RECOUVREMENT DES ALIMENTS
CHILD SUPPORT

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# CONVENTION DU 23 NOVEMBRE 2007 SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS ET À D'AUTRES MEMBRES DE LA FAMILLE

## RAPPORT EXPLICATIF

*établi par Alegría Borrás et Jennifer Degeling*
*avec l'assistance de William Duncan et Philippe Lortie, Bureau Permanent*

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# CONVENTION OF 23 NOVEMBER 2007 ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

## EXPLANATORY REPORT

*drawn up by Alegría Borrás and Jennifer Degeling*
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## I. BACKGROUND

1. The formal mandate for negotiations on a new Convention on the international recovery of child support and other forms of family maintenance is to be found in the decision taken by the States represented at the Nineteenth Session (2002) of the Hague Conference on Private International Law. According to this mandate, the Session:

> "a) Decides to include in the Agenda for the Twentieth Session the preparation of a new comprehensive convention on maintenance obligations, which would build on the best features of the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation, and requests the Secretary General to continue the preliminary work and to convene a Special Commission for this purpose;
>
> b) Considers to be desirable the participation of non-Member States of the Conference, in particular signatory States to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, and requests that the Secretary General make his best efforts to obtain their participation in this work, and ensure that the processes involved are inclusive, including by the provision if possible of Spanish translation of key documents and facilities for Spanish interpretation at plenary meetings".[1]

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

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[1] See Final Act of the Nineteenth Session of 13 December 2002, *Proceedings of the Nineteenth Session, Tome I, Miscellaneous matters*, pp. 35-47 at p. 45.
[2] See abbreviations and references under para. 15 of this Report.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] See "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau, *Proceedings of the Nineteenth Session, Tome I, Miscellaneous matters*, pp. 217-235 and "Note on the desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation", drawn up by W. Duncan, First Secretary, Prel. Doc. No 2 of January 1999 for the attention of the Special Commission of April 1999, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

3. There was clearly disappointment at the 1999 Special Commission meeting that many of the problems identified appeared to have remained unresolved despite the attention that had already been drawn to them by the previous Special Commission of 1995. That earlier Special Commission had taken the view that there was no need to consider major reforms of the relevant Conventions. The emphasis was placed on improving practice under the existing Conventions.[8] This approach was advocated again during the 1999 Special Commission. There was a natural reluctance among delegates to consider further international instruments in an area in which so many instruments already exist. Apart from the four Hague Conventions and the 1956 New York Convention, there are various regional conventions and arrangements, including the Brussels Convention, the Brussels Regulation, the Lugano Convention, the Montevideo Convention and the system that operates among Commonwealth countries, as well as a proliferation of bilateral treaties and less formal agreements.

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

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

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

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

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

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

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

> "The new instrument should:
>
> – contain as an essential element provisions relating to administrative co-operation,
>
> – be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations,
>
> – take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology,
>
> – be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification."

[8] See "General Conclusions of the Special Commission of November 1995 on the operation of the Hague Conventions Relating to Maintenance Obligations and of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*", drawn up by the Permanent Bureau, Prel. Doc. No 10 of May 1996 for the attention of the Eighteenth Session of 19 October 1996, *Proceedings of the Eighteenth Session,* Tome I*, Miscellaneous matters*, pp. 123-133.

6. In carrying out the Decision of the Nineteenth Session (2002), the Secretary General convened a Special Commission which met at The Hague from 5 to 16 May 2003, from 7 to 18 June 2004, from 4 to 15 April 2005, from 19 to 28 June 2006 and from 8 to 16 May 2007. This Special Commission authorised the drawing up of a preliminary draft Convention, which, accompanied by a draft Explanatory Report,[9] served as a basis for the discussions at the Conference's Twenty-First Session which took place at The Hague from 5 to 23 November 2007.

7. Mr Fausto Pocar, expert from Italy, was elected as Chairman of the Special Commission and Ms Mária Kurucz, expert from Hungary, Ms Mary Helen Carlson, expert from the United States of America, and M. Jin Sun, expert from China, were elected as Vice-Chairs. Ms Alegría Borrás, expert from Spain, and Ms Jennifer Degeling, expert from Australia, were elected as *Rapporteurs*. A Drafting Committee was constituted under the chairmanship of Ms Jan Doogue,[10] expert from New Zealand. The work of the Special Commission and of the Drafting Committee was greatly facilitated by the substantial preliminary documents[11] and remarks of Mr William Duncan, Deputy Secretary General, who was responsible for the scientific work of the Secretariat, and of Mr Philippe Lortie, First Secretary.

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

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

10. The President of the Plenary Session of the Twenty-First Session of the Hague Conference was Mr Teun Struycken (Netherlands). The Vice-Chairs of the Plenary Session were: Mr Gilberto Vergne Saboia (Ambassador of Brazil), Mr Xue Hanqin (Ambassador of China), Mr Ioannis Voulgaris (Greece), Ms Dorothée van Iterson (Netherlands), Ms Jan Doogue (New Zealand), Mr Alexander Y. Bavykin (Russian Federation), Ms Hlengiwe B. Mkhize (Ambassador of South Africa) and Ms Mary Helen Carlson (United States of America).

11. The Conference's Twenty-First Session entrusted the drafting of the Convention to its Commission I, which held 22 sittings, and the drafting of a Protocol on the law applicable to maintenance obligations to its Commission II. Commission I was chaired by

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[9] "Revised preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance", drawn up by the Drafting Committee under the authority of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, Prel. Doc. No 29 of June 2007 for the attention of the Twenty-First Session of November 2007 and "Hague preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance, Draft Explanatory Report, provisional version", drawn up by Alegría Borrás and Jennifer Degeling, Prel. Doc. No 32 of August 2007 for the attention of the Twenty-First Session of November 2007. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

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

[11] A full list of the preliminary documents is set out in Annex 1. See, in particular, W. Duncan, "Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 3 of April 2003 drawn up for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the Duncan Report), available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

Ms Mária Kurucz, expert from Hungary, and Commission II was chaired by Mr Andrea Bonomi, expert from Switzerland. Vice-Chairs for Commission I were Ms Mary Helen Carlson (United States of America) and Mr Lixiao Tian (China), and Vice-Chairs for Commission II were Ms Nádia de Araújo (Brazil) and Mr Shinichiro Hayakawa (Japan). Participating in the negotiations, in addition to the delegates of 56 Members of the Conference represented at the Twenty-First Session, were observers from 14 States as well as from nine intergovernmental and non-governmental organisations.

12. A Drafting Committee chaired by Ms Jan Doogue (New Zealand) was constituted to address the work of Commissions I and II. In addition to its Chair, the *Rapporteurs* of both Commissions, as members *ex officio*, and members of the Permanent Bureau, the Drafting Committee was made up of the following experts: Mmes Denise Gervais (Canada), Katja Lenzing (European Commission), María Elena Mansilla y Mejía (Mexico) and Mary Helen Carlson (United States of America) and Messrs James Ding (China), Lixiao Tian (China), Miloš Hatapka (European Commission), Edouard de Leiris (France), Paul Beaumont (United Kingdom) and Robert Keith (United States of America).

13. It is noteworthy that, for this Convention, it is the first time that, in the Final Act of the Diplomatic Session[12] in which the agreement to start the drafting of the Convention was adopted, Spanish is mentioned. Interpretation in Spanish was also available throughout the negotiations and Preliminary Documents were translated into Spanish. However, this does not mean a new status for Spanish in the Hague Conference.

14. This report deals with the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance which was drawn up by the Drafting Committee under the authority of the Twenty-First Session of November 2007. The Plenary Session, in its meeting of 22 November 2007, completed the third reading of the draft Convention, which was formally adopted in the closing session of 23 November 2007, with the signing of the Final Act of the Twenty-First Session. The United States of America signed the Convention on the day of its adoption.

## II. ABBREVIATIONS AND REFERENCES

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

– **1956 New York Convention** – *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. It is the first Convention in which a system of co-operation of authorities is established. It is not a Convention on enforcement and it can be applied in combination with the 1958 Hague Maintenance Convention or with the 1973 Hague Maintenance Convention (Enforcement) (see Annex 1 of the Duncan Report[13]).

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

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

[12] See note 1.
[13] See note 11.

– **1958 Hague Maintenance Convention** – Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children. A great majority of States Party to this Convention are also Parties to the 1973 Hague Maintenance Convention (Enforcement).

– **1973 Hague Maintenance Convention (Applicable Law)** – *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*. According to Article 1, the Convention applies "to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate". The law designated by the Convention (Art. 3) "shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a Contracting State".

– **1973 Hague Maintenance Convention (Enforcement)** – *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. Article 1 of the Convention defines the scope of application as does the Hague Convention of the same date on applicable law.

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

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

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

– **1996 Hague Child Protection Convention** – *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*. Article 4 *e)* excludes "maintenance obligations" from the scope of application of the Convention, an exclusion that is considered as necessary, taking into account the existence of other Hague Conventions and the existing rules in Brussels and Lugano Conventions.[14]

– **2000 Hague Adults Convention** – *Hague Convention of 13 January 2000 on the International Protection of Adults*. Article 4(1) *a)* excludes "maintenance obligations" from the scope of the Convention, for the same reasons as the 1996 Hague Child Protection Convention.[15]

– **2005 Hague Choice of Court Convention** – *Hague Convention of 30 June 2005 on Choice of Court Agreements*.

[14] P. Lagarde, *Explanatory Report* on the 1996 Hague Child Protection Convention (1998), *Proceedings of the Eighteenth Session* (1996), Tome II, *Protection of children*, pp. 533-605, para. 31.
[15] P. Lagarde, *Explanatory Report* on the 2000 Hague Protection of Adults Convention (2003), *Proceedings of the Special Commission with a diplomatic character of September - October 1999* (1999), *Protection of adults*, pp. 389-451, para. 32.

– **Brussels Convention** – *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Brussels, Belgium, on 27 September 1968. The original Parties were the six original Member States of what was the European Economic Community. As new States have joined the European Union, as it is now called, they have become Parties to the Brussels Convention. It now applies only between the fourteen old European Union Member States and the Netherlands Antilles and French overseas territories. Maintenance obligations are included in the Convention and the Convention includes a special rule on jurisdiction (Art. 5(2)).

– **Lugano Convention** – *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Lugano, Switzerland, on 16 September 1988. It contains similar provisions to the Brussels Convention (it is also called the "Parallel" Convention). The Contracting States to the Lugano Convention are the 15 States which were Members of the European Community on 16 September 1988 and Iceland, Norway, Poland and Switzerland. The demarcation between the Brussels and Lugano Conventions is laid down in Article 54 B of the Lugano Convention. It is based on the principle that the Lugano Convention will not apply to relations among the European Union Member States, but will apply where one of the other countries mentioned above is involved. As in the Brussels Convention, maintenance obligations are included in the Lugano Convention. A new revised Lugano Convention was concluded on 30 October 2007. The text, as adopted in March 2007, maintains the same rule on maintenance obligations as the Convention of 1988. This new Lugano Convention will apply between the Member States of the European Union and Iceland, Norway and Switzerland.

– **Brussels I Regulation** – Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It applies throughout the European Union except Denmark and replaces the Brussels Convention in the mutual relations between those States to which it applies. The Regulation includes similar rules as in the Brussels Convention. An agreement, which entered into force on 1 July 2007, between the European Community and Denmark was concluded on 19 October 2005 to apply the provisions of the Brussels I Regulation to the relations of the European Community with Denmark.

– **Brussels II Regulation** – Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

– **Brussels IIa Regulation** – Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

– **EEO Regulation** – Council Regulation (EC) No 805/2004 creates a European Enforcement Order for uncontested claims, which means (Art. 5) that a decision which has been certified as a European Enforcement Order in the Member State of origin shall be recognized and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition. The EEO Regulation, just as the Brussels I Regulation, also includes maintenance.

– **Maintenance Regulation** – Council Regulation (EC) No 4/2009, of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations, published in the *Official Journal of the European Union* L 7, of 10 January 2009. According to its Article 76, the Regulation "shall apply from 18 June 2011, subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, this Regulation shall apply from the date of application of that Protocol in the Community".

– **Montevideo Convention** – Inter-American Convention on support obligations, adopted in Montevideo, on 15 July 1989. The States Parties to the Convention are Argentina, Belize, Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay and Uruguay (see Annex 2 of the Duncan Report).[16]

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

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

– **UIFSA** – The Uniform Interstate Family Support Act (USA) of 1996. Developed by the National Conference of Commissioners on Uniform State Laws to provide for a uniform process of establishment and enforcement of child support obligations, across state lines. Enacted by all individual states within the United States of America. Amended in 2001 and 2008.

