for establishing paternity (paternity suit) may be filed by a child represented by a collision custodian, or a mother, or a man purporting to be the child's father, or the application may be filed in joint action. In establishing the paternity, the court bases its assumptions on expert assessment; documentary evidence or witnesses hearing may be used in support. In Czech judicial practice, paternity is being established on blood test basis only exceptionally. Experts rather use molecular genetics methods, e.g. by DNA analysis of samples taken from oral cavity mucous membrane of the man identified as the child's father. These state-of-the-art methods enable to establish paternity with 99.99% certainty; the costs of such expert assessment amount to approx. CZK20,000. The costs of expert assessment are usually borne by the respondent, provided that his paternity was thereby established. If established otherwise, the costs are borne by the state, as child and mother are exempt from paying the costs of proceedings. If the identified father (respondent) is a person of inferior economic situation, he may ask the court of jurisdiction to provide for free legal assistance. There are no differences between persons having their place of residence in the Czech Republic and those resident abroad in paternity and maintenance cases. In the Czech Republic, foreign paternity and maintenance judgment may be acknowledged and enforced only on reciprocity basis warranted by a bilateral or multilateral international treaty, in case that the foreign judgment pertains to the father being a Czech citizen. Czech court does not reassess the rationale of a foreign judgment in the execution proceedings, i.e. it does not compare whether the law or the method applied in determining the paternity in the foreign country is identical with Czech judicial practice or not.

Legal and administrative aid and assistance

The petitioner is exempt from payments of court fees in maintenance cases pursuant to Court Fees Act #549/1991 Coll. in its current version. This Act does not distinguish between a petitioner having his/her residence in the Czech Republic and that resident abroad. Provided that the petitioner is a person of inferior material standing, Czech court may appoint for him/her a counsel (attorney-at-law) at his/her request. The costs of such legal assistance for the petitioner are borne by Czech state. Similar conditions apply for proceedings in spouse maintenance cases as well. There are no firm criteria (e.g. income) set for providing free legal assistance in the Czech Republic. Requests for said free legal assistance are dealt with by courts individually. It is the petitioner's obligation to credibly document his/her property and social condition. Further extension of free legal assistance provided is dependent on the possibilities available to be covered from Czech national budget; currently there are no funds available.

Legal costs and expenses

The costs and expenses for maintenance case proceedings cannot be covered from maintenance money payments. There are no other typical costs and expenses involved except court fees and counsel costs in first-instance proceedings, in proceedings in court of appeal or revision.

Collection and transfer arrangements and enforcement of decisions

The judgment collection and enforcement are governed in the Czech Republic by Civil Proceedings Order – Act #99/1963 Coll. in its current version and international treaties by which the Czech Republic is committed (The Hague Conventions, New York Convention) or relevant provisions of International Private and Proceedings Law Act #97/1963 Coll. The proceedings concerned are civil proceedings. The Act #99/1963 Coll. quoted hereabove enables an enforcement of the judgment by deduction from liable person's wages or pension, claim order (and deduction of the amount due from liable person's bank account and its crediting to beneficiary), sale of liable person's property (in case of maintenance money debt). A punishment by prison term may be imposed for failure to meet alimony obligation (failure to pay the fixed maintenance without substantial reason, deliberate avoiding alimony obligation etc.). A sentence to a prison term does not mean that the liable person may not pay the alimony debt afterwards. If he/she is working during the prison term, the alimony is deducted from the wages for such work. No special modes of alimony payments to or from abroad are being used. The expenses ancillary to alimony payment transfers from/to abroad depend on the fees charged by individual banks for the transfers.

III. Questions concerning the elements to be included in the new instrument

Maintenance claims abroad for children having residence in the Czech Republic cope with drawbacks not originating in international treaties on maintenance recovery. The problem is rather in varying approaches of foreign recipient authorities and judicial or administrative authorities in the processing of maintenance recovery requests. Maintenance recovery judgment enforcement in a foreign country takes long, alimony payments to Czech Republic are being made irregularly, they have to be urged.

The situation in maintenance recovery in the Czech Republic for children having residence in foreign countries has substantially improved since early 2001 when the amendment to Act #99/1963 Coll. was adopted, accelerating the procedures in Czech courts in civil proceedings. Czech Republic shall of course participate in the negotiations of the new allround Hague International Private Law Conference on maintenance recovery in foreign countries. We consider the summary of the key segments of the new Convention shown in item 33 of this part of the Questionnaire being fully sufficient and we assume that the segments are listed in their order of precedence in the summary. Binding for all parties to the Convention should be the segments listed under a) thru d), g), j), k) and l). As alternative we consider the segments listed under e), f), h) and i).

We agree that where acknowledgement and enforcement of existing maintenance judgment in the liable person's country is impossible, the beneficiary could file a motion for the issue of a new judgment on maintenance in the liable person's country. The authorities in such country should provide him/her in acquiring a new judgment equal assistance as there is provided to their own citizens. The new global instrument should enable that its parties could enter into bilateral or regional agreements governing more into detail their authorities' procedures in the application of this global instrument and accelerate their cooperation.

IV. Negotiating partners and miscellaneous

We consider it sufficient that member countries of The Hague International Private Law Conference and New York Convention participate in the negotiations on the new global instrument. Czech Republic has currently no possibility to contribute to the fund that would provide funds for less wealthy countries so that they could participate in the negotiations and that would cover the costs of translations and interpreting into Spanish. Information on Czech Republic social policy, incomes, life standard and status of Czech family may be found in Czech language on the Czech Republic Ministry of Labor and Social Welfare web site <http://www.mpsv.cz>, postal address: Ministerstvo práce a sociálních věcí ČR, Na porádku právu 1, 128 01 Praha 1, Czech Republic. The Ministry is also the superior authority to the Children's International Law Protection Agency in Brno that is the Czech Republic's recipient and dispatch agency under The Hague Conventions for maintenance recovery in foreign countries and under the New York Convention.

**Answers to the list of questions
of the Hague Conference on Private International Law
regarding a new global instrument on
the international recovery of child support
and other forms of family maintenance**

Part II

**Questions concerning national systems of maintenance obligations
in respect of children and other family members**

Question 1:

What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Response:

Maintenance between relatives is to be granted by effecting payment of an annuity to be paid monthly in advance. The obligor may request to be permitted to provide it in another manner if special reasons justify this (section 1612 subsections 1 and 3 of the Civil Code [Bürgerliches Gesetzbuch - BGB]).

If parents are obliged to grant support to an unmarried child, they may determine how and for what period in advance support is to be granted (section 1612 subsection 2 first sentence of the Civil Code).

Maintenance rights between parents who are not married with one another are to be met in line with the provisions relating to maintenance obligations between relatives (section 1615I subsection 3 first sentence of the Civil Code).

Maintenance between spouses is to be granted in the manner suggested by the marital co-habitation (section 1360a subsection 2 first sentence of the Civil Code). With post-marital maintenance, ongoing maintenance is to be granted by paying an annuity monthly in advance. Instead of the annuity, the obligee may demand a lump sum in capital if an important reason applies and the obligor is not unfairly burdened thereby (section 1585 subsection 1 first and second sentences, and subsection 2 of the Civil Code).

Eligibility

Question 2:

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

Response

Direct relatives are entitled to receive maintenance (section 1601 in conjunction with section 1589 first sentence of the Civil Code), as are children, grandchildren, great grandchildren, etc., and parents, grandparents, great grandparents, etc.

Maintenance entitlements may exist between parents who are not married with one another in the first three years after the birth (section 1615I of the Civil Code). Furthermore, spouses are entitled to maintenance (section 1360 of the Civil Code), even if they are separated (section 1361 of the Civil Code) and after the marriage has been dissolved (section 1569 of the Civil Code).

Question 3:

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

Response:

In general terms, a requirement to provide maintenance among relatives is conditional on the person entitled to maintenance being unable to maintain themselves (section 1602 subsection 1 of the Civil Code). A minor unmarried child may require from his/her parents, even if he/she has assets, to grant maintenance to the extent that the income of his/her assets and the yield of his/her work are insufficient for maintenance (section 1602 subsection 2 of the Civil Code).

Question 4:

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

Response:

The Federal Republic of Germany ratified the Hague Convention on the law applicable to maintenance obligations towards children on 2 October 1973. The Convention entered into force for Germany on 1 April 1987.

The provisions of the Convention which refer to the collision of laws were included in Art. 18 of the Introductory Act to the Civil Code in the interest of the comprehensibility of German international private law.

In accordance with Art. 18 subsection 1 first sentence of the Introductory Act to the Civil Code, on principle the material provisions of the law applying at the respective place of habitual residence of the person entitled to maintenance are to be applied to all kinds of family law maintenance duties.

If the law of the place of habitual residence does not afford the person entitled to maintenance a right to maintenance, in accordance with Art. 18 subsection 1 second sentence of the Introductory Act to the Civil Code the subordinate law of the state is to be applied to which the maintenance obligee and obligor belong jointly. Only in cases in which neither the law of the place of habitual residence nor the law of the joint home grant maintenance, is German law to apply in accordance with Art. 18 subsection 2 of the Introductory Act to the Civil Code.