– **"The Convention"** – This refers to the text of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

– "**The Protocol"** – This refers to the text of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*.

## III. GENERAL FRAMEWORK

16. The protection of children is one of the main concerns in international co-operation in general and in the Hague Conference on Private International Law in particular. And, in this context, maintenance is a fundamental element. It is true that problems of maintenance obligations can arise from other family relationships, parentage, marriage or affinity. But a great majority of claims related to maintenance obligations involve children.[17] In the period which followed the end of the Second World War three Conventions were concluded on maintenance obligations. Firstly, the 1956 New York Convention. Secondly, in the Hague Conference on Private International Law, the 1956 Hague Maintenance Convention and the 1958 Hague Maintenance Convention. And those Conventions were renewed and broadened by the 1973 Hague Maintenance Convention (Enforcement) and the 1973 Hague Maintenance Convention (Applicable Law).[18]

[16] See note 11.
[17] Without prejudice of the fact that the progressive aging of the population may give rise to a change in those terms.
[18] See the Conventions and the Explanatory Report of Michael Verwilghen, *Actes et documents de la Douzième session,* Tome IV*, Obligations alimentaires.* In para. 1 of the Report it is pointed out that "there are few examples in the annals of this legal discipline of subject-matter which has been made the subject of so many attempts at unification". See also < www.hcch.net > under "Publications" then "Explanatory Reports".

17. It is worth underlining how the Hague Conference, in recent times, has successfully adopted several Conventions on the protection of children and adults, which include notably modern rules on the co-operation of authorities and of the recognition and enforcement of decisions. These Conventions are the 1980 Hague Child Abduction Convention, the 1993 Hague Intercountry Adoption Convention, the 1996 Hague Child Protection Convention and the 2000 Hague Adults Convention.[19] In the meantime, the UN Convention on the Rights of the Child[20] also entered into force in a large number of States in the world. The current Convention on maintenance is in harmony with the principles in all of these Conventions and can be considered as a significant further step in the protection of children and adults.

## IV. DIRECT RULES OF JURISDICTION

18. The subject of direct rules of jurisdiction was discussed from the beginning of the negotiations[21] and at different moments thereafter. The discussions focussed on the questions of whether the inclusion of uniform rules would bring real and practical benefits to the international system, and whether it was realistic to expect that negotiations on the subject would produce agreement or consensus.[22] There are two important areas of divergence in relation to current approaches to jurisdiction. First, in the case of jurisdiction to make original maintenance decisions, there is the divergence between on the one hand those systems which accept creditor's residence / domicile without more as a basis for exercising jurisdiction (typified by the Brussels / Lugano and Montevideo regimes), and on the other hand systems which require some minimum nexus between the authority exercising jurisdiction and the debtor (typified by the system operating within the United States of America). Second, as described under Article 18, in the case of jurisdiction to modify an existing maintenance decision, there is the divergence between systems that adopt the general concept of "continuing jurisdiction" in the State where the original decision was made (see the United States of America model), and those which on the other hand accept that jurisdiction to modify an existing order may shift to the courts or authorities of another State, in particular one in which the creditor has established a new residence or domicile (see the regional systems mentioned above).

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

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

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

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

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[19] See abbreviations and references under para. 15 of this Report.
[20] *Ibid.*
[21] A summary of these discussions can be read in "Report on the First Meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5-16 May 2003)", drawn up by the Permanent Bureau, Prel. Doc. No 5 of October 2003 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 5/2003), paras 86-89. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".
[22] The discussion took place in the context of the description found in the Duncan Report (*op. cit.*, note 11), paras 103-134.

20. At the end of the first meeting of the Special Commission, further to a proposal supported by several experts, an informal working group on direct jurisdiction was established[23] to proceed on an exchange of views on the subject.[24] However, since there was no consensus on this issue, the informal working group did not have any mandate to report to the Special Commission or the Drafting Committee.[25]

21. The agreements for and against including in the Convention direct rules of jurisdiction are summarised as follows in the "Report on the First Meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5-16 May 2003)"[26] at paragraph 88:

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

[23] Co-ordinated by Mr Matthias Heger, from Germany.
[24] See Prel. Doc. No 5/2003, *op. cit.*, note 21, at para. 94.
[25] *Ibid.*, at para. 147.
[26] *Ibid.*

(g) If, as appears to be the case, the differences are small in terms of practice between those systems which do and those which do not without qualification accept a creditor's jurisdiction, it ought to be possible to formulate jurisdictional principles which capture the large area of common ground.

(h) Uniform rules on jurisdiction in Hague Conventions provide a valuable model for reforms in national systems.

D. Against the inclusion of rules of direct jurisdiction

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

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

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

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

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

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

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

22. Over time, the balance of opinion among experts favoured leaving aside the general issue of uniform direct rules of jurisdiction. While many experts acknowledged the possible advantages of uniform rules, the preponderant view was that any practical benefits to be derived from uniform rules were far outweighed by the cost of embarking on a long, complex and possibly futile attempt to reach a consensus.[27]

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

## V. INFORMATION TECHNOLOGY

23. The fourth recital of the Preamble of the Convention provides that the States signatory to the present Convention are "[s]eeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities". In that respect the Convention invites the use of electronic funds transfers (Art. 35) and is geared towards the use of cross-border electronic case management and communications systems such as the iSupport software that was presented on several occasions to the Special Commission during the course of its work.[28]

24. The system would assist the effective implementation of the Convention and lead to greater consistency in practice in the different countries. The system would help significantly to improve communications between Central Authorities and alleviate translation problems and costs as it could operate in different languages. Such a system could assist the daily operations of the Central Authorities established under the Convention and help to improve standards of case management. The system could also generate the required statistics as part of the means of monitoring the operation of the Convention. In addition to the management and monitoring of cases, the system could provide instructions to banks with regard to electronic transfer of funds and could send and receive secured online communications and applications under the Convention. Where the Convention creates bridges between the different internal legal systems for the recovery of maintenance, the iSupport system will create bridges between existing local information technology systems.

25. In order to pave the way to these important developments, the Drafting Committee has taken great care to develop a text that would allow the implementation of technologies without endangering due process principles. In this regard, the Drafting Committee benefited to a large extent from the work of the Forms Working Group that examined the practical issues surrounding electronic communication of Forms and other accompanying documents. The result is a text that avoids as much as possible the use of terms such as "signature" (where what is usually needed is a simple identification), "writing", "original", "sworn", and "certified". Furthermore, exchange of views with the UNCITRAL Secretariat in relation to "authentication" issues helped to inspire new provisions on the transmission of documents and related information. Language has been added to Articles 12(2), 13, 25 and 30, further to the mandate of the Special Commission, to ensure that the language of the Convention is media-neutral, without altering its substance and thereby making possible the swift transmission of documents by the most rapid means of communication available (*i.e.*, technology-neutral).

26. The aim of the language under Articles 12(2), 13, 25 and 30, is to ensure in a first stage the swift transmission (whatever the medium employed) of applications, including accompanying documents, between Central Authorities while recognising the need for sometimes making available at a later stage (most often probably for evidence purposes), either at the request of the requested Central Authority (Art. 12(2)), or at the request of the competent authority of the State addressed (Art. 25(2)) or upon a challenge or an appeal by the defendant (Art. 25(2)), a complete copy certified by the

[28] The iSupport system is described in Info. Doc. No 1, "Development of an International Electronic Case Management and Communication System in Support of the Future Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance" of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance. It is inspired by the iChild software which is now being implemented around the world in several Central Authorities under the 1980 Hague Child Abduction Convention. This document is available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

competent authority in the State of origin of any document specified under Articles 25(1) *a)*, *b)* and *d)* and 30(3).[29]

## VI. TITLE AND GENERAL LAYOUT OF THE CONVENTION

27. The title of the Convention – *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* – stresses the main objective of the Convention: to ensure that maintenance obligations are respected in cross-border cases in particular when the creditor and debtor are in different countries. Reflecting the provisions of Article 2 on Scope, child support is mentioned in the first place but, in the second place, other forms of family maintenance are also envisaged. In contrast to other Hague Conventions, in particular the 1996 Hague Child Protection Convention, the techniques which are envisaged (such as recognition and enforcement, co-operation) are not mentioned in the title. Besides being a more elegant title, it has the advantage of simplicity and of being distinct from the titles of other Conventions on maintenance obligations.

28. The Preamble explains the main concerns and the thinking underlying the preparation of the Convention. A special mention is made of the UN Convention on the Rights of the Child.[30] According to Article 2 of that Convention, the parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. And the Preamble of the Convention specifically mentions Article 3 of the UN Convention on the Rights of the Child, which establishes that the best interest of the child shall be a primary consideration, and Article 27, which states the following:

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

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

[30] In force in 193 States (as of 29 October 2009).

29. The Convention is divided into nine Chapters: Object, scope and definitions; Administrative co-operation; Applications through Central Authorities; Restrictions on bringing proceedings; Recognition and enforcement; Enforcement by the State addressed; Public bodies; General provisions; and, Final provisions.

30. Chapter I of the Convention (Object, scope and definitions) includes, firstly, in Article 1, the object of the Convention. Secondly, Article 2 sets out the material scope of the Convention, discussed at length during the preparation of the Convention. Finally, Article 3 provides some definitions.

31. Chapter II (Administrative co-operation) contains provisions concerning Central Authorities, in particular, their designation, functions and costs. It also provides for requests for specific measures of assistance where no applications are pending.

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

33. Chapter IV (Restrictions on bringing proceedings) includes only one article, Article 18.

34. Chapter V (Recognition and enforcement) deals with the recognition and enforcement of decisions, which means the intermediate formalities to which recognition and enforcement of a foreign decision are subject (see comments to Chapter V) before enforcement *stricto sensu*, which is the subject of Chapter VI (Enforcement by the State addressed). Chapter VII (Public bodies) clarifies that for the purpose of recognition and enforcement under Article 10(1) *a)* and *b)* and cases of establishment of a decision covered by Article 20(4), “creditor” includes a public body in certain circumstances.

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

## VII. ARTICLE-BY-ARTICLE COMMENTARY

## CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

### *Article 1 Object*[31]

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

36. The main objective of the Convention is to make internationally effective the recovery of maintenance and to the same end the Preamble underlines that the States are "[a]ware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive and fair"[32] for the recovery of maintenance.

37. This Article includes a list of the principal elements in the Convention. The list is not exhaustive, and the words "in particular" indicate that the Convention in fact includes many other provisions which will improve the recovery of maintenance.

38. Nothing in this Article precludes "direct requests" for maintenance (see Art. 37) by an applicant to a competent authority in the requested State, but they are not mentioned in the Article. The reason is that it would be misleading to suggest that provision for "direct requests" is a primary object of the Convention.[33]

**Paragraph *a)* – establishing a comprehensive system of co-operation between the authorities of the Contracting States;**[34]

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

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

41. In previous drafts of the Convention a reference was made in paragraph *a)* to the fact that the system of the Convention includes the "establishment of parentage when required for such purpose", *i.e.*, where this is necessary for the effective recovery of maintenance. The arguments against this inclusion were that it is difficult in some systems for parentage to be established only for the purpose of maintenance and that the establishment of parentage is often a judicial matter. See the discussion in this Report on Article 6(2) *h)* and on Article 10(1) *c)*. The solution in these Articles makes the

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[31] Following the most recent Conventions prepared in the Hague Conference (*Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (hereinafter "2006 Hague Securities Convention"), 2005 Hague Choice of Court Convention) a heading appears following the number of every article, thereby facilitating the readability of the Convention. In this Explanatory Report, it was also decided to include the text of the article being discussed to further facilitate the readability of the Report.

[32] See Preamble of the Convention.

[33] See "Observations of the Drafting Committee on the text of the preliminary draft Convention", Prel. Doc. No 26 of January 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 26/2007), under Art. 1. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[34] It is important to note that, in accordance with Art. 59(5): "Any reference to a 'Contracting State' or 'State' in [the] Convention shall apply equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a 'Contracting State' or 'State' in [the] Convention shall apply equally to the relevant Member States of the Organisation, where appropriate." (See para. 700 of this Report.)

reference in Article 1 *a)* no longer necessary. The Convention is not prejudging the effects that the legislation of the State gives to the establishment of parentage. It is an open solution that allows that in every State this question may be solved by the internal law.