A special provision for maintenance after divorce is contained in Art. 18 subsection 4 of the Introductory Act to the Civil Code. In accordance with this provision, which corresponds to Art. 8 subsection 1 of the abovementioned Convention, maintenance claims between divorced spouses living in legal separation is adjudicated in accordance with the law under which the spouses were divorced.

Procedures for the initial assessment of maintenance

Question 5:

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

Response:

Support claims are determined in court proceedings or out of court by establishing an enforceable document.

In accordance with section 18 of the Eighth Book of the Social Code – children and youth assistance – there is a right to advice from the youth welfare office. In accordance with section 18 subsection 1 of the Eighth Book of the Social Code, mothers and fathers who look after a child alone have a right to advice and support in exercising personal custody, including asserting claims for support, or alternatives to support, for the child or juvenile. In accordance with section 18 subsection 2 of the Civil Code, the mother of a child who is not married to the father and is the sole holder of custody for the child also has a corresponding right as to her own claim in accordance with section 1615l of the Civil Code. In accordance with section 18 subsection 4 of the

Eighth Book of the Social Code, finally, young adults (i.e. between 18 and 21) may require appropriate advice and support from the youth welfare office in asserting child support claims.

As to asserting support claims of minors, there is a provision in section 52a of the Eighth Book of the Social Code. Accordingly, the youth welfare office must offer the mother advice and support in asserting maintenance claims without delay after the birth of a child whose parents are not married with one another. The mother may decide whether or not to accept this assistance from the youth welfare office.

The youth welfare office may in particular function as an advisor in asserting maintenance claims (sections 1712 et seqq. of the Civil Code) if this is applied for. Furthermore, documents may be established at the youth welfare office in accordance with section 59 No. 3 of the Eighth Book of the Social Code regarding the maintenance duty if the person entitled to maintenance has not yet reached the age of 21. Coercive execution may be pursued in accordance with the provisions of the Code of Civil Procedure (Zivilprozessordnung) regarding coercive execution of executable documents from such documents that have been established by the youth welfare office in accordance with section 59 of the Eighth Book of the Social Code. The advantage of documentation at the youth welfare office is that this takes place without fees being charged. Other agencies allowed to establish executable documents (e.g. notaries, etc.) levy fees.

The youth welfare office however does not have a right or a duty to bindingly establish the child support/maintenance amounts. Only courts have such an entitlement.

As to the court procedure, the following can be stated:

If it is a matter of claims by minor children, they may not themselves claim in court in accordance with section 52 of the Code of Civil Procedure, which is why they need representation. This is carried out by the parents if they have custody (sections 1626 subsection 1 and 1629 subsection 1 of the Civil Code), or the youth welfare office as an advisor (section 1712 subsection 1 No. 2 of the Civil Code). A lawyer is required to pursue an action for maintenance if it takes place in connection with divorce proceedings. Otherwise, no representation by a lawyer is required at first instance. Such representation is provided on the basis of a private law mandate between the lawyer and the client. In cases in which the personal and economic circumstances do not permit proceedings to be pursued, legal aid may be granted if there are prospects

for success. The consequence of this is that legal costs for the lawyer appointed to the party are initially assumed by the state coffers. Depending on the assets, these costs must be repaid in instalments.

In the case of children who have a right to support, there may be a right to advance court costs against the parents who are under a duty to effect payment of support which assists the financial side of pursuing the proceedings.

Question 6:

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

Response:

The process is not different depending on whether either the applicant or the respondent lives in Germany or abroad.

This may only be significant when initiating proceedings or on concluding them, but not for the actual course of the proceedings: The residence of a party may be relevant to the international and local jurisdiction of the court. For instance, section 23 a of the Code of Civil Procedure governs the local jurisdiction at the place of residence of the person entitled to maintenance if there is no venue on domestic territory against the person obliged to pay maintenance. Section 642 of the Code of Civil Procedure governs the exclusivity of venues with maintenance actions of minor children against the parents.

In the area of application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as: Brussels I), all jurisdiction arrangements contained in the Code of Civil Procedure are supplanted by the latter.

Furthermore, written applications or actions must be served. This also applies a rule to summonses to appear. This may lead to different periods for the submission of objections if an order to appear at an early first hearing is to be served abroad (section 274 subsection 3 second sentence of the Code of Civil Procedure). The court determines in written proceedings the statutory deadline within which willingness to defend must be demonstrated (section 276 subsection 1 third sentence of the Code of Civil Procedure) if the written action is to be served abroad. Comparable provisions also exist to set other periods if service must be effected abroad (section 339 subsection 2 and section 647 subsection 1 of the Code of Civil Procedure).

If it is necessary to take evidence abroad, special provisions apply to this (sections 363 et seq. and 369 of the Code of Civil Procedure). This however does not depend on

whether the parties live abroad. Furthermore, if one may expect the judgment to be executed abroad, it is possible that a ruling with reasoning may be required, whilst otherwise an abstract may be considered (section 313 a subsection 4 and section 313 b subsection 3 of the Code of Civil Procedure).

Question 7:

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

Response:

A normal case of maintenance proceedings is action proceedings. Such proceedings function in the same manner for both persons entitled to maintenance in terms of procedural law. The maintenance applications may be filed together with a divorce, and (if no separation is applied for) are then heard and decided on together. If this is not the case, both sets of proceedings are released from the obligation to be represented by a lawyer at first instance. There is therefore no obstacle to joining the proceedings in accordance with general principles.

As to child support, the child may select between two methods of claiming support. He/she may either demand a specific amount of annuity or a percentage of the respective normal amount graded by age groups in accordance with the Ordinance on Normal Amounts (Regelbetrag-Verordnung) (hereinafter referred to as Normal Amounts Ord.). The Normal Amounts Ord. determines – graded by three age groups – a normal amount for the maintenance of a minor child as against the parent with whom he/she does not live in a household. The normal amount here determines not the individual needs of the child entitled to support, or the needs of children entitled to support in general, but is a number irrespective of needs. The support to which the child entitled to support is entitled is converted here into a percentage of the normal amount. This states the ratio of the individual circumstances of the person entitled to maintenance to normal needs in accordance with the Normal Amounts Ord. In accordance with section 1612a subsection 4 of the Civil Code, the normal amounts determined in the Normal Amounts Ord. are determined again in line with the (economic) development of the average disposable income every two years in each case as of 1 July.

In addition to the action proceedings, minor children have available the simplified procedure on support for minor children (sections 645 et seqq. of the Code of Civil Procedure). Also in the simplified proceedings, the child may opt between the two

types of asserting the support claim which are available. The simplified procedure however only takes place if the parent claimed against does not live in a household with the child and maintenance is to be determined for the first time.

Furthermore, only maintenance claims may be asserted in these proceedings which do not exceed 150 % of the normal amount in accordance with the Normal Amounts Ord. before child benefit or comparable payments are counted against it (sections 1612b and 1612c of the Civil Code) in accordance with the Normal Amounts Ord.

The simplified procedure is initiated by means of an application in the shape of a form submitted to the Local Court. It is not a judge who has jurisdiction in this instance, but a judicial administration officer. The latter does not examine whether the asserted support claim actually exists, but merely calls on the opponent to assert relevant objections against the claims. If no objections are submitted within a specific period, or if objections are not put forward in the prescribed form, the support applied for is determined by means of a ruling. If there are relevant objections, at least the part that is non-contentious and has been recognised is determined by means of a ruling. As to the part of the support claim that was originally applied for and has not been determined, the party may apply for implementation of the action proceedings in accordance with section 651 subsection 1 first sentence of the Code of Civil Procedure.

Question 8:

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

Response:

The Civil Code only provides that the degree of the support to be granted is to be determined by the circumstances of the person in need (suitable maintenance) (section 1610 subsection 1 of the Civil Code). Maintenance covers all living expenses, including the cost of suitable preliminary training for an occupation, and with an individual still in education, also the cost of such education (section 1610 subsection 2 of the Civil Code). Furthermore, the question of the amount in which a maintenance claim exists, taking account of the circumstances of the individual case in a case of dispute, is to be ruled on by the competent independent courts.

In court practice, guidelines and tables apply to support in cash which have been developed by the Higher Regional Courts. These are not binding provisions, but can be understood as an orientation from which it is possible to derogate, and from which it is necessary to derogate, depending on the situation of the individual case.

The well-known "Düsseldorf table" (as on: 1 January 2002) distinguishes by the net income of a person obliged to give cash support (14 groups), the number of children entitled to support and their age (4 age groups). Occupational expenses and debts which may be taken into account are to be deducted from the net income (corrected net income). Special provisions exist for children who study and do not live with their parents or a parent. It is ensured that the necessary own needs of the person obliged to grant maintenance is retained, also with regard to any maintenance obligations towards the (former) spouse. If the income is not sufficient to cover the needs of the obligor to give maintenance and the person entitled to maintenance with equal rank (so-called insufficiency cases), after the necessary own needs (deductible) of the person obliged to give maintenance have been deducted, equal distribution is carried out to the person entitled to maintenance at the respective requirement rates.

Calculation example:

A person obliged to pay cash maintenance with a corrected net income of Euro 2,700 (8th group) must pay to his/her three-year-old child (1st age group) Euro 301, and to his/her ten-year-old child (2nd age group) Euro 365 per month. The necessary own needs of the person obliged to pay maintenance of at least Euro 840 are hence safeguarded.