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

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

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

43. The reference in Article 1 *c)* of the Convention to the recognition and enforcement of maintenance decisions, is to those provisions of the Convention which are designed to facilitate and to simplify the procedures to which a foreign decision is submitted (known in some systems as *exequatur*) before enforcement under internal law may take place.[35]

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

44. The Convention is not limited to the traditional procedure of *exequatur*, but also seeks truly to facilitate the execution of the decision, thereby making it effective and this objective is underlined in paragraph *d)*. But the wording of this provision cannot go further, as specific enforcement measures are not required by the Convention. The precise enforcement measures necessary to meet the broad requirements of effectiveness and promptness are a matter for individual Contracting States.[36]

### *Article 2 Scope*

45. Article 2 defines the material scope of the Convention in a positive way by stating to which cases it applies. The Article begins by describing the core maintenance obligations to which all the Chapters of the Convention apply (para. 1), with a possibility of a reservation (para. 2), followed by the maintenance obligations to which the Convention, or parts of the Convention may be extended by declaration (para. 3). Finally, paragraph 4 introduces an interpretative rule.

**Paragraph 1 – This Convention shall apply –**

**Sub-paragraph *a)* – to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years;**

46. Sub-paragraph *a)* describes the core maintenance obligations to which the whole of the Convention applies and these are maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years. There are no doubts on this point, accepted by all delegations. The effect of the reference to the age of 21 years is different from that in the UN Convention on the Rights of the Child. It does not mean that States are obliged to modify internal rules if the limit for according maintenance in respect of children is below 21 years. Nor does it mean that States are obliged to modify the age of majority. Paragraph 1 merely fixes the scope of application of the Convention. The main effect of this is that there is an obligation under the Convention to recognise and enforce a foreign decision made in favour of a child up to the age of 21 years[37] and to provide administrative assistance, including legal assistance, in respect of maintenance towards such persons. See comments to paragraph 2.

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[35] See comments on Chapter V (Recognition and enforcement).
[36] See comments on Chapter VI (Enforcement by the State addressed).
[37] In this respect, see also comments on Art. 20(5), para. 471 of this Report.

**Sub-paragraph *b)* – to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph *a)*; and**

47. There was much discussion of the situation of spousal support under the Convention. There are two different situations envisaged in sub-paragraph *b)* and sub-paragraph *c)*. In sub-paragraph *b)* there is the situation where a claim for spousal support is made in combination with the claim for maintenance in respect of a child as defined in sub-paragraph *a)*. It was accepted during the Diplomatic Session that such a claim would fall within the compulsory scope of the whole Convention (*i.e.*, including the provisions on co-operation through Central Authorities) only where the application is for recognition and enforcement, or enforcement, of a decision, and not in the case of an application for establishment or modification of a decision concerning spousal support. The words "application is made with a claim within the scope of sub-paragraph *a)*" mean that the application has to be "related" or "linked" to child support, meaning that both applications can be handled together, irrespective of whether the spousal support is claimed together with the child support and irrespective of whether both are included in one and the same decision.

**Sub-paragraph *c)* – with the exception of Chapters II and III, to spousal support.**

48. After long discussions within the Special Commission, a consensus was developing that, while claims for spousal support alone should come within the compulsory scope of the Convention, Contracting States should not be bound to apply the provisions of Chapters II and III on administrative co-operation to such cases. This approach was confirmed by the Diplomatic Session, with the result that the provisions of Chapters II and III will only apply where two States concerned have made a declaration extending those Chapters to spousal support in accordance with Article 63. On the other hand, the system for recognition and enforcement, as well as all the other provisions of the Convention, will apply to spousal support.

49. A proposal to extend the provisions on scope concerning spousal support to "analogous situations to marriage according to the applicable law" did not achieve the needed consensus.[38]

**Paragraph 2 – Any Contracting State may reserve, in accordance with Article 62, the right to limit the application of the Convention under sub-paragraph 1 *a)*, to persons who have not attained the age of 18 years. A Contracting State which makes this reservation shall not be entitled to claim the application of the Convention to persons of the age excluded by its reservation.**

50. The difficulties for some States to accept the application of the Convention in all cases until the age of 21 years resulted in the inclusion of the possibility to make a reservation to limit the application of the Convention to persons who have not attained the age of 18 years. In this case, the reservation has reciprocal effect, as the State which has made the reservation cannot claim the application of the Convention to persons between 18 and 21 years. According to Article 62(4),[39] it is the only reservation provided in the Convention which has reciprocal effect.

[38] See proposal of the delegations of Argentina, Brazil, Chile and Peru (Mercosur States and associate States), Work. Doc. No 48. See also below, para. 58.
[39] See comments to Art. 62(4), under paras 707 *et seq.* of this Report.

**Paragraph 3 – Any Contracting State may declare in accordance with Article 63 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.**

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

52. This is why paragraph 3 includes a rule according to which the States "may" declare the extension of the application of the whole or of any part of the Convention to maintenance obligations in respect of any of those relationships. To this end, a declaration has to be made in accordance with Article 63.

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

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

55. Special attention was paid in the Diplomatic Session to the obligations in respect of vulnerable persons.[40] See the definition of "vulnerable person" in Article 3 *f)*. As well as being highlighted in Article 2(3), a special rule applies to vulnerable persons in direct requests, in Article 37(3). Finally, a Recommendation No 9[41] of the Twenty-First Session, as approved in the Final Act:

> "Recommends that the Council on General Affairs and Policy should consider as a matter of priority the feasibility of developing a Protocol to the *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the international recovery of maintenance in respect of vulnerable persons.
>
> Such a Protocol would complement and build upon the *Hague Convention of 13 January 2000 on the International Protection of Adults*."

56. No specific reference is made in this rule to the claims by a public body in respect of maintenance obligations (see Chapter VII, Art. 36). It is to be noted that whilst public bodies are not mentioned in the scope provision, as they were in Article 1 of the 1973

[40] See Work. Doc. No 48 of the delegations of Argentina, Brazil, Chile and Peru (Mercosur States and associate States), and Work. Doc. No 60 of the delegations of Argentina, Brazil, Chile, Ecuador, Peru and Uruguay.
[41] Final Act of the Twenty-First Session, Part C, Recommendation No 9.

Hague Maintenance Convention (Enforcement), the Convention applies to them. It is open to a Contracting State to extend the provisions on public bodies in Chapter VII to all or any of the additional maintenance obligations which are the subject of a declaration by that State under Article 2(3). In addition, it is implicit that any such extension of the provisions on public bodies may be limited to certain Chapters of the Convention. Thus, for example, a State may, while extending the provisions on public bodies to certain specified relationships based on affinity, indicate that this should not extend to the co-operation provisions of Chapters II and III.

57. The term "family relationship" is not defined in paragraph 3. The matter is left for each Contracting State to determine for itself. The precise relationships which fall within the meaning of that term will be specified by a Contracting State when making a declaration under paragraph 3. Mutual obligations will only arise as between Contracting States which have made equivalent declarations. Thus, for example, the extension by one Contracting State by virtue of the Convention to national obligations arising for a registered partnership will only have effect in relation to another Contracting State which has made an equivalent declaration.

**Paragraph 4 – The provisions of this Convention shall apply to children regardless of the marital status of the parents.**

58. The 1973 Conventions made a reference to maintenance obligations towards "an infant who is not legitimate". In the new Convention, this has been substituted by including a maintenance obligation in respect of a child "regardless of the marital status of the parents", in line with modern terminology.

59. It expresses the overwhelming view that the benefits of the Convention should extend to all children without discrimination in line with Articles 2 and 27 of the UN Convention on the Rights of the Child.

### *Article 3 Definitions*

60. Article 3 includes some definitions for the purposes of the Convention. There was lengthy discussion as to whether a definition of "decision" was needed and, in the affirmative, if it should be placed in this Article or in Article 19, at the beginning of Chapter V (Recognition and enforcement). The reason was that this definition is only needed for Chapters V (Recognition and enforcement), VI (Enforcement by the State addressed) and VII (Public bodies). Another possibility would have been to include the definition of "decision" in Article 3, pointing out that the definition is only for the purposes of Chapters V, VI and VII. The final solution was to structure Article 19 of the Convention as a "scope-article" for Chapters V, VI and VII, specifying what is included, for the purposes of the Convention, under the term "decision".

61. A definition of "maintenance obligations" was not considered necessary. In favour of the inclusion of such a definition it was argued that it might be possible to refuse assistance for the recovery of arrears by arguing that they are not included in the scope of the Convention, even if the internal law allows this. But such a definition is not needed because Article 19(1) (definition of "decision")[42] makes clear that the recovery of arrears is covered by the Convention. In consequence, there was no need to repeat in Article 10(1) that an application for arrears is an available application.

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

63. As for "habitual residence" some suggestions had been made by delegations during the Special Commission to include a definition in a positive sense or in a negative one. The main question was to ascertain if there are reasons for changing the term "habitual

[42] See comments to Art. 19, under para. 436 of this Report.

residence", which appears in the Hague Conventions on the protection of children, in particular, the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, to "residence". In the end, it was decided that "habitual residence" was still an appropriate connecting factor for the purposes of recognition and enforcement, and that no definition should appear in the Convention. For further explanation, see below at paragraph 444 of this Report under Article 20.

64. The possibility of including a definition of "requested State" and of "requesting State" had been proposed during the Special Commission. Doubts arose from the fact that in the recent 2005 Hague Choice of Court Convention it was decided not to have such definitions in the text of the Convention, but to include them in the Explanatory Report thereto (drawn up by Messrs Dogauchi and Hartley).[43] In the context of the Maintenance Convention, it was decided not to define these terms in either the text of the Convention or of the present Report.[44]

65. The possibility of including a definition of "maintenance" was considered, but in the end, rejected. In addition to periodic payments, maintenance may in different systems for example include capital (lump sum) payments or property transfers.[45] It was not suggested that maintenance should be restricted to periodic payments. Indeed it was accepted that any monetary or property order may constitute a maintenance order where its purpose is to enable the creditor to provide for himself or herself and where the needs and resources of the creditor and debtor are taken into account in determining what order is appropriate.[46]

**For the purposes of this Convention –**

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

66. The first definition in paragraph *a)* of Article 3 is the definition of "creditor". In general, a creditor means the person who needs the maintenance and it can be a person to whom the maintenance has been awarded or the person who seeks a maintenance decision for the first time. It is helpful that the Convention clarifies this point, in order to avoid any assumption that it is only the person who is beneficiary of a decision who may be considered as a creditor, and not the person who is seeking maintenance for the first time. The term "creditor" includes, without any doubt, the child for whom maintenance was ordered or sought.

67. Although paragraph *a)* does not refer to the position of public bodies, Article 36(1) makes it clear that, for the purposes of applications for recognition and enforcement under Article 10(1) *a)* and *b)* and in the cases covered by Article 20(4), "creditor" includes a "public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance".[47]

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

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

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[43] Available on the Hague Conference website at < www.hcch.net >, under "Publications" then "Explanatory Reports".
[44] See comments to Art. 10, under para. 236 of this Report.
[45] For further details, see the Duncan Report, *op. cit.,* note 11, at paras 180-182.
[46] This broadly is the approach adopted by the European Court of Justice in defining maintenance in the context of the Brussels / Lugano system. See *De Cavel* v. *De Cavel* (No 2) [1980] ECR 731, and *Van den Boogaard* v. *Laamen*, C-220/95 (27 February 1997).
[47] See comments to Art. 10(1) *a)* and *b)*, under para. 235 of this Report.

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

69. The definition of "legal assistance" was discussed at length at the Special Commission meeting of May 2007, and the definition which now appears in Article 3 *c)* was developed by the Drafting Committee in the light of those discussions. The meaning of "legal assistance" in the particular contexts of Article 6(2) *a)* and Articles 14 to 17 is explained in greater detail below, at paragraphs 126 to 134 and 370 to 373. Where under the Convention, provision of legal assistance is required, the overriding obligation is to provide those elements of legal assistance which are necessary to achieve the purposes set out in the first sentence of paragraph *c)*, namely to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The list of "means" set out in the second sentence specifies the kinds of legal assistance that may need to be made available. The words "may include as necessary" indicate that where such forms of assistance are indeed "necessary" to achieve the purposes set out in the first sentence, they must be made available. The extent of any obligation to provide free legal assistance is determined by Articles 14 to 17.

70. It has to be underlined that in the French version reference is always made to *"État requis"*, while in English the terms "requested State" and "State addressed" are used. Both terms have the same meaning and are equivalent to *"État requis*".