The normal amounts contained in the Normal Amounts Ordinance issued on the basis of section 1612a of the Civil Code do not serve to determine the child's support needs, but as the basis for assessment in establishing support titles in an index-linked form and as a point of reference for the preconditions for admission to the simplified procedure. They merely form the starting amount for the maintenance guidelines values contained in the maintenance law guidelines and tables of the Higher Regional Courts, but do not replace an individual calculation on the basis of these guidelines and tables.

Question 9:

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

Response:

If the person entitled to maintenance and the person obliged to pay maintenance live in different states, and if German law applies to the maintenance relationship, the

circumstances at the respective place of residence are to be taken into account in assessing the requirements of the obligee and the evaluation of the economic circumstances of the obligor.

Question 10:

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

Response:

The parents have a more intensive duty of maintenance towards minor unmarried children than exists between other relatives. Parents who when taking account of their other obligations are unable to afford to provide support to their children without endangering their own appropriate maintenance must use all funds available to them equally to maintain themselves and their children. The obligation does not apply if there is another relative obliged to provide maintenance; it also does not apply to a child whose maintenance can be obtained from his/her capital. The same applies towards unmarried children who have come of age, until they reach the age of 21, if they still live in the household of one or both parents and are in general schooling (section 1603 of the Civil Code).

Because of this basic legal difference, the guidelines and tables of the Higher Regional Courts developed with regard to the support claim of children towards their parents (cf. Response to Question 8) do not apply to maintenance claims between other relatives. There has been no comparable schematisation in this area.

The degree of maintenance of the divorced spouses is determined in accordance with the marital circumstances (section 1578 subsection 1 first sentence of the Civil Code). The case law on principle splits the difference between the income of both sides, after deducting additional occupational expenses (principle of equal shares).

Question 11:

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

Response:

Also the question as to which law applies to assessment of maintenance is standard for all family law maintenance claims in accordance with Art. 18 of the Introductory Act to

the Civil Code. In this sense, reference may be made to the information provided at Question 4 in this respect.

Question 12:

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

Response:

There is no automatic repeat of the procedure. The execution title may be structured as to maintenance for the future such that also future maintenance claims are already determined as recurring claims. No new proceedings are then required in order to determine maintenance. Added to this is the fact that maintenance proceedings on principle are subject to the maxim of parity disposition, and hence their initiation depends on the will of the person entitled to maintenance, who must file a corresponding application.

Question 13:

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

Response:

On principle, the maintenance title is not index-linked. Only with child support can a maintenance title be forced which automatically adjusts to the development of average disposable incomes. As already stated, a minor child has the choice as to whether to demand maintenance as a percentage of the respective normal amount in accordance with the Normal Amounts Ord. or a maintenance annuity expressed as a figure. If a maintenance title was obtained which hands down a percentage of the respective normal amount, this title does not need to be adjusted. The normal amounts are adjusted in accordance with section 1612 a subsection 4 of the Civil Code every two years respectively as on 1 July to the development of the average disposable income. The specific maintenance owed is automatically adjusted through each adjustment of the normal amounts via the personal percentage of the maintenance title, without a need for an action to effect an alteration.

Question 14:

In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?

Response:

A maintenance title may be amended under the preconditions of section 323 of the Code of Civil Procedure. This change action initiates new, separate proceedings – separate from the original maintenance proceedings, that is???. Jurisdiction is had by the family court with jurisdiction in accordance with general rules. This is not necessarily the court of first instance first seized.

The alteration clause in accordance with section 323 of the Code of Civil Procedure is only admissible with a conviction to recurrent payments due in future. It is conditional on a major change having subsequently (in other words after the last oral hearing in the maintenance case) taken place in the circumstances that are relevant in the sentence determining the amount of the payments or the duration of their establishment.

Question 15:

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

Response:

A foreign decision which must be recognised may be altered in Germany by means of an alteration action. There must be a domestic venue. Grounds of non-recognition are examined in an interlocutory procedure.

Establishing paternity**Question 16**

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

Response:

In accordance with the caselaw of the Federal Court of Justice, the preliminary question of paternity emerging in the context of a duty of support under family law is to be joined in a connected manner, meaning that establishing paternity is to be adjudicated in accordance with the law stated to apply by international private law of

the maintenance status. As to the regulations on collision contained in Art. 18 of the Introductory Act to the Civil Code, reference may be made to the information regarding Question 4.

Question 17

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

Response:

The proceedings to establish paternity are governed by sections 640 et seqq. of the Code of Civil Procedure and allocated to "proceedings in parent and child cases". Accordingly, the court has jurisdiction in whose area the child has his/her place of residence, or his/her place of habitual residence if there is no domestic place of residence (section 640a of the Code of Civil Procedure). In accordance with sections 23a No. 1 and 23b subsection 1 No. 12 of the Courts Constitution Act (GVG), the factual jurisdiction of the Local Court sitting as a family court emerges.

As to the proceedings, it is a fact that in proceedings under the law of parent and child the court in accordance with sections 640 subsection 1 second sentence and section 616 subsection 1 of the Code of Civil Procedure is not bound by the submission of the party, but may also carry out investigations ex officio and order evidence to be taken. In particular, the possibility exists in accordance with section 372a of the Code of Civil Procedure to also order coercive taking of blood samples, etc., if this is necessary in order to draw up a report on descent.

Without being bound to evidence offered by those concerned, the court has all means of taking evidence available to it (hearing those concerned, personal inspection, witnesses, documents and expert witnesses). It is up to the free selection of the court of items of evidence after a due assessment of the circumstances.

In accordance with section 640h first and third sentences of the Code of Civil Procedure, a positive judgment establishing paternity works for and against all, irrespective of participation in the proceedings with this regard.

Establishment of paternity is reserved to the courts. There is no administrative procedure to establish paternity.

Question 18

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

Response:

In this respect, there is no difference between paternity to be established in the context of a dispute on support, and isolated proceedings to establish paternity. If the court is unable to become sufficiently convinced of paternity on the basis of other methods and by taking evidence (submissions by the parties, witnesses testimony, etc.), it will commission an expert to draft a report on descent.

In the current court practice, the well-known methods for such report on descents are blood group tests, additional Serostat test, determination of the gestation period, establishment of infertility, genetic tests and those on a genetic engineering basis (DNS). Blood group tests mostly require several blood samples to be taken of (possible) relatives of the child and costs several thousands of Euros, depending on the extent of the comparative tests to be carried out. By contrast, genetic engineering test procedures are cheaper. Costs of between Euro 500 and 1500 should be expected in most cases.

Question 19

May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

Response:

The fact of a foreign support decision containing establishment of paternity does not essentially oppose its recognition and enforcement in Germany.

Legal and administrative aid and assistance

Question 20:

What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:

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

Response:

- a) In accordance with sections 1712 et seqq. of the Civil Code, in response to a written application by a parent, the youth welfare office becomes an advisor for the child for the purpose of establishing paternity, and asserts support claims.

Furthermore, a child living in Germany may also request legal aid in asserting support claims in accordance with the general provisions (sections 114 et seqq. of the Code of Civil Procedure).

Financial support is provided for by the Code of Civil Procedure for court proceedings in the shape of legal aid (sections 114 et seqq. of the Code of Civil Procedure) for parties which in accordance with their personal and economic situation are unable or partly unable to meet the cost of the proceedings, or can only meet them in instalments. There is a need for a corresponding application to the court. The intended legal prosecution or defence must have sufficient prospects of success, and may not appear wanton.

Financial support in legal advice outside court proceedings is made possible by the Act on Legal Advice Aid (Beratungshilfegesetz) dated 18 June 1980 (Federal Law Gazette [BGBl.] Part I p. 689). Legal advice aid is given by lawyers. In the city states of Bremen and Hamburg, legal advice aid is given by public legal advice agencies.

- b) It emerges from section 1777 that the advice of the youth welfare office may not provide advice if the child has his/her place of habitual residence abroad. The possibility to obtain legal aid is in line with the general provisions.

Regardless of their nationality and their place of residence, natural entities may receive legal aid in Germany to implement court proceedings. The requirement of reciprocity is

no longer necessary. In accordance with section 116 first sentence No. 2 of the Code of Civil Procedure, foreign legal entities and associations which may be parties may however not receive legal aid unless a multilateral international treaty or a bilateral treaty make express provision for this (such as Article 44 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters).

A place of residence in Germany is not necessary in order to be able to claim benefits in accordance with the Legal Advice Aid Act. It is sufficient for a need for advice to occur in Germany and for the facts to relate to Germany.

Question 21:

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

Response:

Assistance for legal advice and representation outside court proceedings is received by persons in need (legal advice aid) in accordance with the Act on Legal Advice and Representation for Citizens on a Low Income (Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen - Beratungshilfegesetz).

Legal aid is granted for court proceedings in accordance with the provisions on legal aid (sections 114 – 127a of the Code of Civil Procedure). No distinction is made in the legal advice aid and legal aid proceedings between child support and maintenance for parents or relatives. The same procedural rules apply to all maintenance claims.

It is irrelevant to the approval of legal aid whether the person seeking justice lives abroad. Persons seeking justice living abroad may also be granted legal aid for court proceedings (maintenance action, coercive execution proceedings). Legal aid may however only be granted to assert rights before German courts, not to assert and implement maintenance claims abroad and for the administrative procedure in accordance with the Maintenance Abroad Act (Auslandsunterhaltsgesetz).