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

71. Additional language has been added to different articles of the Convention[48] further to the mandate of the Chair of the Special Commission meeting in June 2006 to the Drafting Committee to ensure that the language of the Convention is media-neutral and without altering the substance (*inter alia*, respecting due process principles and ensuring the swift transmission of documents by the most rapid means of communication available). As the additional language is media-neutral, it would still be adequate in the future, once advances in technology will allow worldwide secured electronic communications that could be transmitted "in-chain". This requires the definition of "agreement in writing", which is included in paragraph *d)*, which has two characteristics. The first, the inclusion of any medium in which the agreement may be recorded. The second, the need to be accessible for subsequent reference.

**Paragraph *e)* – "maintenance arrangement" means an agreement in writing relating to the payment of maintenance which –**

72. Extensive discussions took place on including authentic instruments and private agreements, *i.e.*, maintenance agreements, in the scope of the Convention. See comments to Article 30. The definition of "maintenance arrangements" is meant to encompass both authentic instruments and private agreements. The arrangement has to be in writing and meet one of the conditions referred to in sub-paragraphs *i)* and *ii)*. Contracting States do not have to recognise and enforce maintenance arrangements just because they are defined in the general definition section.[49] States that make the reservation in Article 30(8) are not obliged to recognise and enforce maintenance arrangements.

[48] See Arts 12(2), 13, 25 and 30 and related comments in this Report.
[49] See Minutes No 17, para. 58.

**Sub-paragraph *i)* – has been formally drawn up or registered as an authentic instrument by a competent authority; or**

73. The notion of "authentic instruments" is known in many States not only in connection with maintenance obligations. They are drawn up by an authority which is especially entrusted with this task by the State and which authenticates the signature of the parties and verifies the content of the instrument. In several States (*e.g.*, Germany, Poland, France, Belgium or Spain) this authority will be a notary public and the instrument will be produced in the form of a notarial deed.

**Sub-paragraph *ii)* – has been authenticated by, or concluded, registered or filed with a competent authority,**

74. This sub-paragraph covers a range of different situations in which a competent authority intervenes in the context of agreements relating to the payment of maintenance. The definition intends to reflect the diverse practice States have developed in relation to such agreements. Thus, for example in some States, agreements are confirmed by a competent authority which has some discretion as to whether or not to confirm an agreement. However, it will typically not go into a full investigation of the content of the agreement but may, for example in the case of an agreement concerning child support, consider whether the agreement appears at face value to be in the interest of the child. In Germany and Austria, maintenance arrangements are often concluded with the child welfare authority (*Jugendamt*). In this context, it should be noted that, by virtue of Article 19(1), an agreement may be regarded as a "decision" for the purposes of recognition and enforcement if it has been "concluded before or approved by" a judicial or administrative authority. One difference in the case of a "maintenance arrangement" is that the authority involved may be a "competent authority", such as a notary public, and need not be a judicial or administrative authority. A further difference is that Article 19 only applies to agreements concluded "before" a judicial or administrative authority whereas Article 3 *e)* covers agreements concluded "with" a competent authority.

**and may be the subject of review and modification by a competent authority;**

75. Beside the need to be an agreement in writing, in both cases the maintenance arrangement has to be capable of being reviewed or modified by a competent authority.

**Paragraph *f)* – "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself.**

76. The special reference in Article 2(3) to "vulnerable persons" gives rise to the need for a definition. This definition is along similar lines to that used in Article 8(3) of the Protocol, which in turn follows the wording used in the 2000 Hague Adults Convention. The one deliberate difference between the wording used in the Convention ("is not able to support him or herself") and the Protocol ("is not in a position to protect his or her interest") arises from the different contexts in which the references to vulnerable persons are used in the two instruments.

## CHAPTER II – ADMINISTRATIVE CO-OPERATION

77. The importance of effective and efficient administrative co-operation for the success of the Convention was recognised throughout the negotiations. This is now reflected in the objects of the Convention in Article 1 *a)*.

78. In his report, "Towards a new Global Instrument on the International Recovery of Child Support and other forms of Family Maintenance", William Duncan, Deputy Secretary General, concluded that administrative co-operation "will be an essential, and perhaps the most important, element in the new instrument on the international recovery of maintenance."[50] In discussions in the 2004 Special Commission meeting, a harmonized, or universally consistent, approach to co-operation that used the 1956 New York Convention as a starting point was favoured. To achieve this goal, it became apparent that a clear and detailed list of the Central Authorities' functions would be essential, while maintaining a balance between specificity and flexibility in describing how those functions might be performed.

79. Experts were in agreement that the current system for the international recovery of child support and other forms of family maintenance is excessively complex and that provisions for administrative co-operation need to be overhauled and properly monitored.[51] Effective and efficient administrative co-operation is the corner-stone of this Convention for achieving a simple, low cost and rapid system for the international recovery of child support. The Duncan Report listed the objectives of a modern system of administrative co-operation. It should be: (a) capable of processing requests swiftly, (b) cost effective when comparing administrative costs against amounts of maintenance recovered; (c) flexible enough to allow co-operation between very different internal systems; (d) efficient in avoiding unnecessary or complex formalities or procedures; (e) user-friendly, and (f) it should ensure that obligations imposed on Contracting States are not too burdensome.[52]

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

81. The Central Authority functions and application processes described in Chapters II and III of the Convention are intended to address the problems identified in the Duncan Report,[53] namely structural problems, concerning the shortcomings of existing international instruments; organisational problems, concerning lack of co-operation between authorities; and problems of process, concerning inefficient or inadequate procedures for processing applications which cause delays.

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[50] The Duncan Report, *op. cit.*, note 11, paras 15-17.
[51] Prel. Doc. No 5/2003, *op. cit.*, note 21, para. 10.
[52] The Duncan Report, *op. cit.,* note 11, para. 16.
[53] Paras 24-28.

82. Practical solutions to these shortcomings were also to be the focus of discussions by an informal Administrative Co-operation Working Group which was established following the 2003 Special Commission meeting. The following year, the informal Working Group was given a mandate by the Special Commission to become a fully constituted Hague Special Commission Working Group on the Operational Aspects of Administrative Co-operation (the Administrative Co-operation Working Group). Four Co-convenors were appointed for the Working Group: Mary Helen Carlson (United States of America), Mária Kurucz (Hungary), Jorge Aguilar Castillo (Costa Rica) and Jennifer Degeling (Australia). Approximately 60 individuals from 24 countries and organisations participated in the Administrative Co-operation Working Group,[54] whose membership was open to States and international organisations participating in the Special Commission.

83. The main goal of the Administrative Co-operation Working Group was "to improve administrative co-operation among those countries that handle international child support and other forms of family maintenance''.[55]

84. The establishment of the Administrative Co-operation Working Group was an innovation for Hague Conference negotiations. In addition, three Sub-Committees were established to consider particular aspects of administrative co-operation: Forms[56] (co-chaired by Ms Shireen Fisher (Association of Women Judges) and Ms Sheila Bird (Australia) who was later replaced by Ms Zoe Cameron (Australia)), Country Profiles (co-chaired by Ms Danièle Ménard (Canada) and Ms Margot Bean (NCSEA) and later Ms Ann Barkley (NCSEA)), and Monitoring and Review (co-chaired by Ms Mária Kurucz (Hungary) and Ms Elisabeth Matheson (United States of America)). The work of the Committees led to improvements in the text of the Convention, the development of forms for applications and related procedures, as well as the consideration, at an early stage, of the future requirements for post-Convention monitoring and review.

### *Article 4 Designation of Central Authorities*

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

85. The designation of a Central Authority to discharge the duties that are imposed on it by a Convention is a feature of many modern Hague Conventions.[57] These authorities act as the focal point for international co-operation at the administrative level and are intended to play the primary role in the "comprehensive system of co-operation", one of the objects of the Convention referred to in Article 1.

86. Experience with other Hague Children's Conventions has highlighted the need for new Contracting States to ensure that their implementing measures (their laws, regulations or procedures) for the Convention provide adequate powers and resources for the Central Authority to "discharge the duties that are imposed by the Convention".[58] The term "Central Authority" is not defined. The concept is left open, having regard to

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[54] "Report of the Administrative Co-operation Working Group", prepared by the Administrative Co-operation Working Group, Prel. Doc. No 34 of October 2007 for the attention of the Twenty-First Session of November 2007, paras 3 and 4. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[55] *Ibid.*, paras 5 and 6.

[56] After the 2005 Special Commission, the Forms Sub-Committee became a working group in its own right co-ordinated by the Permanent Bureau.

[57] See, for example, the Hague Conventions of 1980, 1993, 1996 and 2000. The 1956 New York Convention was also innovative in establishing Transmitting and Receiving Agencies to manage the flow of applications.

[58] See the 1980 Hague Child Abduction Convention *Guide to Good Practice: Part I – Central Authority Practice* in "Chapter II – Establishing and consolidating the Central Authority", published by Family Law Publishers for the Permanent Bureau, 2003, and available on the Hague Conference website at < www.hcch.net >, under "Publications" then "Guides to Good Practice".

differences of capacity and administrative structures of each Contracting State, and taking account of the peculiarities of different legal systems.[59]

87. The act of designating the Central Authority under paragraph 1 does not relieve a Contracting State of its obligations to provide the other important details in accordance with paragraph 3. The words of paragraphs 1 and 2 relating to designation are inspired by similar articles in other Hague Conventions.[60] However the words as to timing of the designation in paragraph 3 – at the time when the instrument of ratification or accession or a declaration made under Article 61 is deposited – follow the model of Article 2 of the 1956 New York Convention.

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

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

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

90. While Contracting States are "free to appoint more than one Central Authority", if they do so, they must specify the territorial or personal extent of the functions of each of the appointed Central Authorities. The appropriate time for making this specification is at the time of designating the Central Authority when the instrument of ratification or accession or a declaration made under Article 61 is deposited. The details are to be communicated to the Permanent Bureau in accordance with paragraph 3.

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

[59] The 1980 Hague Child Abduction Convention *Guide to Good Practice* referred to in the preceding footnote also contains suggestions on how, when, where and why a Central Authority may be established.

[60] Art. 6 of the 1980 Hague Child Abduction Convention, Art. 6 of the 1993 Hague Intercountry Adoption Convention, Art. 29 of the 1996 Hague Child Protection Convention and Art. 28 of the 2000 Hague Adults Convention.

**Paragraph 3 – The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited or when a declaration is submitted in accordance with Article 61. Contracting States shall promptly inform the Permanent Bureau of any changes.**

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

93. Paragraph 3 makes the Permanent Bureau the recipient or repository of information about Central Authority contact details and functions, which are published on the Hague Conference website.[61] It is essential that these be kept up to date, in order to facilitate communications between Contracting States. The responsibility for providing the correct and current information about the Central Authority, and for notifying the Permanent Bureau of any changes in those details, rests with each Contracting State. In practice, the Central Authority is usually best placed to provide this information.

94. Paragraph 3 imposes an obligation on Contracting States to inform the Permanent Bureau of the Central Authority designations and functions at the time of depositing the instrument of ratification or accession or a declaration made under Article 61. For States with non-unified legal systems, the time to inform the Permanent Bureau is when a declaration is made under Article 61 extending the Convention to another territorial unit. The timing of the designation is most important. Experience with other Hague Children's Conventions has shown that if it is not done at the time of ratification or accession, there is a risk that a Contracting State will not have a functioning Central Authority in operation when the Convention enters into force for that State. The obligation as to timing was suggested in the Report of the Monitoring and Review Sub-committee in Preliminary Document No 19 of June 2006.[62] It was accepted by delegates at the 2006 Special Commission that the obligation in Article 4(1) to designate the Central Authority needed to be reinforced by the obligation to communicate to the Permanent Bureau, at the time of ratification or accession or a declaration made under Article 61, the information about Central Authority contact details and functions.

### *Article 5 General functions of Central Authorities*

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

96. Article 5 lays down what must be done by Central Authorities in a general sense to achieve the objects of, and ensure compliance with the Convention. Article 5 contains general functions which are imposed directly on Central Authorities, and cannot be performed by or delegated to other bodies. Article 6(1) states what must be done by Central Authorities, public bodies or other bodies in individual maintenance cases. Article 6(1) contains mandatory functions concerning transmission of applications and the institution of proceedings which may be performed by the Central Authority or by public

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[61] < www.hcch.net >.

[62] "Report of the Administrative Co-operation Working Group of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance", prepared by the Administrative Co-operation Working Group, Prel. Doc. No 19 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance.

or other bodies. It is important to emphasise that these functions (in Art. 6(1)) are not discretionary and must be performed comprehensively. They are not functions for which it is sufficient that "all appropriate measures" could be taken. Article 6(2) lists specific mandatory functions which must be performed by Central Authorities, public bodies or other bodies in individual cases, to the extent permitted by their powers and resources and their internal law.

97. The obligations in Articles 5 and 6 apply to all child support cases and to cases of recognition and enforcement of spousal support decisions when made in combination with a child support claim. They do not automatically apply to spousal support alone, such cases being excluded by Article 2(1) from the operation of Chapters II and III. However, Articles 5 and 6 could apply to spousal and other forms of family maintenance if a Contracting State makes an appropriate declaration under Article 63 and referred to in Article 2(3).

**Central Authorities shall –**

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

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

99. The obligation to "co-operate with each other and promote co-operation" in paragraph *a)* highlights the need for and importance of co-operation as a basic positive principle that underpins the regular communications between Central Authorities concerning the implementation of the Convention generally, or assistance for individual cases.

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

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

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

102. Paragraph *b)* makes clear that Central Authorities must assist, as far as possible, in finding solutions for difficulties arising in the application of any part of the Convention. The formulation "seek solutions" is taken from the Brussels II Regulation.[63] It has the advantage of stating positively the obligation to do everything possible to ensure the effective working of the Convention, compared with the negatively stated obligation implied in "eliminating obstacles", the words of a previous draft that were drawn from a

[63] See abbreviations and references under para. 15 of this Report.

number of existing conventions, including Article 7 *i)* of the 1980 Hague Child Abduction Convention and Article 7(2) *b)* of the 1993 Hague Intercountry Adoption Convention.

103. The words "in particular, Chapters II and III" were omitted after the words "in the application of the Convention" from the October 2005 draft text[64] as being unnecessarily restrictive. Chapter II (Administrative co-operation) and Chapter III (Applications through Central Authorities) are the two areas for which Central Authorities will have primary responsibility, and therefore they are best placed to assist in identifying and resolving difficulties arising from the application of those parts of the Convention, but their responsibilities should not be seen as being confined to those areas.

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

### *Article 6 Specific functions of Central Authorities*

105. There are notable differences in the obligations created by Articles 5, 6(1) and 6(2). However, in each Article the obligations are mandatory. In Article 5 the obligations are of a general nature and are imposed directly on Central Authorities. In Article 6(1), the obligations are specific, but may be performed by Central Authorities, public bodies or by other bodies. In Article 6(2) the obligations are less specific, and allow Central Authorities or bodies more flexibility as to how the functions will be performed. In spite of this flexibility as regards the level of services, there is an obligation to provide all types of services mentioned in sub-paragraphs *a)* to *j)* and thereby to do everything possible within the powers and resources of the Central Authority to provide the assistance requested. Progressively, Central Authorities may acquire more powers and resources to offer more assistance.[65]

106. The functions listed in Article 6 are administrative functions, and the obligations they impose relate to administrative co-operation (with the possible exception of Art. 6(1) *b)* – if the Central Authority has the power to institute proceedings). Article 6 is not intended to impose any unrealistic judicial functions on Central Authorities (see the explanation below for Art. 6(2) *c)* and *g)*). However, if the carrying out of a function in Article 6 would be improved by applying for judicial intervention, and if the Central Authority has the power to take such a step, this may be a great benefit to both the child or creditor, and to the requesting State, for example, to locate a debtor or identify his or her assets.

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

108. Some experts believed that the term "facilitate", used in relation to a number of Article 6 functions, lacked clarity and that it would be preferable to use more concrete terms in order to clearly define the basic functions of Central Authorities. However, the

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[64] "Tentative draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance", prepared by the Drafting Committee, Prel. Doc. No 16 of October 2005 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 16/2005). Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[65] See note 66.

accepted view was that more flexible language was more appropriate in order to accommodate the wide divergence in the powers, resources and capabilities of Central Authorities to perform the functions in question. Partly to compensate for this flexible language, Article 57(1) *b)* requires Contracting States to provide to the Permanent Bureau a description of the measures it will take to meet the obligations under Article 6.

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

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

110. The placement of the mandatory functions of transmitting and receiving applications and initiating or facilitating proceedings in Article 6(1) is intended to give Contracting States the freedom to decide by which bodies these responsibilities should be carried out within their State, including the possibility that these tasks might be performed by bodies other than the Central Authorities. This is achieved when Article 6(1) is read in combination with Article 6(3).

111. The chapeau of paragraph 1 imposes two obligations. The first is an obligation on Central Authorities to provide general assistance with any of the categories of applications in Article 10 and any other procedures described in Chapter III. The second is an obligation to provide the specific forms of assistance which are listed in paragraph 1. The phrase "in particular" means that the assistance mentioned in Article 6(1) includes, but is not restricted to, the more precise functions of transmitting and receiving applications, or initiating or facilitating legal proceedings.

112. Article 6 should be read in conjunction with Article 9 (Application through Central Authorities). It is intended that assistance from Central Authorities under Article 6 be restricted to those cases where requests (in Art. 7) or applications (in Art. 10) are made through Central Authorities. Although it was agreed that a person should not be prevented from applying directly to a court or competent authority under Chapter V for recognition and enforcement of a decision (Art. 19(5)) or under Chapter VIII for other procedures (Art. 37), the direct applicant will not be entitled to the assistance of Central Authorities that is mandated in Articles 5, 6, 7 and 8.

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

113. The transmission and receipt of applications is a specific primary function of Central Authorities. This is not an obligation for which a Central Authority can take "all appropriate measures". The obligation must be carried out comprehensively and the Central Authority must have sufficient powers and resources to do so. This function may be performed by a Central Authority or a public body or other body in accordance with Article 6(3).

114. As stated in paragraph 110 above, States needed the flexibility to decide themselves how and by whom the functions in Article 6(1) would be performed. In some States these functions were already being performed effectively by public or other bodies. In such circumstances, it would be counter-productive to the objects of the Convention to require that these functions be performed directly by a Central Authority. However, an important safeguard was added (in Art. 6(3)), ensuring that where these functions were performed by "other bodies" (*i.e.*, non-public authorities), such bodies would be "subject to the supervision of the competent authorities of that State".

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

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

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

117. When the Central Authority "facilitates" a function it means the Central Authority helps to bring it about or to make it happen by taking whatever steps are necessary, but does not usually perform the function itself. Some other person or body performs the function, usually upon the request of the Central Authority. See also the discussion on the meaning of "facilitate" above at paragraphs 107 and 108 (in relation to Art. 6). The term "facilitate" is also used in Article 6(2) *a)*, *e)*, *f)*, *g)*, *i)* and *j)*.

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

119. Sub-paragraph *b)* should be read in conjunction with Articles 14, 15, 16 and 17. Sub-paragraph *b)* should also be read in conjunction with Article 42 which refers to the circumstances in which a Central Authority may require a power of attorney from an applicant.

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

120. The obligation in Article 6(2) is an obligation in relation to Chapter III applications to take "all appropriate measures" to provide the kinds of assistance listed in sub-paragraphs *a)* to *j)*. It obliges Contracting States to do what is possible within their State. This will be determined by available resources, legal or constitutional constraints, and the manner in which different functions are distributed within the State. It is expected that only a small number of the listed functions would be requested or required for any one case. There is no expectation that Central Authorities themselves must perform these functions, as paragraph 3 makes clear.

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

expand their capacity to carry out these functions, thereby putting into practice the principle of "progressive implementation".[66]

122. The phrase "all appropriate measures" is expansive. All measures, if appropriate, shall be taken; Central Authorities can be more proactive in finding appropriate ways to assist. "All appropriate measures" lends itself more effectively to the principle of "progressive implementation" of the Convention.

123. It is not possible to provide absolute clarity about the nature and extent of the functions in paragraph 2. Every Contracting State has a different internal system of laws and procedures that must be accommodated in this international instrument. There must be some flexibility for Contracting States and Central Authorities to decide how the obligations in paragraph 2 can be fulfilled, at the present time and in the future. It is recalled that Article 57(1) *b)* requires Contracting States to provide to the Permanent Bureau a description of the measures it will take to meet the obligations under Article 6.

124. It is a misunderstanding to consider the obligations in paragraph 2 as "soft" obligations, even "optional". The word "shall" means there is a clear obligation to "take all appropriate measures". There is flexibility in how an obligation may be carried out, but not whether it is or is not carried out. The flexible language in Article 6(2) needs to be read in the light of the overarching principle of effective access to procedures set out in Article 14.

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

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

126. Sub-paragraph *a)* was inspired partly by concerns expressed in the 1999 Special Commission that some countries had not ratified the 1973 Hague Maintenance Convention (Enforcement) because of the absence of adequate provisions on legal aid. Furthermore, "[w]ithout greater harmony in this matter [of a more uniform approach to the provision of legal aid], the efficacy of any re-shaping of the international system of recovery would be diminished."[67]

127. The obligation imposed by sub-paragraph *a)* will not arise in every case. This is clear from the opening words "where the circumstances require". When the circumstances do so require, the Central Authority or designated body must take steps to ensure that legal assistance is provided. If the Central Authority itself does not provide the service, it must take all appropriate measures to help to obtain it or to ensure that this service is provided by another body or person, to the extent permitted by the laws and procedures in the requested State. This obligation is given additional emphasis by the obligation in Article 14 to provide effective access to procedures and should be read in the light of the obligations coming from legal assistance in child support cases set out in Articles 15 and 16. The meaning of "facilitate" is explained under Article 6(1) *b)*.

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[66] "Progressive implementation" is a key operating principle in the 1980 Hague Child Abduction Convention *Guide to Good Practice: Part I – Central Authority Practice,* referred to at note 58.

[67] "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", *op. cit.,* note 7, at para. 12.

128. The term "legal assistance" is defined in Article 3 *c)*. It is intended to be an all-encompassing term that may include any kind of legal help, advice or representation that will "enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State".[68] Previous drafts of the Convention text made a distinction between legal advice, legal representation and legal assistance. However, due to the need to accommodate differences in the legal and administrative systems of States, as well as differences in resources, it was agreed in the 2005 Special Commission that the general term "legal assistance" would be preferable, allowing different countries to provide the service according to their structure and resources. As mentioned in paragraph 69 of this Report, the term was discussed again in the 2007 Special Commission and the definition was expanded to give it greater clarity. The revised definition also makes a clearer connection with the overarching obligation in Article 14 to provide effective access to procedures, however that may be achieved.

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

130. Provision of "legal assistance" may include helping to obtain "legal representation". This could mean having a lawyer, attorney or solicitor in the requested country to represent the applicant in and out of court; in legal proceedings or negotiations with the other party; or to provide legal advice specifically in relation to the conduct of the applicant's case in the requested country. In some countries, "legal representation" by the Central Authority will mean legal representation of the claim, not the applicant, and the implications of this should be explained in accordance with Article 57(1) *b)*.

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

132. Provision of "legal assistance" may include help to obtain "legal advice". This could be legal advice from the Central Authority or legal advice from a private attorney. If the Central Authority is the service provider and is located in a government ministry or department, the Central Authority is unlikely to give private "legal advice" to individuals. "Legal advice" given by the requested or requesting Central Authority in the context of Article 6 is intended to be of a general nature, but which a Central Authority may be best placed to give. For example, advice on how the child support laws operate in that country; advice on how the Convention is implemented internally or internationally; advice on whether the Convention is the most effective instrument to use in a particular case; advice on whether an amicable solution proposed under Article 6(2) *d)* is

[68] Such help, advice or representation may include any legal steps needed in relation to functions listed in Art. 6(2) such as locating a debtor's assets, the taking of evidence and establishing parentage, including genetic testing if necessary, or in relation to enforcement measures referred to in Art. 34.

acceptable in a particular case. These are matters on which a Central Authority lawyer is likely to have particular knowledge and expertise. Legal advice should not be given by a person who does not have appropriate qualifications and training.

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

134. The text of sub-paragraph *a)* is drawn from Article 7 *g)* of the 1980 Hague Child Abduction Convention. The interpretation of this provision in the 1980 Convention has not been to impose directly on the Central Authority the responsibility to provide free legal representation or free legal aid. The provision has not caused any problems of interpretation in that Convention.

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

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

136. The majority of requests will presumably be to locate the debtor. However, assistance in locating a creditor may be needed when the creditor is the respondent to an application by the debtor for modification of a decision in accordance with Article 10(2).

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

138. The obligation to help locate the debtor or creditor may be subject to the internal privacy laws. If the information about the debtor's or creditor's location may not be released because of privacy laws, the requested Central Authority will need to consider what steps could be taken to obtain the information needed to locate the debtor or creditor. It must be emphasised that the information referred to here is obtained for the purpose of legal or administrative proceedings in the requested State, and not for disclosure to the other parent or the requesting Central Authority. Protection of personal information, obtained for the purposes of this Convention, is guaranteed by Articles 38, 39 and 40. In its implementing measures, a Contracting State will need to balance a child's right to financial support against an adult's right to privacy. However, the UN Convention on the Rights of the Child implies that the rights of the child, by virtue of her / his vulnerability, should take precedence.