Procedural assistance (legal advice aid or legal aid) is granted if the person seeking justice is unable as a result of his/her personal and economic circumstances to find the required funding (need) and has no other acceptable method of obtaining assistance.

Furthermore, the intended assertion of the rights must not be wanton. In the event of legal aid being granted, furthermore, the intended assertion or defence of rights must have sufficient prospects for success. The court ruling on the application to grant legal aid must consider the legal point of view of the applicant to be correct, or at least justifiable, on the basis of their presentation of the facts and the available documents,

and must be convinced from a factual point of view of the possibility of evidence being taken.

If the statutory preconditions are met, there is a right to have legal advice aid or legal aid granted.

Children are granted legal aid in the form of advice from the youth welfare office. Advice may be applied for in accordance with section 1712 of the Civil Code for the following tasks:

1. establishment of paternity, and
2. asserting maintenance claims, as well as disposing of these claims. If the child is being cared for by a third party for a fee, the advisor is entitled to effect payment to the third party from what has been paid by the person obliged to provide maintenance.

Advice may be restricted to individual tasks mentioned above in response to an application (section 1712 subsection 2 of the Civil Code).

Advice applies once the written application has been received by the youth welfare office (section 1712 subsection 1 and section 1714 of the Civil Code). In accordance with section 1713 subsection 1 second sentence of the Civil Code, the parent is entitled to file who has sole parental custody for the tasks to which the application relates. If both parents have joint parental custody for the child, the application may be filed by the parent in whose care the child is (section 1713 subsection 1 second sentence of the Civil Code in the version in effect since 11 April 2002). The application may not be made by a representative. In accordance with the provision contained in section 1717 of the Civil Code, advice only applies if the child has his/her habitual residence in Germany. Advice is no longer provided if the habitual residence of the child goes abroad after support has started to apply.

Advice is terminated if the applicant so requests in writing or no longer meets the requirements just put forward contained in section 1713 of the Civil Code (section 1715 of the Civil Code).

In accordance with section 1716 of the Civil Code, appointment of the advisor has the following effects:

1. Parental custody is not restricted by support (section 1716 first sentence of the Civil Code).
2. The advisor is given the status of a curator (cf. sections 1909 et seqq. of the Civil Code), whereby the provisions otherwise applicable to a custodian regarding invoicing, supervision by the guardianship court regarding the work of the custodian and the regulations relating to handing over a certificate of appointment by the guardianship

court do not apply (section 1716 second sentence of the Civil Code). The advisor may hence represent the child both in and out of court (sections 1716, 1909, 1915 subsection 1 and 1793 of the Civil Code).

Question 22:

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

Response:

The preconditions for granting legal aid are in line with sections 114 et seqq. of the Code of Civil Procedure. No distinction is made as to the identity of the party entitled to apply.

The possibility of advice from the youth welfare office in asserting maintenance claims exists in accordance with sections 1712 et seqq. of the Civil Code only to assert child support. Advice may not be applied for to assert maintenance claims of other persons (such as spouses during separation or once divorce has gained legal force, or the separate maintenance claim of the mother who is not married to the father of the child in accordance with section 1615I of the Civil Code, or indeed of parents against their children) (cf. Question 21).

However, the possibility also exists in the context of section 59 No. 4 of the Eighth Book of the Social Code to establish an executable document (at the youth welfare office) free of charge for maintenance claims of the mother in accordance with section 1615I of the Civil Code.

Legal costs and expenses

Question 23:

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

Response:**a) Court costs**

Costs are levied by the courts in maintenance proceedings (fees and expenses) in accordance with the Court Costs Act (Gerichtskostengesetz - GKG). In accordance with section 11 subsection 2 of the Court Costs Act, the amount of the fees is dependent on the respective value of the dispute.

With claims to meet a statutory maintenance obligation, in accordance with section 17 subsection 1 of the Court Costs Act the amount claimed for the first twelve months after submission of the action or of the application is the relevant value at dispute.

Fees and expenses are summarised in a list of costs relating to the Court Costs Act (Court Costs Act Cost List). Each element of a fee or expense is hence allotted a number.

In addition to a three-fold administrative fee (No. 1210 Court Costs Act Cost List) in maintenance proceedings, most are incurred for servicing. These are however only levied as expenses (No. 9002 Court Costs Act Cost List) if they exceed €50 at one instance. Because of these limits, which in practice as a rule are not exceeded, these costs are not included in the example cases quoted in the enclosed table.

b) Lawyers' fees

Lawyers are paid (fees and expenses) in accordance with the Federal Code of Lawyers' Fees (Bundesgebührenordnung für Rechtsanwälte - BRAGO).

In the same way as the courts, they levy fees depending on certain values. In accordance with section 7 subsection 1 of the Federal Code of Lawyers' Fees, these are calculated in accordance with the value that the article has at the time the lawyer works (value of the subject-matter). Section 8 subsection 1 of the Federal Code of Lawyers' Fees refers to section 17 subsection 1 of the Court Costs Act for calculating the value. The value at dispute and the value of the subject-matter are hence identical. In accordance with section 31 subsection 1 of the Federal Code of Lawyers' Fees, a lawyer as a rule receives two 10/10 fees in maintenance cases, one each for operating the business, including information (case fee) and for attending an oral hearing (hearing fee).

In addition to the fees, the lawyer has a right in accordance with section 25 of the Federal Code of Lawyers' Fees to have his/her expenses refunded. These are mainly the fees for posts and telecommunications (section 26 of the Federal Code of Lawyers'

Fees) and turnover tax that he/she must pay (section 25 subsection 2 of the Federal Code of Lawyers' Fees).

c) Simplified procedure relating to the maintenance of minors

On request, and in accordance with section 645 of the Code of Civil Procedure, the maintenance of a minor child is established under certain preconditions in a simplified, largely formalised procedure. In these proceedings, instead of a three-fold fee, the court levies only a half-fold fee in accordance with No. 1800 of the Court Costs Act Cost List. In accordance with section 44 subsection 1 of the Federal Code of Lawyers' Fees, the lawyer receives a 10/10. No hearing fee is levied.

The following examples are to illustrate the amount of the typical court case costs, average values having been taken as a basis:

Example 1: (Value at dispute: € 3,000 to 3,500)

| | Normal proceedings | Appeal proceedings | Simplified proceedings |
|---|-----------------------|-----------------------|---------------------------|
| <u>a) Court costs</u> | | | |
| aa) Procedural fee | € 291.00 | € 145.50 | € 48.50 |
| bb) Judgment fee | € 0.00 | € 291.00 | € 0.00 |
| <u>b) Legal fees</u> | | | |
| aa) Case fee | € 217.00 | € 282.10 | € 217.00 |
| bb) Hearing fee | € 217.00 | € 282.10 | € 0.00 |
| cc) Fee for posts and telecommunication services | € 20.00 | € 20.00 | € 20.00 |
| dd) Rate of turnover tax re b) | <u>€ 72.64</u> | <u>€ 93.47</u> | <u>€ 37.92</u> |
| Total court case costs: | € 817.64 | € 1,114.17 | € 323.42 |

Example 2: (Value at dispute: € 4,500 to 5,000)

| | Normal proceedings | Appeal proceedings | Simplified proceedings |
|------------------------------|-----------------------|-----------------------|---------------------------|
| <u>a) Court costs</u> | | | |
| aa) Procedural fee | € 363.00 | € 181.50 | € 60.50 |
| bb) Judgment fee | € 0.00 | € 363.00 | € 0.00 |
| <u>b) Legal fees</u> | | | |

| | | | |
|--|-------------------|-------------------|-----------------|
| aa) Case fee | € 301.00 | € 391.30 | € 301.00 |
| bb) Hearing fee | € 301.00 | € 391.30 | € 0.00 |
| cc) Fee for posts and telecommunication services | € 20.00 | € 20.00 | € 20.00 |
| dd) Rate of turnover tax re b) | <u>€ 99.52</u> | <u>€ 128.42</u> | <u>€ 51.36</u> |
| Total court case costs: | € 1,084.52 | € 1,475.52 | € 432.86 |

Court costs in the initial proceedings differ from those of the appeal proceedings by the number and amount of the fee rate. Thus, for example in the proceedings for an appeal on points of fact and law in addition to the one-and-a-half procedural fee (No. 1220 Court Costs Act Cost List) a further three-fold fee (No. 1226 Court Costs Act Cost List) is incurred for the decision of the court.

The legal fees differ only by means of the amount of the fee rate. The case and the hearing fee increase in accordance with section 11 subsection 1 fourth sentence of the Federal Code of Lawyers' Fees to 13/10 respectively.

In the simplified proceedings in accordance with section 645 of the Code of Civil Procedure, on request by a party in accordance with section 651 of the Code of Civil Procedure the (normal) dispute proceedings are implemented if the opponent has filed objections to the simplified proceedings. An appeal on points of fact and law cannot be filed in the simplified proceedings.

Question 24:

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

Response:

In accordance with section 91 subsection 1 of the Code of Civil Procedure, the losing party must refund the cost of the legal dispute, in particular the costs incurred by the opponent (e.g. payments effected to the court or to the lawyer) if they were necessary and expedient to assert or defend rights.

Collection and transfer arrangements and enforcement of decisions

Question 25:

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

Response:

Reference is made to the information provided in response to Question 1.