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

debtor is present in that territory, the Central Authority in the requesting state would make a formal application for child support.

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

141. A comparable provision in the 1980 Hague Child Abduction Convention obliges Central Authorities, either directly or through an intermediary, to take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained.[69] This provision has not caused any difficulties in the operation of the 1980 Convention. What is noticeable in child abduction cases is the different level of resources in different countries to help locate an abducted child. Some countries have very sophisticated locate services where abducting parents may be traced through information on government databases. In other countries, court orders may be sought to direct other bodies such as banks to disclose certain information.[70] On the other hand, some countries are not able to obtain any police assistance if an address for the abducted child is not provided by the requesting country. Just as in a child abduction case it is of fundamental importance to help locate the missing child, so in a child support case it is of fundamental importance to help locate the debtor.

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

142. Any information sought must be relevant to the purpose of the recovery of maintenance. The words “if necessary” relate to the financial circumstances and location of assets. Such information may not be necessary in every case, and there should be no obligation on a Central Authority to obtain it when it is not necessary. For example, a requested Central Authority would help obtain information about the debtor’s financial circumstances upon receipt of a request to recognise and enforce a decision, or upon receipt of a request to establish (or modify) a decision. In some countries, the income of the debtor is only one of the relevant details needed to assess the amount of the debtor’s obligation to pay maintenance, and information about other financial circumstances will be necessary. The Central Authority might fulfil this obligation by contacting the debtor to request the information voluntarily. Or it may refer the request to another body to perform the function. Or it may refer the request to the Public Prosecutor / State Attorney’s Office / Legal Aid Board if legal proceedings are necessary to obtain the information. Information about the creditor’s financial circumstances may be requested if a decision is to be established in the debtor’s jurisdiction, or if the debtor seeks modification of a decision.

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

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[69] Art. 7 *a)*.

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

144. If the assistance under sub-paragraph *c)* is successful, *i.e.*, leads to a location of assets, the requesting country may then seek assistance under sub-paragraph *i)* (a provisional territorial measure) to freeze the debtor's assets in the requested country if, for example, recognition and enforcement of a maintenance decision is pending in the latter country. Requests for assistance under sub-paragraphs *c)* and *i)* could be made simultaneously under Article 7.

145. The information referred to in sub-paragraph *c)* has in some cases been sought by means of a letter of request, for example, under Article 7 of the 1956 New York Convention, or under the 1970 Hague Evidence Convention.[71] Both these avenues can involve a lengthy and complicated process, which could defeat the aims of speed and simplicity in the present Convention. In sub-paragraph *g)* below, another procedure for requesting evidence under this Convention is mentioned, to minimise delays.

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

147. It is emphasised that sub-paragraph *c)* does not impose an obligation on the Central Authority itself to gather the evidence and does not permit Central Authorities to exercise powers which can only be exercised by judicial authorities. In some countries, it may be necessary to apply the 1970 Hague Evidence Convention, the 1954 Hague Civil Procedure Convention[72] or other internal legal rules. But each Contracting State or Central Authority must take steps to help obtain the information as quickly as possible.

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

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

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

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

[71] *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*
[72] Hague Convention of 1 March 1954 on civil procedure.

151. It is acknowledged that mediation and conciliation may present some logistical difficulties in the context of international child support. Although the possibility of bringing parties together for mediation may be remote, the use of audio-visual technology may be explored. New techniques for mediation in international family matters are continually being explored.

152. The minimum requirements in this function would be to obtain advice about mediation facilities for the parties. Other possibilities include enlisting the aid of an external mediator in an intractable case, or referring the parties to an international mediation service. Sub-paragraph *d)* in no way obliges the Central Authority personnel to conduct or be responsible for the mediation. One Central Authority reported a very high success rate with a project aimed at getting defaulting debtors to pay child support. Debtors were contacted directly by specially trained personnel to discuss ways of paying both the ongoing maintenance amount and reducing the arrears debt.

153. The word “encourage” is used instead of “facilitate” as some experts believed the latter word may have created an obligation that could not be met in some countries.

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

154. The word “facilitate” is used in Article 6(1) *b)* and (2) *a)*, *e)*, *f)*, *g)*, *i)* and *j)*. Its meaning is explained above at paragraphs 116 and 117 (under Art. 6(1) *b)*).

155. The obligations imposed by sub-paragraph *e)* include a general obligation on Central Authorities to take appropriate steps to guarantee the regularity of maintenance payments to creditors. The Central Authority should ensure that the initial measures to collect payments or to enforce the maintenance decision will be effective. Some effective enforcement measures are listed in Article 34.

156. The operation of sub-paragraph *e)* will also arise in cases of repeat “defaulters”. The Convention seeks ways to avoid requiring a creditor to submit frequent applications for enforcement. “Ongoing enforcement” in this context implies a resumption of enforcement measures or efforts should the debtor default on the maintenance payments. The assistance provided by Central Authorities in such cases might include providing advice or assistance to a creditor about enforcement measures; providing closer supervision of problem cases in the Central Authority; removing the debtor’s option of voluntary payment and instituting wage withholding. Arrears are included in this provision for two reasons. First, it emphasises that a maintenance decision may be either a decision for arrears only, or a decision for ongoing maintenance and an arrears component. Second, the existence or accrual of arrears means the debtor has already defaulted on the maintenance payments and enforcement is or may be a problem in the particular case.

157. The earlier drafts of this provision referred to “ongoing monitoring and enforcement”. The reference to “monitoring” was deleted as it implied to some experts an impossible burden on Central Authorities to monitor and review every case, whether or not enforcement problems arose. The obligation as stated in sub-paragraph *e)* assumes that recognition and enforcement has already occurred.

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

159. It was pointed out that some countries have computerised case management systems which allowed faster, more efficient review of case records. Where maintenance payments are being collected and distributed by a public authority, any occurrences of non-payment will be apparent immediately through a computerised system. In one country, a notice of non-payment is generated automatically and sent to the debtor as soon as the payment is not received on the due date. A record of recurring non-payments can be created to assist decision-making on appropriate enforcement measures. On-going enforcement can also be improved through the availability of a range of enforcement measures, of increasing severity, possibly to be implemented administratively, and without the delays common to some court-based systems. All these possible measures will not represent a decrease of the juridical guarantees.

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

160. Sub-paragraph *f)* is intended to address existing problems of inefficient methods of collecting and transmitting payments by debtors. If collection methods are not effective, there will be no funds to transfer, regardless of how expeditious the transfer procedures may be. Enforcement measures for effective collection are mentioned in Article 34(2). Inefficiencies may result in reduced payments to creditors after bank charges and currency conversion fees have been deducted. Inefficiencies also result in delays for creditors receiving payments, even if debtors make regular payments.

161. Electronic banking is now the norm in many countries, and the Convention recognises and encourages the benefits that new technologies can bring to expedite child support or other maintenance payments. Article 35 encourages the use of the most cost-effective and efficient methods to transfer funds.

162. The different methods of electronic transfer of funds and their relative advantages and disadvantages were examined in Preliminary Document No 9, "Transfer of funds and the use of information technology in relation to the International Recovery of Child Support and other Forms of Family Maintenance".[73]

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

163. The wording of sub-paragraph *g)* has its origins in Article 7 of the 1956 New York Convention which deals with Letters of Request. Sub-paragraph *g)* is intended to supplement sub-paragraph *c)* on obtaining information on the income, financial circumstances and assets of the parties.

164. Under sub-paragraph *g)*, a Central Authority may be requested to facilitate the obtaining of evidence within its own jurisdiction or to facilitate the obtaining of evidence abroad. The first situation may arise where, for example, a creditor applies for establishment of a decision in the debtor's jurisdiction and requests the Central Authority in that jurisdiction to facilitate the taking of evidence from the debtor in accordance with the internal laws of that jurisdiction.

165. The second situation may arise where, for example, a creditor seeks to obtain an increase in maintenance in the debtor's jurisdiction where the original order was made. In such a case, the Central Authority in the debtor's jurisdiction may require the Central Authority in the creditor's jurisdiction to facilitate the taking of evidence in the creditor's jurisdiction to the extent that such information has not already been submitted by the creditor. If modification of the order has to be sought in the creditor's jurisdiction, she / he may request the assistance of the Central Authority in her / his jurisdiction to obtain evidence from the debtor's jurisdiction to put before the court in the creditor's jurisdiction. This latter request would be a request for special measures "concerning the recovery of maintenance pending in the requesting State" as permitted by Article 7(2).

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[73] Report drawn up by P. Lortie, First Secretary, Prel. Doc. No 9 of May 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 9/2004). Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

166. It is important that Central Authorities carefully distinguish the two situations. In the first situation, the evidence is taken in the Central Authority's own jurisdiction; in the second situation, the evidence is taken abroad. In both cases, the procedural rights and interests of the parties must be protected. The distinction is all the more important as in the second case the taking of evidence abroad may be subject to another treaty.

167. For example, the taking of evidence abroad may be subject to the 1954 Hague Civil Procedure Convention or 1970 Hague Evidence Convention which are not affected by the Convention (Art. 50),[74] or a bilateral treaty or arrangement dealing with evidence matters as contemplated in Article 51 of the Convention. The use of such mechanisms, where applicable, would not be inconsistent with the obligation of the Central Authority under the Convention. However, where no such mechanisms are applicable, sub-paragraph *g)* could be used on its own to seek evidence abroad in accordance with the applicable internal laws.

168. The term "evidence" should be interpreted broadly. It could be any data that is publicly available in the requested State or it could be a document obtainable upon request, or it could be evidence that can only be obtained through a judicial process.

169. The obligation implied by the term "facilitate" is discussed in paragraphs 107 and 108 (general comments on Art. 6) and paragraph 118 (on Art. 6(1) *b)*).

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

170. In many countries the establishment of parentage has become so inextricably linked to the establishment of child support that it was felt that its omission from the new Convention would be a failure to live up to the objective of developing a forward looking instrument. Sub-paragraph *h)* emphasises the necessary connection: that the establishment of parentage must be for the purpose of recovery of maintenance.

171. Sub-paragraph *h)* does not in any way oblige the Central Authority to undertake, for example, genetic testing, but instead to provide assistance to the applicant to have the necessary genetic testing procedures performed. Throughout this Report the term "genetic testing" is used and is intended to include "parentage testing".

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

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

174. In the context of sub-paragraph *h)*, "providing assistance" could mean, at a minimum, providing contact details of the laboratories qualified to undertake genetic testing in the requested country, or providing advice to the creditor or the requesting Central Authority about internal laws, or referring the creditor to the proper authorities. At a higher level of service, it could mean providing assistance in obtaining relevant documents in relation to the establishment of parentage by presumption, acting on a request to contact the putative father to obtain a voluntary acknowledgement of

[74] The Report does not address the legal obligations of States under the 1970 Hague Evidence Convention but only draws attention to its possible relevance in the context of Art. 6(2) *g)* as well as Art. 50 which makes clear that this Convention is not affected by the new Convention. A more detailed discussion of obligations under the Evidence Convention is not needed in this Report.

paternity, initiating judicial proceedings for the establishment of parentage, or assisting with arrangements for a voluntary DNA test of the presumed parent.[75]

175. Internal laws and procedures vary considerably on this question. In some countries, the establishment of parentage is for the "purpose of recovery of maintenance". In other countries, determination of parentage for the "limited purpose" of child support would be impossible due to the *"erga omnes"* effect ("for all purposes") of any such determination. Preliminary Document No 4 of April 2003, "Parentage and International Child Support – Responses to the 2002 Questionnaire and an Analysis of the Issues",[76] gives an overview of the different domestic systems for the establishment of parentage,[77] as well as internal variations in both procedures and costs.[78] It also examines in detail the possible areas of administrative co-operation.[79] In some countries genetic testing can only be ordered by judicial authorities and would require an international letter of request. Some experts believed the use of international instruments such as the 1970 Hague Evidence Convention was preferable to letters of request, but this would only assist those countries that are party to that Convention. Some States accept an application under the 1956 New York Convention.[80] In other countries, such as in Canada (Quebec), it may be a combination of judicial and administrative processes. Some Central Authorities are willing to contact the debtor to request his or her voluntary participation in genetic testing. Preliminary Document No 4 indicates that legal aid for genetic testing is available in most countries and the testing was free to those entitled to legal aid if testing occurs in the course of legal proceedings.