Question 26:

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

Response:

The recognition and execution of foreign maintenance titles in Germany, as well as that of domestic maintenance titles abroad and their execution, is governed by bilateral treaties and in many international agreements. The German-Swiss Treaty of 2.11.1929 can be mentioned as an example of a bilateral agreement. A Convention that can be cited is the Hague Convention dated 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In order to implement international treaties and regulations of the European Community, Germany has in each case issued special implementation ordinances or statutes, such as, for the Hague Convention dated 2 October 1973 and for Council Regulation (EC) No 44/2001 of 22 December 2000, the Act Implementing International Treaties and Implementing Regulations of the European Community in the Recognition and Enforcement of Judgments in Civil and Commercial Matters (AVAG).

Question 27:

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

Response:

All possibilities are open to the maintenance creditor in respect of maintenance claims which otherwise are also available in the case of coercive execution in respect of monetary claims. Coercive execution hence on principle is effected in respect of the whole assets of the debtor. Assets include all rights and things which have a monetary value, even if they are only indirectly suited to satisfying the creditor.

It is irrelevant whether it is a matter of moveables or immoveables, receivables or other rights. Conditional or elapsed receivables can also be attached.

With maintenance claims the particularity exists in the interest of the maintenance creditor that the restrictions on attachment otherwise applicable for the income with

attachment for the current receivables and for the arrears from the last year before the application for attachment (section 850 d subsection 1 of the Code of Civil Procedure) do not apply. The creditor must however be left sufficient means to meet his/her own necessary maintenance and to meet his/her other priority or non-priority maintenance obligations.

Question 28:

Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:

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

Response:

Reference may be made to the response to Question 27.

Question 29:

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

Response:

It is not possible to precisely state what banking costs are *typically* incurred since the bank fees depend on the amount transferred and the conditions of the respective bank. The following examples (as on: 25 February 2002) show that transfer fees may vary considerably. Additionally, the recipient bank abroad may also levy costs, and we cannot comment on their amount.

| Banks | Prices for transfers to EU countries | | Prices for transfers to other states | |
|--------------------------|---|----------------------------|---|--|
| Sparkasse Bonn | to € 12,500 | € 7.67 | to € 10 to € 50 to € 250 over this: at least: Online: at least: | free € 5.11 € 7.67 0.15% € 10.23 0.15% € 6 |
| Sparkasse Hennef | up to country-specific upper limits: | € 7.67 | to € 51: to € 511.30: over this: at least: | € 3.83 € 7.67 0.15% € 10.23 |
| Kreissparkasse Ahrweiler | in the Inter Pay System of the Sparkassen up to country-specific upper limits: over this: at least: | € 7.67 0.15 % € 7.67 | to € 255.65: over this: at least: | € 7.67 0.15 % € 10.23 |
| Dresdner Bank | to € 25: to € 2556.46: over this: | free € 7.50 0.15% | to € 10: to € 25: to € 125: to € 250: to € 8333.33: over this: | free € 2.50 € 7.50 € 10.00 € 12.50 0.15% |
| Postbank | if credited to foreign post bank account: otherwise: | € 0.50 € 1.50 | as EU states | |
| Volkbank Bonn Rhein-Sieg | up to country-specific upper limits: | € 7.50 | to € 75: to € 5000: over this: at least: | € 7.50 € 11.00 0.15% € 13.00 |

Question 30:

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

Response:

The provisions contained in section 676 a of the Civil Code regarding transfer contracts specify that transfers on principle must be effected as soon as possible. Cross-border transfers to Member States of the European Union and of the European Economic Area which are in their currency or currency unit or in Euros are, unless otherwise agreed, to be credited to the account of the financial institution of the beneficiary within an implementation period of five banking days (meaning working days on which all financial institutions concerned are usually open, excepting Saturdays).

Part III**Questions concerning the elements to be included in the new instrument****Question 31:**

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

Response:

Frequently, too much time passes until the competent foreign authority reacts. It would be desirable for a new instrument if registration of the proceedings were to be immediately notified and an automatic duty to inform were to exist if it was impossible to conclude the proceedings after for instance six months.

Question 32:

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

Response:

Sending incomplete application documents has the effect of delaying the proceedings and requires time-consuming enquiries and subsequent requests for missing documents. Indispensable core elements of the application are certified duplicates of the documents on civil status (birth certificate, marriage certificate). If the child was born out of wedlock, the document on recognition of paternity is to be sent by the father of the child. Equally, certified copies of all court rulings existing in the case are to be sent with an enforcement clause and certification of legal force, as well as proof of service of the documents initiating the proceedings to the maintenance creditor (written action, summons to attend, notification) are to be enclosed. All documents must additionally be submitted in a certified German translation or in the official language of the country processing the application.

Particular significance attaches to submitting true, complete translations in the proceedings to declare foreign maintenance decisions enforceable since the title to be declared enforceable must be sufficiently precise, and no lack of clarity may remain as to what maintenance was granted to one or several beneficiaries for which period.

In accordance with applicable international private law, the substantive law of the respective place of habitual residence of the person entitled to maintenance applies on principle to maintenance obligations. In cases in which the habitual residence of the person entitled to maintenance is abroad, the preconditions for the claim, the amount and duration of the maintenance to be paid must hence be evaluated not in accordance with German law, but with the foreign law applying there. The recipient agency must be provided with all the information necessary to process the case which would also be provided to the adjudication of the foreign court. This applies, for one thing, to the question of which maintenance requirement is to be estimated, taking account of the living expenses in the country of the person entitled to maintenance, and secondly, however, also to the question of whether and under what circumstances (for example placing the debtor in arrears) foreign law permits retroactive determination of maintenance. If a mediatory agency acts, the latter must comprehensively inform the recipient agency of the legal basis applying there when assessing maintenance. If the necessary information is already available at the start of the case proceedings, no enquiries are required in subsequent court proceedings which would delay the procedure.

It is also of vital significance that the mediatory agency performs its filter function and checks the application documents for completeness before forwarding them to the recipient agency, and calls on the applicant to forward any documents which may still be missing. It should also be manifest from the application whether, and where appropriate for which periods, public coffers have advanced maintenance payments, and whether these are addressing the debtor directly in order to obtain their payments.

Quick forwarding by the mediatory agency of the documents requested is indispensable in the interest of rapidly implementing the maintenance claims.

Question 33:

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

- a provisions concerning administrative co-operation;

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

Response:

- a) *highly important:* The mediatory and recipient agencies should communicate directly, as has been the case heretofore.
- b) *highly important:* The proceedings to declare a foreign maintenance title enforceable are less time-consuming (both in preparation and as to the duration of the proceedings in court) than court proceedings to establish maintenance before a German court, and have the advantage that the amount of the maintenance owed is no longer open to dispute. Once the proceedings have been concluded, coercive execution measures may rapidly be taken if the debtor does not meet his/her obligation to pay.
- c) *highly important:* This applies in particular in cases in which the recipient agency must issue a determination of maintenance.
- d) *less important:* The main focus of attention is, initially, to assert existing court rulings from abroad. These titles should be amended as a rule by the court handing down the judgment since the latter is best able to evaluate a change to the factual situation relevant to the ruling as against the time of the initial decision, and is able to comprehensively examine the substantive law to be applied there. The required respect for the foreign jurisdiction should also be in favour of this procedure.

e) *less important*: I presume in this assessment that the direct communication channels between mediatory and recipient agencies at a) and the person entitled to maintenance is comprehensively advised and informed by the mediatory agency of his/her country.

f) *important*:

The previous regulations (Art. 9 of the UN Convention and Art. 15 of the 1973 Hague Convention) should be retained.

g) *highly important*: Since the establishment of paternity is a precondition for subsequently establishing maintenance, the proceedings must be carried out rapidly.

This is not always possible because of the need for many parties to work together (mother of the child, child, alleged father, court, medical institutions, experts, etc.) and the fact that the case is being processed in more than one country.

h) *highly important*: One should strive towards a provision corresponding to Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro, in accordance with which the fees for international transfers may not be higher than for domestic transfers.

i) *less important*: On principle, all persons seeking maintenance should be granted support.

j) *particularly important*: The exclusive use of uniform, multilingual application forms would be welcome.

k) *unimportant*: I consider it to be a matter of course that all contracting states should keep to the instrument.

l) *particularly important*: It should be clarified whether as a result of the new instrument only claims of natural persons should be asserted, or claims which have transferred to public coffers because of payment of an advance.

m) The procedure should be such that the applicant on principle must address the mediatory agency of his/her home state and only the latter should be in contact with the recipient agency. Experience shows that direct contact by the person entitled to maintenance or a third party commissioned by such party causes additional work of the recipient agency which does not serve the expedient completion of the task (constant calls, involvement in processing the case, circumventing the filter function of the mediatory agency).

Question 34:

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

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

Response:

- a) All areas marked at Question 33 as important, highly important and particularly important,
- b) Those aspects which are marked as less important: Where possible an instrument should be striven towards which does not permit *any* options.
- c) Yes, any other regulation would consist of a backward step as against the previous procedure.

Question 35:

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

Response:

N/A

Part IV

Negotiating partners and miscellaneous

Question 36:

Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that would wish to be invited to take part in the negotiations on the new instrument?