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

176. A provisional measure referred to in sub-paragraph *i)* might be sought in the State to which an application for the recovery of maintenance has been made, or in another Contracting State in which assets of the debtor are located. Provisional measures include measures to prevent the dissipation of assets, or measures to prevent the debtor leaving the jurisdiction to avoid legal proceedings. The freezing of the debtor's assets (pending the outcome of any legal proceedings) may be the measure most frequently requested under this provision.

177. The measures requested under sub-paragraph *i)* must be both "provisional" meaning interim or temporary, and "territorial in nature", meaning that their effect must be confined to the territory of the requested State (the State which takes the measures) or of several States in accordance with the applicable rules. Provisional measures are, by their nature, of limited duration. They should, therefore, be obtainable by the most expeditious procedures, if necessary in an undefended (*ex parte*) hearing. Frequently in maintenance cases, speed is of the essence to secure assets located abroad. See also the example given under Article 6(2) *c)* in paragraph 144 of this Report.

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

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[75] Prel. Doc. No 5/2003, *op. cit.*, note 21, para. 115.
[76] Report drawn up by P. Lortie, First Secretary, Prel. Doc. No 4 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 4/2003), available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".
[77] Paras 3-21.
[78] Paras 13, 23 and 24.
[79] Paras 43 and 44.
[80] Prel. Doc. No 5/2003, *op. cit.*, note 21, para. 112.

179. The provisional measures taken in the requested State (*e.g.*, to freeze the debtor's assets) are intended to help the creditor to eventually recover some maintenance ("secure the outcome") in a "pending maintenance application". The words of sub-paragraph *i)* leave open the possibility that a maintenance application could be purely domestic in nature or it could be an international case.[81] For example, assistance under sub-paragraph *i)* may be sought in relation to current applications under Article 10 (an international case). A typical situation might begin with a creditor seeking recognition and enforcement of a maintenance decision in the debtor's jurisdiction, where it is known the debtor has assets. In order that enforcement of the maintenance decision actually results in the recovery of maintenance, the creditor needs to be sure the debtor will not spend, hide or move the assets to avoid his or her maintenance liability. Sub-paragraph *i)* will assist the creditor to achieve this aim. A specific measures request may also be made under Article 7(1) for provisional territorial measures, when there is no Article 10 application pending for the international recovery of maintenance (the request may be for a domestic case, or as a preliminary enquiry for an international case).

180. It is recalled that the Central Authority itself is not required to take the provisional measures. The Central Authority function is to take all appropriate measures to initiate, or facilitate the initiation of, legal proceedings, to obtain the necessary protection for the applicant. The nature of this obligation is no different to the obligation under Article 6(1) *b)*.

181. Sub-paragraph *i)* is inspired by Article 15(1) of the Montevideo Convention.

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

182. Under sub-paragraph *j)*, a Central Authority may be requested to facilitate service within its own jurisdiction or to facilitate service abroad. The first situation may arise where, for example, a creditor applies in the debtor's jurisdiction to establish or modify a decision. In such a case, the creditor may require the Central Authority in the debtor's jurisdiction to facilitate service of process on the debtor in accordance with legal requirements in the Central Authority's jurisdiction. For example, the Central Authority might have to send the documents to a private process server, the Public Prosecutor or any other authority or person competent to effect service, or to have service effected, in that jurisdiction.

183. The second situation may arise where, for example, a creditor applies to establish or modify a decision in his or her own jurisdiction, and service must be effected on the debtor in another jurisdiction. In this case, the Central Authority in the creditor's jurisdiction may be required to facilitate the transmission of the documents abroad so that they can be served on the debtor in accordance with legal requirements in the debtor's jurisdiction.

184. It is important that Central Authorities carefully distinguish these two situations. In the first situation, the documents do not have to be transmitted abroad for service; in the second situation, the law of the Central Authority's jurisdiction (law of the forum) is likely to require that documents be transmitted abroad for service. In both cases, the procedural rights and interests of the parties must be protected. The distinction is all the more important as in the second situation, the transmission of the documents for service abroad may be subject to another treaty.

185. For example, the service abroad may be subject to the 1954 Hague Civil Procedure Convention or the 1965 Hague Service Convention[82] which are not affected by the

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

[82] *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

Convention (Art. 50),[83] or a bilateral treaty or arrangement dealing with matters of service as contemplated in Article 51 of the Convention. The use of such mechanisms, where applicable, would not be inconsistent with the obligation of the Central Authority under the Convention. However, where no such mechanisms are applicable, sub-paragraph *j)* could be used on its own to facilitate service abroad in accordance with the applicable internal laws.

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

186. This provision gives greater flexibility to States to decide how mandatory functions will be most effectively performed in their State.

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

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

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

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

190. Paragraph 4 provides clarity about the limits of the requested Central Authorities' powers. It is also intended to overcome any concerns that Articles 6 and 7 may appear to impose obligations on Central Authorities that could only be carried out in their countries by judicial authorities.

[83] The Report does not address the legal obligations of States under the 1965 Hague Service Convention but only draws attention to its possible relevance in the context of Art. 6(2) *j)* as well as Art. 50 which makes clear that this Convention is not affected by the new Convention. A more detailed discussion of obligations under the Service Convention is not needed in this Report.

### *Article 7 Requests for specific measures*

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

192. It is useful to recall that an application for limited assistance had been included in Article 10 in early drafts of the Convention.[84] However, concerns were expressed that it could be too burdensome on Central Authorities to be obliged to provide this type of assistance. As a compromise, and to give a treaty basis to this form of limited assistance, the "application for limited assistance" in Chapter III became the "request for specific measures" in Chapter II. Furthermore, as the requested Central Authority has some discretion in how the service is to be provided, no unmanageable obligations are imposed on Central Authorities, and there could be great benefits generated from having a wider range of services available under Article 7(1). Hence a reference to Article 6(2) *b)*, *c)*, *g)*, *h)*, *i)* and *j)* has been added to Article 7(1).

193. There are at least three possible situations in which a request for specific measures might be made by a Central Authority: (i) a request that is preliminary to an application for the establishment, modification or enforcement of a maintenance decision, for example, a request for assistance made to a Central Authority to verify whether a debtor resides in the State to which the requesting Central Authority wishes to make a maintenance application; (ii) where establishment, modification or enforcement of a maintenance decision is being undertaken in the requesting country and help from the requested country is needed for the proceedings, for example, a request for assistance made to another State to help locate a debtor's assets; and (iii) a request for assistance in the context of a purely internal maintenance matter in which, for whatever reason, there was a need for assistance from another State, for example, in relation to the establishment of parentage or identification of assets abroad. The situation referred to in (iii) is covered by Article 7(2). It is likely that the most common request for specific measures would relate to Article 6(2) *b)* and location of the debtor. This has the potential to be a significant cost-saving measure. Many Central Authorities and the creditors they are assisting will want to ascertain that a debtor is in fact residing in a particular country before expending time, effort and money in preparing and translating a Chapter III application. Requests under Article 6(2) *c)* to obtain details of the debtor's income might also be made regularly. Such information will help decide in the early stages if it is worth pursuing a claim.

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

195. Many experts believed that the type of assistance envisaged by Article 7 was essential to the development of a new and comprehensive system of co-operation in matters relating to the recovery of maintenance. This type of assistance, particularly to help locate a debtor, was already offered by some countries under the 1956 New York Convention.

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[84] See Art. 11(1) *h)* in "Working draft of a Convention on the international recovery of child support and other forms of family maintenance", prepared by the Drafting Committee, Prel. Doc. No 7 of April 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

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

197. Where a specific measures request for assistance, such as locating a debtor’s assets, requires the initiation of legal proceedings or similar judicial action, it is a matter for the requested authority to decide if it is able to take those particular steps. If not, the Central Authority may be able to offer other administrative assistance or advice on how to achieve the purpose of the request, by, for example, the use of the applicable international instruments.

198. The issue of costs for specific measures is dealt with in Article 8(2) and (3). How such costs are treated is a matter for the requested State. They could also be the subject of bilateral or reciprocity agreements between States under Article 51(2).

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

200. Article 7 must not be misused for “fishing expeditions” or pre-trial discovery. The request for specific measures may only be used in cases falling within the core scope of the Convention, subject to, on a reciprocal basis, a declaration extending the scope. See the explanations on the scope provision in Article 2.

**Paragraph 1 – A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2) *b)*, *c)*, *g)*, *h)*, *i)* and *j)* when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated.**

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

202. While the first sentence of paragraph 1 states that a request may be made when no Article 10 application is pending, the second sentence of paragraph 1 does impose a necessary connection between the specific measure and the possibility of an application under Article 10. This sentence reflects the common view that there needed to be limits imposed on the scope of requests for specific measures. In particular, there was concern about the use of this Article for purposes other than the recovery of maintenance. There was also the desire for specific words to be added to limit such requests to reflect the purposes of this Convention.

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

204. Hence, upon receipt of a request for specific measures, if satisfied of the connection to a possible Article 10 application, a Central Authority is expected to take appropriate measures and provide a level of assistance and co-operation that is appropriate for that particular request and is in accordance not only with its own powers and resources, but also with its internal laws. For example, the request could be for information about the debtor's income that will allow the requesting State to make a maintenance decision that is later to be recognised and enforced in the requested State. This example would be one covered by paragraph 1 rather than paragraph 2 because a future application under the Convention is definitely contemplated, even though proceedings must first be completed in the Requesting State (the situation envisaged under para. 2).

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

205. The pending case to which paragraph 2 refers is an internal case concerning the recovery of maintenance in the requesting State, and for which there was a need for assistance from another State. Article 7(2) is limited to internal cases having an international element and concerning "recovery of maintenance". The words "concerning the recovery of maintenance" were added to make clear that the scope of this provision was restricted to those cases so described, and not simply to "any" internal case. In order not to disadvantage a creditor who seeks to establish a maintenance decision in his / her own jurisdiction and first needs assistance to establish parentage, Article 7(2) provides for such assistance in "a case having an international element concerning the recovery of maintenance pending in the requesting State".

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

207. When a request is submitted under Article 7(2), the Central Authority "may also take specific measures". The word "may" in paragraph 2 denotes a discretion and not an obligation of the kind imposed by the word "shall" in paragraph 1. One reason for this is that the specific measures referred to in paragraph 2 could be any of the measures in Article 6(2) and are not restricted to those mentioned in Article 7(1).

208. Paragraph 2 could apply even if both the debtor and creditor lived in the requesting State. There are circumstances where information or measures in the requested State, such as the location of assets or evidence from a foreign witness, are needed for legal proceedings in the requesting State. For example, paragraph 2 would permit a specific

measures request for provisional territorial measures referred to in Article 6(2) *i)* to be made for a purely internal maintenance claim, but if assets cannot first be secured in the requested state (or another State), it may be pointless for a creditor to proceed with the internal application. As there is a well-established and co-operative network of Central Authorities that can provide administrative assistance, it is logical to use that network even for a domestic case with an international element, provided it does not create an unacceptable burden on the requested Central Authority.

209. If a service or function listed in Article 6 is provided in response to a request under Article 7 (when no application under Art. 10 is pending), Article 14 does not apply and requests do not attract the same benefits as Chapter III applications, such as effective access to procedures and cost-free services. However, only exceptional costs or expenses for Article 7 requests may be charged for by Central Authorities under Article 8(2) and (3).

### *Article 8 Central Authority costs*

210. The general principle of Article 8 is that there should be no costs imposed for services provided by the Central Authority. The general principle of cost-free administrative services for applicants and Central Authorities was well supported, and consistent with the Convention's aims for a simple, low cost and rapid procedure.[85] This principle was considered to be particularly important with regard to maintenance for children. It was also considered important to ensure that access to the benefits and services of the Convention was not denied to applicants because of their limited financial circumstances. A number of other important principles underpin Article 8: (a) the need to provide effective access to services and procedures provided under the Convention; (b) ensuring that the burdens and benefits of the Convention are not disproportionate; (c) ensuring a certain level of reciprocity among Contracting States which would contribute to mutual confidence and respect which are necessary for a successful Convention; and (d) the recovery of maintenance should take precedence over the payment of legal and other costs.

211. The subject of Article 8 is administrative costs of Central Authorities. Nevertheless, it should be understood that the explanation of Article 8 is in the context of applications under Chapter III and any reference to charging for services must be read in relation to Articles 14, 15, 16, 17 and 43 concerning effective access to procedures, free legal assistance for child support applications, and recovery of costs. It should also be clear that the Central Authority may only charge for exceptional costs incurred under Article 7 and not under Article 6. It is also important to make clear that all the services mentioned in the Convention which are necessary to have a child support order established or enforced are covered by either Article 8 or Articles 14, 15, 16, 17 and 43 (the only exception being translation services).