Response:

no

Question 37:

Would you prepared to contribute to a fund (a) enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?

Response:

No payments over and above the membership subscription to the supplementary budget for the financial year XLVIII can be provided.

Question 38:

Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

Response:

There is no website or brochure on the law on maintenance.



Ministry of Justice

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Hague Conference on Private International Law
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Date:

Legislation Technique Division

Charlotte Lauritsen

Our ref.:

2002-780/5-0013

Doc.:

CHA20413

With reference to letter of 20 June 2002, please find below the Danish Ministry of Justices answers to the questionnaire regarding maintenance obligations.

QUESTIONNAIRE

PART I PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS

The questionnaire on maintenance obligations, which was sent out in advance of the Special Commission of April 1999 has already provided much information on practice under the existing international instruments. Parts I to IV of that questionnaire are attached to this document as Annex I.

States and organisations which responded to the questionnaire in 1999 are requested only to supply supplementary responses to Parts I to IV of that questionnaire, covering any relevant developments since April 1999.¹

States and organisations, which were not able to respond in 1999 are asked to provide full responses.

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

Form of maintenance decision

- 1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

¹ See extracts from responses to the Questionnaire on Maintenance Obligations, Prel. Doc. No 3 for the attention of the Special Commission of April 1999 (<http://www.hcch.net/e/workprog/maint.html>).

Maintenance decisions according to Danish law are confined to periodic payments of money. However, the maintenance debtor may satisfy a maintenance obligation by voluntarily paying a sum of money that covers his or her obligations.

Eligibility

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

Danish law imposes an obligation to pay maintenance only in relation to the debtor's children or spouse – i.e. only children and spouses can benefit from a maintenance decision.

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

The obligation to pay child support ceases when the child reaches 18 years of age. However, a parent may be ordered to pay economic contribution to the education of the child until the child has reached 24 years of age.

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

The provisions on payment of child maintenance are found in the Act of Child Maintenance (formerly the Act of the Legal Status of Children), No. 200 of May 18, 1960, most recently amended by Act No. 460 of June 7, 2001.

The provisions on the payment of spouse maintenance are found in:

- 1) The Act on the Contracting and the Dissolution of Marriage, No. 256 of June 4, 1969, most recently amended by Act No. 461 of June 6, 2001.**
- 2) The Act on the Legal Effects of Marriage, No. 56 of March 3, 1925, most recently amended by Act No. 385 of May 22, 1996.**

Procedures for the initial assessment of maintenance

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

In Denmark, child support is only determined through an administrative process by The County Governor's Office ("statsamtet").

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

The process is the same, wherever the parents are living.

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

The process is the same.

Methods of calculating maintenance

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

The law sets no limit as to the amount of child maintenance.

If the maintenance debtor has a gross-income that does not exceed the average income, child maintenance payment will be fixed to the standard allowance (In 2002 the standard allowance is DKK 940 (Euro 126,56) a month).

If the maintenance debtor has a gross-income exceeding the average gross-income, maintenance payment can be fixed at a higher amount. Every year, the Ministry of Justice lays down advisory guidelines for maintenance payments higher than the standard maintenance payment.

In recent years, the Ministry of Justice has not made a decision about a higher amount of child maintenance than five times the standard allowance.

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

Generally, there are no differences in the assessment criteria wherever the parents are living.

However, if the maintenance creditor and the child lives in a country, where the living expenses are considerable lower than in Denmark, maintenance payment can be fixed to an amount less than the standard allowance.

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

Generally, applications for maintenance in respect of a spouse or a child are treated the same way.

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

See the answer to question 4 above.

Reassessment / adjustment / modification of maintenance decisions or assessments

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

Only maintenance payments in respect of children are subject to automatic reassessment. The Ministry for Social Affairs regulates the standard allowance once a year. In 2002 the standard allowance is DKK 940 (Euro 126,56) a month.

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

The standard allowance is regulated every year by January the 1st by the same index that is used to regulate social benefits.

- 14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?

A decision regarding child or spouse maintenance is normally valid until further notice. Upon application the decision may be modified either upwards or downwards. This means that the maintenance can be altered, for instance if there are considerable changes in the personal or economic situation of the parties concerned.

Normally, modifications only have effect for future payments.

Modifications are done by the same authority (The County Governor's Office), which made the original assessment.

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

A foreign decision or assessment may only be modified on the application of a resident debtor if Danish authorities have international jurisdiction in accordance with the Brussels and Lugano Conventions.

If the case is not governed by the conventions mentioned above, Danish authorities usually have international jurisdiction in situations, where the resident debtor is living in Denmark.

Having international jurisdiction, a foreign decision can be modified in Denmark according to the rules set out in the answer to question 14.

Establishing paternity

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

The provisions on the determination of paternity are found in The Children Act, Act No. 460 of June 7, 2001.

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

If a married woman gives birth to a child, her husband shall be considered the child's father

The husband or the mother may, however, contest the husband's paternity within 6 months after the birth of the child.

When an unmarried woman gives birth to a child, it is necessary to establish the paternity.

Unmarried parents who wish to share the care and responsibility for their child can file a Statement of Care and Responsibility with the church register office, the local birth registrar or the County Governor's office and thereby establish the man as the child's legal father. At the same time the parents will obtain joint custody of the child.

The parents can also establish paternity by submitting a written statement to the County Governor's office or by accepting paternity in a meeting at the Governor's office.

If paternity is not established as mentioned above, the courts will establish paternity.

After the child is 6 months old, paternity can only be contested if there are special circumstances. After the child is 3 years old, paternity can only be contested in exceptional cases.

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

Genetic testing involving DNA-analyse is used in establishing paternity.

All testing in paternity cases is performed at no cost for the parties.

If the case is brought before the courts, both parties may need legal counsel by an attorney. The court may appoint an attorney for both parties, if the court finds it necessary. This procedure corresponds to legal aid, which covers the fees of the legal counsel.

No distinction is made between residents and non-residents in these cases.

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

a) Danish authorities may refuse the recognition and enforcement of a foreign child support decision, if the paternity has not yet been determined.

b) Danish authorities accepts recognition and enforcement of a foreign decision according to the Hague and UN conventions, if paternity it is determined correctly according to the law and method of the country in question.

Legal and administrative aid and assistance

- 20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:

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

The parties in child support cases are not entitled to legal aid, as such cases are dealt with through an administrative system.

In stead, the County Governor's Office is obliged to assist and advice the parties.

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

All parties are entitled to assistance by the County Governor's office.

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

In Denmark it is only possible to make orders about spouse or child maintenance.

Legal costs and expenses

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

There are no legal cost or expenses in determining the amount of child or spousal maintenance; as such cases are dealt with administratively.

However, if spouses do not agree upon the obligation to pay spousal maintenance after divorce or legal separation the question is settled by the courts. In such cases the parties may have to pay the costs of their own attorney. They may also have to pay the costs of the attorney representing the other spouse.

The Ministry of Justice has no information on the costs in such cases.

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

No.

Collection and transfer arrangements and enforcement of decisions

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

The maintenance debtor must pay directly to the maintenance creditor.

If child support is not paid, the standard allowance may be paid in advance to the maintenance creditor by the local public authority ("kommunen").

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

No particular arrangements apply.

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

Enforcement of maintenance decisions is subject to the rules found in Act of the Enforcement of Alimony, No. 150 of April 24, 1963, most recently amended by Act No. 461 of June 7, 2001.

If maintenance is not paid on time, the maintenance creditor can be assisted by the local public authorities ("kommunerne") in recovering the amount due.

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

please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:

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

All the above-mentioned enforcement/collection methods are - to some extent - available in Denmark. Committal to prison is not used.

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

Approximately DKK 300 (Euro 40).

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

No.

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

The Danish ministry of Justice has no comments in particular to the questions in part III.

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

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

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

- a* provisions concerning administrative co-operation;
- b* provisions for the recognition and enforcement of foreign decisions;
- c* applicable law principles;
- d* uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;
- e* provisions specifying the assistance to be provided to an applicant from another Contracting Party;
- f* provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;
- g* provisions concerning co-operation in the establishment of paternity;

- h* provisions concerning co-operation in the international transfer of funds at low cost;
 - i* provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;
 - j* standard forms;
 - k* provisions aimed at securing compliance with obligations under the instrument;
 - l* provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;
 - m* others. Please specify.
- 34 With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should "combine the maximum efficiency with the flexibility necessary to achieve widespread ratification",
- a* which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,
 - b* which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them, and
 - c* do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?
- 35 In the case of States, which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

- 36 Apart from the Member States of The Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?

No.

- 37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?

Denmark would look positively upon contributing to such a fund. A final decision on a Danish contribution would, however, have to await a concrete proposal concerning the funding of such a fund.

- 38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

Further information on maintenance payments can be found at the homepage of the Ministry of Justice, Department of Private Law: www.civildir.dk. Unfortunately the information is only available in Danish.

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

ANNEX I

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

QUESTIONNAIRE ON MAINTENANCE OBLIGATIONS

(Parts I to III only)

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

Section A – Questions addressed to States Parties

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

Enforcement of foreign maintenance orders in Denmark is only based on the New York Convention, if enforcement according to The Hague, Brussels and Lugano Conventions is not possible.

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

No.

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

- a) **Full name, address, date of birth, nationality and occupation of both the maintenance creditor and the maintenance debtor.**
- b) **Specification of the debt and any relevant information of the grounds upon which the claim is based.**
- c) **Final or temporarily decision or settlement of the maintenance obligation.**

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

The case is transmitted to the local authority, which first of all attempts to obtain voluntary payments from the maintenance debtor or to reach an agreement.

If this fails, the convention allows for the creation of a new maintenance order according to Danish laws. Thus, the case is transmitted to The County Governor’s Office. Thereafter, the new maintenance order of the Governor’s Office is enforced like other Danish orders.

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

No.

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

No.

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

Yes, Denmark permits public bodies to make use of the convention if maintenance has been paid to the maintenance creditor in advance by this public body. This does not require, that certain conditions are met.

- 8 Legal assistance:

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

Since the assessment and enforcement of maintenance orders is handled administratively, there is no need for legal assistance to the claimant.

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

All services for determination and enforcement of foreign maintenance orders are free of charge, except costs in connection with forced sale of property, which are charged to the claimant.

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

All relevant documents must be translated into Danish, except documents from Nordic countries. However, the local public authority may also accept documents in English and sometimes in German.

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

The Ministry of Foreign Affairs, which is the receiving and transmitting agency in connection with the New York Convention, has stated that there are no guidelines regarding this matter. Typically, the Ministry will accept all Nordic languages, English, German and French.

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

Danish law does not regulate these matters, and to the knowledge of the Ministry such questions have not appeared.

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

Danish law does not regulate this.

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

The Ministry has no knowledge of the least costly methods of transferring funds.

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

The Ministry is not aware of such cases.

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

The whereabouts or place of work of a maintenance debtor is usually found through the civil registration and the taxation systems. If this fails, the police may assist in finding the debtor.

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

See the answer to question 4 above and the answer to question 3 below. The debtor must thus always be left with means for the maintenance of the debtor himself and his family.

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

If a maintenance debtor intends to emigrate from Denmark the debtor may be ordered to fulfil the maintenance obligations or provide security for the payments.

It is also possible to seize the passport of the debtor, if the debtor is a Danish citizen.

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

In determining the extent of assets the debtor or other persons with relevant information may be questioned under the penalty of law. Information may also be collected from other public authorities. Finally, enforcement proceedings may take place at the debtor's home.

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

None.

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

Unfortunately, no statistics are available.

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

No.

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

Section A – Questions addressed to States Party to one or both Conventions

- 1 Does a limitation period operate in respect of an action for the enforcement of a maintenance obligation? Which law governs any such limitation period?

The general limitation period for maintenance obligations is 5 years according to the Limitation Act. (Act No. 274 of December 22, 1908). Maintenance paid by a public body in advance is, however, subject to a limitation period of 20 years.

- 2 Does a limitation period operate in respect of the execution of a writ for the recovery of maintenance? Which law governs any such limitation period?

See the answer to question 1.

- 3 Do your procedures for enforcement permit the debtor to claim inability to pay?

Yes, the debtor may claim inability to pay the debt. Thus the debtor must always be left with means for the maintenance of the debtor himself and his family.

- 4 Do your procedures allow for the possibility of modifying the content of a decision registered in application of the 1973 Convention?

No.

- 5 Is the debtor entitled to bring modification proceedings in respect of the foreign decision? If so, on what jurisdictional basis and on what grounds?

See the answer to question 15 of part II.

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

Denmark is not a party to either of these conventions.

Section A – Questions addressed to States Party to one or both Conventions

- 1 Which law is applied by your courts to incidental / preliminary questions (e.g., as to the paternity of a child) arising in the course of maintenance proceedings within the scope of the Hague Conventions?
- 2 In a decision of 21 February 1997 (*Nederlandse Jurisprudentie* 1998, No 416), the Netherlands Supreme Court ruled that Article 8 of the Hague Convention of 1973, in the

light of its history and that of the Convention as a whole, was not incompatible with the admission of a choice by divorced spouses of the governing law, the law chosen being that of the country of their common habitual residence for a long period and of the forum. (Dutch law, chosen by the parties, was applied rather than Iranian Law which governed the divorce.)

Is this decision consistent with the manner in which Article 8 has been interpreted by your courts? If not, do you think that an amendment of Article 8 would be desirable to allow expressly for a choice of law by the spouses?

- 3 Do your courts interpret the Hague Convention of 1973 as applying to maintenance obligations of one spouse in respect of children of the other spouse to whom she / he is in *loco parentis*?
- 4 Have any particular difficulties arisen in applying / interpreting either the 1956 or the 1973 Conventions?

Kind regards,



**EESTI VABARIIGI JUSTIITSMINISTEERIUM
MINISTRY OF JUSTICE OF ESTONIA**

Hague Conference on Private International Law

20 June 2003 Your ref. L.c. ON No 26 (02)

19.November 2003 Our ref. 3-3-4/9294

*Questionnaire of the Hague Conference on
Private International Law*

Dear Madam, dear Sir,

Estonia welcomes the initiative of the Hague Conference on Private International Law to draw a new global instrument on the international recovery of child support and other forms of family maintenance. Herewith we send you our response to the questionnaire concerning the maintenance obligations (Preliminary Document No 1 of June 2002).

**Part II – Questions concerning national systems of maintenance obligations in
respect of children and other family members**

Form of maintenance decision

- 1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?**

In all the cases when a person fails to perform his/her legal maintenance obligation in respect of a family member, support may be ordered from him/her by a court decision. This applies both in case of maintenance owed to (a) a child (b) a spouse and to other family member entitled to support.

The law stipulates the payment of maintenance support under periodic intervals, i.e. monthly payment of maintenance support (the modalities thereof, such as lump sum payments or transfer of objects of property are possibly applicable as measures of securing an action).

Eligibility

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

The persons eligible for maintenance support are as follows:

(a) A minor child and an adult child incapacitated for work in the need of assistance; also an adult child who continues attending an institution of basic or secondary education or vocational training. An obligated person is the parent, the maintenance support is ordered by the court in favour of the parent who has filed a claim or in favour of a guardian or a person, in whose interests the guardianship authority has filed the claim.

(b) The parent incapacitated for work and in need of assistance (the obligated person is the adult child) or a grandparent (provided he/she does not have a spouse or an adult child or if it is impossible to get maintenance support from them).

(c) A step-parent or a foster-parent incapacitated for work and in need of assistance, who does not have an adult working child or a spouse or if it is impossible to get maintenance support from them. The obligated person is an adult step- or foster child, whom the step-parent or foster-parent requesting support has raised and supported for at least 10 years.

(d) A spouse during the time of marriage – in case the spouse in need of assistance is incapacitated for work, also during pregnancy of the spouse and during care of the child till the child gets 3 years old. The obligated person is the other spouse, in case his/her financial status allows to support.

(e) A spouse after divorce of marriage – in case the spouse in need of assistance is incapacitated for work and became invalid or reached the age of retirement during the time of marriage; also the divorced spouse during pregnancy and during care of the child until the child attains three years of age, in case the child was conceived during the marriage. The obligated person is the other divorced spouse, in case his/her financial status allows for provision of maintenance.

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

“Dependent” child in the meaning of law is:

- (a) a minor child;
- (b) an adult child in need of assistance and incapacitated for work;
- (c) an adult child who continues attending an institution of basic or secondary education or vocational training.

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

Pursuant to Article 61 of the International Private Law Act (RT I 2002, 35, 217), the Hague Convention on the Law Applicable to Maintenance Obligations from October 02, 1973 applies to the duty of maintenance based on filiation relations.

Pursuant to Estonian legislation the right of maintenance proceeding from filiation relations, also the maintenance relations between spouses and divorced spouses are regulated by the Family Law Act.

Procedures for the initial assessment of maintenance

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

The maintenance support obligation and the amount of maintenance support are determined in court proceedings by way of a civil action.

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

With regard to duties of maintenance within the family, the Hague Convention on the Law Applicable to Maintenance Obligations (October 02, 1973) applies.

In case pursuant to the above Estonian law is applicable, there are no procedural differences stipulated for in cases where the applicant or the respondent lives abroad.

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

The process of ordering (maintenance) support for a child or for a spouse or for another family member are not regulated differently. It is possible to join the actions pursuant to the provisions of the civil procedural right.

Methods of calculating maintenance

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

According to Estonian law, the assessment of the amount of child support is primarily based on the financial status of both parents and on the needs of the child. The ability of the obligated person to procure facilities, necessary for performance of maintenance obligation, as well as his/her other obligations, are taken into account.

The law stipulates the minimum amount of monthly support per child, that is ¼ of the minimum monthly salary established by the Government of the Republic (minimum support in 2002 - 342.- kroons). For good reasons, the court is entitled to reduce the amount of support to less than the above-mentioned minimum.

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

No.

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

The minimum amount of support mentioned in p. 8 is applicable only by the assessment of the amount of support for a child. The maintenance obligation in respect of any other person rather than a child incurs only in the case when the financial status of the obligated person allows for provision of maintenance.

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

Pursuant to Article 61 of the International Private Law Act (RT I 2002, 35, 217), the Hague Convention on the Law Applicable to Maintenance Obligations from October 02, 1973, applies to the duty of maintenance based on filiation relations.

Pursuant to the Estonian law, the assessment of the amount of (maintenance) support is regulated by the Family Law Act.

Reassessment / adjustment / modification of maintenance decisions or assessments

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

The amount of support is not automatically subject to periodical reassessment. The amount of support can be modified upon the claim of the interested person by way of a court decision.

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

No. Even in the case of change of the minimum monthly salary forming the basis of the minimum support mentioned in p. 8, the respective modification of the amount of support for the child has to be pursued in court.

14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?

The amount of support may be modified by the court (both upwards and downwards) upon the claim of the interested person, if there has been a change either (a) in the financial status of the obligated person; or (b) in the need of assistance of the dependant (child). The upwards modification of the support is possible upon the lapse of the circumstances which originally caused the restriction of the amount of support (e.g. the obligated person acquires larger income). Downwards modification of the support or cessation of payment may come under discussion first of all in case the obligated person has become incapable for work or the dependant himself/herself has acquired sufficient income.

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

The Estonian court cannot amend the support decision made by the court (or some other institution) of a foreign country. If the case is in the jurisdiction of an Estonian court and no restrictions to the substantive decision by the Estonian court proceed from the international agreements in force for Estonia, then the resident obligated person may request for a new decision by the Estonian court.

Establishing paternity

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

Establishment and contestation of filiation are governed by the law of the state of residence of the child at the time of birth. Filiation from a parent may be established and contested also pursuant to the law of the state of residence of the parent. The parent may recognise a child also under the law of his/her state of residence. (International Private Law Act, Article 62).

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

Under Estonian law, paternity is established as follows:

(a) the father of a child is the man, who is/was married to the mother of the child at the time the child was born or conceived (paternity is fixed by the vital statistics office in the birth registration certificate under the petition of either parent);

(b) under joint written petition of the father and mother of the child, submitted to the vital statistics office – if the parents of the child are not married to each other (the vital statistics office, under joint petition of the parents, fixes the paternity in the birth registration certificate of the child);

(c) with court decision, if the parents of the child are not married to each other and paternity has not been established under joint written petition of the father and mother of the child.

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

The proving of paternity is necessary only in case paternity is established by the court. In this case, the order of proof stipulated by the civil court procedure, is followed. The court may order for a DNA analysis for the establishment of paternity, which is conducted in the Estonian Bureau for Forensic Medicine. Analysis of three persons – the mother, the child and the man to be tested – costs 3600 Estonian kroons.

The costs of the above mentioned expert analysis will be added to legal costs. Under the petition of the party, in whose favour the decision was made, the court may order payment of the necessary and justified legal costs from the other party. The costs of expert analysis cannot be included to the costs for legal assistance, from the payment

of which the court may release a person. (Code of Civil Procedure Article 59). Estonian law does not make any difference between the resident and non-resident parties of the procedure.

- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.**

Estonia recognizes and enforces the foreign child support decisions in accordance with the Hague Convention on Recognition and Enforcement of Maintenance Decisions from 1973. Estonian law does not provide any grounds to refuse from recognition and enforcement of foreign court decisions, if (a) the decision includes establishment of paternity or (b) a law or a method has been applied to that determination which differs from such applied in Estonia.

Legal and administrative aid and assistance

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

Both a resident claimant and a non-resident claimant have a possibility to use the services of a lawyer or any other legal consultant. According to Article 59 of the Code of Civil Procedure, the court has the right to fully or partially release a natural person from payment for legal assistance and to charge the advocate's fees to the state if the court finds that the person is insolvent.

As administrative agencies do not participate in the maintenance support proceedings, they also lack any direct role of a consultant in respect of a claimant. In case of several international conventions¹ on maintenance obligation, the Ministry of Justice has been designated as the central authority. Thus, in certain cases based on such conventions, the Ministry of Justice may be obliged to provide certain information or assistance.

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

In releasing a person from the costs of legal assistance, the court takes the financial status of the person into account. A person may be released from payment for legal assistance if the court finds that he/she is insolvent.

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

No. For all persons the principles of accessibility of consultation are the same.

¹ The Hague Convention on Recognition and Enforcement of Foreign Decisions from 1973; The Hague Convention on the Law Applicable to Maintenance Obligations from 1973; The Convention on Reclaim of Maintenance from a Foreign Country (New York, 1956).

Legal costs and expenses

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

Legal costs are made up of: 1) state fees (these depend on value of the action; in case of an action for support – the amount of one year's support payments); 2) costs essential to proceedings; 3) security on cassation. According to State Fees Act Article 16 Subsection 1 clause 2, the claimant is released from the payment of state fees in case of action for support. As upon appeal the state fees are due in the same amount as it is provided upon preliminary filing with the court of first instance, no state fees shall be due in the process of appeal likewise. The amount of the security on cassation to be paid is 200.- kroons.

It is difficult to specify the amount of the 'typical' costs of legal assistance, as it is not uncommon that upon support claims any legal service is waived by the parties. The other possible costs in addition to the legal assistance costs are as follows: the fee for expert, the fee for a translator and the compensation for witness; the costs connected with obtaining of the documentary evidence, costs for conducting an inspection of physical evidence and on-the-spot visit of inspection; postage and costs for serving summonses, wages which a party does not receive due to absence from work and travel and accommodation expenses. (Code of Civil Procedure, Article 52).

Enforcement costs may be added to the above – those shall be enforced from the debtor under the decision of the court bailiff.

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

The question is not clear – it is not clear, what costs are meant and by who should pay them.

Collection and transfer arrangements and enforcement of decisions

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

The parties may agree upon details between themselves. As a rule, the support is paid by way of a bank transfer to the account of the person, in whose favour the support was ordered. It is also widely practiced that the support is withheld from the salary of the obligated person.

In case no agreement can be reached or in case the obligated person does not voluntarily perform the court judgement by virtue of which was support ordered, the person, in whose favour the support was ordered, may institute enforcement proceedings against the obligated person. In such case the claim for payment may be made against the debtor's property pursuant to general procedure. In case of support claims, it is not permitted to demand advance payment of the enforcement costs from the entitled person.

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

In order to enforce the judgement or of other decision of a foreign court pertaining to the recovery of a monetary debt, the debtor shall pay the money to the official account of the bailiff and it remains on this account until the claimant gets a permission to transfer it into a foreign country. Upon the wish of the claimant, the money is transferred to the deposit account or bank account, opened in his/her name in the Republic of Estonia. The money shall be transferred to the claimant by a public banking authority.

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

Compulsory execution of support claims takes place the same way as with all other monetary claims. The order of compulsory execution is the same with the decisions, made in favour of children as well as with the decisions, made in favour of the other persons. Under the payment order, the bailiff may:

- 1) make a claim for payment against the property of the debtor by seizure or sale of the property;
- 2) make a claim for payment against the deposit of the debtor;
- 3) make a claim for payment against the money and property of the debtor, in the hands of the third parties;
- 4) confiscate from the debtor the object, mentioned in the court judgement and to hand them over to the claimant;
- 5) take other legal measures provided for in the enforcement document.

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

See the previous item.

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

- **wage withholding** – YES (widely spread in practice);
- **tax refund intercepts** – possible, as it concerns claims against the state or local government and it is possible to make a counterclaim against the claim for payment (Article 34, Taxation Act);
- **garnishment from bank accounts or other sources** YES (possible pursuant the Code of Enforcement Procedure – by seizure of the bank account);
- **deductions from social security payments** – not specifically provided for. Deductions from the pension [separately mentioned hereinafter] are possible, but the law does not stipulate anything about the other benefits;
- **forced sale of property** – YES (Code of Enforcement Procedure: Making claims against the both the movable as well as immovable property of the debtor. The property shall be sold after seizure on the compulsory auction);
- **division of pension benefits** – YES (the basis for making deductions from the public pension – Article 47, Public Pension Insurance Act, requires the existence of the judicial decision, subject to enforcement under the Code of Enforcement Procedure); **and**

committal to prison – YES ((a) Article 169 of the Penal Code: A parent who intentionally evades payment of monthly support ordered by a court to his or her child of majority but is incapacitated for work and needs assistance shall be punished by a pecuniary punishment or up to one year of imprisonment.

b) Article 170 of the Penal Code: An adult child who intentionally evades payment of monthly support ordered by a court to his or her parent who is incapacitated for work and needs assistance shall be punished by a pecuniary punishment or up to one year of imprisonment.

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

Under the service price lists of the major Estonian banks (Hansa- ja Ühispank) the service charge for a transfer made in foreign currency is 120 – 140 kroons (to be reduced from the sum transferred), in case of full amount the service charge is 400 – 500 kroons. The service charges for foreign payments range from 30 to 100 kroons, depending on currency. For non-clients the service charges are two times higher.

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

No.

Part III - Questions concerning the elements to be included in the new instrument

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

Estonia has not many experiences in applying the conventions and at the moment we can not point out any shortcomings.

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

Estonia has not many experiences in applying the conventions and at the moment we can not point out any shortcomings.

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

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

We find that all the issues mentioned should be included in the new instrument.

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

- a* which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,

The elements mentioned under 33 a, b, c, d, g, j and e.

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

The elements mentioned under 33 e, f and i.

- c* do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?

We agree in principle to the obligation to provide assistance to the creditor in obtaining the new decision if the recognition of an existing decision is not possible. The concrete obligations of the country where the debtor resides should be specified.

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

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Yours sincerely

Mart Rask
Minister

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