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

212. This provision derives from Article 26 of the 1980 Hague Child Abduction Convention and Article 38 of the 1996 Hague Child Protection Convention. The possibility is left open for States to enter into bilateral or regional arrangements under Article 51(2) to provide other cost free services on a reciprocal basis.

[85] These principles were proposed in "Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and other Forms of Family Maintenance, including Legal Aid and Assistance", Report drawn up by W. Duncan, Deputy Secretary General, with the assistance of C. Harnois, Legal Officer, Prel. Doc. No 10 of May 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 10/2004), at paras 41-44. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

213. The formulation in paragraph 1 clarifies that a Central Authority may not charge another Central Authority for services and must bear its own costs. It does not prevent the possibility of a Central Authority imposing charges on any other person or body apart from the applicant referred to in paragraph 2. See paragraphs 215 and 216 below.

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

214. Paragraph 2 applies to the Central Authority in both the requesting and requested State. The "applicant" is a person or public body making an application under Article 10. When the applicant is a public body, the same principle of cost-free services applies. It was considered undesirable to penalise a State by imposing charges simply because that State has provided maintenance to children in advance of recovery from the debtor.

215. Although paragraph 2 states that there shall be no charge to the applicant for services provided by the Central Authority, there may be other persons who could be charged for Central Authority services, or ordered by a court to pay costs. For example, a debtor who unsuccessfully opposed the legal proceedings, or the debtor's employer who refused to implement a wage withholding order, could be required to pay administrative costs. Article 43 may refer to the recovery of administrative or legal costs. During negotiations, there was some support for imposing charges for Central Authority services on a debtor. It was said this could encourage the debtor to pay maintenance voluntarily if faced with the prospect of paying other costs.

216. The general principle in paragraph 2 applies to the services or functions of Central Authorities listed in Articles 5, 6, 7 and 12. The specific reference to "their services" in Article 8(2) clarifies that Central Authorities cannot charge for their services but it is possible that a service that has to be provided by a body other than a Central Authority might be charged for except in the context of an application for child support, in which case free legal assistance must be provided and no costs can be imposed (Art. 15(1)). However, a body referred to in Article 6(3) must not charge for services if it is performing functions as the Central Authority.

217. In earlier drafts of the Convention,[86] there was an exception to the general principle set out in Article 8 according to which a charge could have been imposed for additional services or higher level services unless they would interfere with the obligation under Article 14 to provide effective access to procedures.

218. However, that provision was substituted at the 2006 Special Commission by a simpler provision, now in Article 8(2), which exempts the applicant from any administrative charges, while allowing for some charges in relation to requests for specific measures under Article 7. Experts agreed that to allow for the possibility of charging for additional or higher level services could have the unintended consequence that some Central Authorities may do less or offer only the minimum services for free while charging for the maximum number of services.[87] It was also recognised that it would be a failure of the Convention if the costs of the procedure prevented a creditor from making a legitimate claim for maintenance.

[86] Prel. Doc. No 16/2005, *op. cit.*, note 64.

[87] See "Comments on the tentative draft Convention on the international recovery of child support and other forms of family maintenance", received by the Permanent Bureau, Prel. Doc. No 23 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 23/2006). Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

219. The principle of effective access to procedures set out in Article 14 is thus an overriding principle. An applicant must not be denied effective access to procedures because charges may have to be imposed for some services. See also the explanations for Articles 15 and 16, in which the principle of effective access is further emphasised.

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

221. A Central Authority must bear its own costs in providing all services in connection with an application under Article 10. Those entitled to benefit include the creditor, the debtor and a public body. Any creditor who is brought within the scope of the Convention by a declaration under Article 2(3) which extends Chapter II or III to that creditor, may also benefit from cost free services

222. A specific exception to the general rule is that an applicant may be charged for translation costs under Article 45.

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

**Paragraph 3 – The requested Central Authority may not recover the costs of the services referred to in paragraph 2 without the prior consent of the applicant to the provision of those services at such cost.**

224. Paragraph 3 was included on the initiative of Switzerland.[88] The Diplomatic Session supported the arguments of the Swiss delegation concerning the situations in which exceptional costs or expenses can arise, namely that the requesting authority should be notified of the costs prior to a service being provided. Article 7 requests for specific measures could trigger costs which are considerable, even though it is possible that the result will be that no application is made. For example, some specific measures which need the support of external authorities might not be taken free of charge, such as finding details of the debtor's location or details of the debtor's financial situation.[89] However, the suggestion that the requesting authority should somehow guarantee payment of these costs was not supported as an inclusion in the Convention text, but that does not limit the possibility that Contracting States might make such arrangements between themselves.

225. An example may help to illustrate the relationship between Article 8(3) and Article 43(1). Take the example of a creditor who agrees under Article 8(3) to the provision of services to locate a debtor which will result in "exceptional costs". If the search for the debtor is unsuccessful, the creditor will have to bear the costs. But if the search is successful, the costs should be recovered from the debtor under Article 8(2) or Article 43(2). However, the rule in Article 43(1) must be applied. The creditor may agree to a reduction in maintenance payments to offset the cost of locating the debtor, but this is neither implied nor required by the Convention.

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[88] See "Consolidated list of comments on the revised preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance", drawn up by the Permanent Bureau, Prel. Doc. No 36 of October 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 36/2007). Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[89] Minutes No 2, para. 53.

## CHAPTER III – APPLICATIONS THROUGH CENTRAL AUTHORITIES

226. The titles of Chapter III and of Article 9 are intended to remove any ambiguity about applications and procedures. Any application made in accordance with Chapter III must be made to and transmitted through the Central Authorities. The applicant must reside in the Requesting State and must apply to the Central Authority of that State. The application must be one as permitted by Article 10 and must be in the form required by Article 11, and in accordance with the procedures in Article 12.

227. A person who makes an application under Chapter III is entitled to seek the full range of Central Authority services that are listed in Chapter II. With the exception of specific measures under Article 7, these services are only available if an application is made under Chapter III.[90]

### *Article 9 Application through Central Authorities*

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

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

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

230. The question of the legal relationship between the applicant and the Central Authority was discussed, in particular, whether a mandatory power of attorney was needed. Some delegates agreed that the relationship could be clarified by requiring a power of attorney. Others stated that the Central Authority may represent neither the applicant nor the requesting State, but be regarded as fulfilling the obligations of the Convention for its own State. The applicant in such case could not direct the Central Authority how to act in the proceedings. It was felt that it would be wrong to impose on all Contracting States a uniform model of how the Central Authority relates to an applicant. Now, Article 42 permits a requested Central Authority to ask for a power of attorney only if it acts as legal representative of the applicant.

### *Article 10 Available applications*

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

[90] The Convention does not interfere with the rights of any person to apply, outside of this Convention, to another country, for any procedure or remedy available under the law of the other country. See Art. 37.

232. The range of applications in Article 10 reflects the recommendations of the 1999 Special Commission that the Convention should be "comprehensive in nature, building upon the best features of the existing Conventions",[91] including for example, the establishment and modification of maintenance decisions as provided for in the 1956 New York Convention.

233. A separate application for recovery of arrears had been included in earlier drafts of Article 10. However, it was agreed that recovery of arrears will always be a question of recognition and enforcement of an existing order under which arrears have accrued. Therefore, a separate application was redundant. The recovery of arrears is provided for in Article 6(2) *e)* concerning ongoing enforcement, and in Article 19(1), where an obligation to pay arrears is explicitly included within the scope of a maintenance decision for the purposes of Chapter V on recognition and enforcement.

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

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

235. Article 10(1) applies exclusively to the creditor. Although the definition of "creditor" in Article 3 refers only to an "individual", Article 36(1) provides that for the purposes of applications for recognition and enforcement of a decision in Article 10(1), a creditor may also be a public body. The chapeau describes the threshold criteria to be met by the creditor when seeking the assistance of a Central Authority under Article 10(1): the applicant must be in the requesting State; the applicant must be the creditor (or a person acting for the creditor) who is seeking to recover maintenance in another Contracting State (the requested State); and the application must be one of the applications described in Article 10(1) *a)* to *f).* The application must be made through the Central Authorities in accordance with Article 9.

236. The creditor must be in the requesting State in order to make an application. The choice of the words "in a requesting State" ensured that Article 10 applied equally to individual creditors and to public bodies, and removed the need to define "requesting State" in Article 3 as the place where the applicant has his or her residence and from where the application is made. Such a definition would not have been appropriate for a public body. The term "requesting State" was considered to be self-defining.

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

237. A decision to which Article 10(1) *a)* and *b)* applies is a decision as described in Article 19.[92] It may also be a part of a decision as described in Article 21. See also the explanation of "recognition" and "enforcement" in paragraph 429.

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[91] "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", *op. cit.*, note 7, para. 46.

[92] An application for the recognition and enforcement of a maintenance decision may be made under Chapter III, through a Central Authority. Alternatively, a direct request for the recognition and enforcement of a maintenance decision is available in accordance with Arts 19(5) and 37, but this is not a Chapter III application. Central Authority assistance cannot be sought as Chapter II does not apply to such applications. See explanation for Arts 19 and 37.

238. For the purposes of Article 10(1) *a)*, an application for recognition or recognition and enforcement of a decision would be processed in accordance with Article 23 or, as the case may be, Article 24, and would be accompanied by the documents listed in Article 25.[93]

239. For the purposes of processing an application for recognition or recognition and enforcement of a decision, the question may arise whether the maintenance decision is made by a judicial authority or an administrative authority. If the decision meets the requirements of Article 19, and it is enforceable in the country of origin and is made by the legal authority competent to make such decisions in that Contracting State, it must be recognised and / or enforced, provided the bases for recognition and enforcement in Article 20 are met and the grounds for refusal in Article 22 are not raised. The deciding authority is irrelevant.

240. Although not stated explicitly, a decision for which recognition, or recognition and enforcement, under the Convention is sought must, in accordance with Article 20(1), be a decision made in a Contracting State. However, it need not be a decision of the requesting State. For example, a creditor who was living in country X and obtained a maintenance order there, moves to country Y. The debtor has moved to country Z. Countries X, Y and Z are all Contracting States. The creditor living in country Y can request recognition, or recognition and enforcement, in country Z of the decision made in country X.

241. Whether the same rule would apply if the originating jurisdiction is a non-Contracting State was discussed and it was agreed that only a decision made in a Contracting State is entitled to recognition and enforcement under Chapter V in the requested State (see Art. 20(1)). On the other hand, Article 10(1) *a)* does not prohibit, as an act of comity between States, the transmission of a decision made in a non-Contracting State for recognition and enforcement under the law of the requested State.

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

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

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

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

244. Sub-paragraph *c)* permits the creditor to make an application to establish a maintenance decision when no decision exists in any other State. If parentage must be determined before the maintenance decision can be established, that is authorised by sub-paragraph *c)*.[94]

245. The establishment of a maintenance decision was authorised under the 1956 New York Convention. An application under sub-paragraph *c)* is subject to paragraph 3, so that jurisdictional rules of the forum may limit the circumstances in which an application

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[93] "Report of the Forms Working Group – Recommended Forms", co-ordinated by the Permanent Bureau, Prel. Doc. No 31-B of July 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 31-B/2007), Annex A, contains the application form proposed by the Forms Working Group. See also Art. 11(4). Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[94] *Ibid.*, Annex C, contains the application form proposed by the Forms Working Group. See also Art. 11(4).

for establishment might be made, and the forum's rules of procedure and substance will govern the proceedings.

246. Many systems allow for the creditor to apply for establishment in the debtor's jurisdiction, and for good reasons. It may be faster and more efficient, as there will be no international requirements to meet for service of process or notification of the respondent and no need for procedures for the recognition and enforcement of foreign judgments. There will be a more accurate assessment of the debtor's ability to pay and a creditor may get more child support; more assets may be found; and further applications for modification are less likely. In addition, authorities in the debtor's jurisdiction may be able to enforce their own decision more quickly and more effectively. See also the explanation for Article 6(2) *j)*.

247. The operation of the second part of sub-paragraph *c)* concerning parentage may arise in a situation where a creditor applies for the establishment of a maintenance decision in the debtor's jurisdiction, but the application cannot proceed without proof of parentage. A separate application for the establishment of parentage is not available under the Convention. It can only be requested in connection with a request to establish a maintenance decision. This is the intention of sub-paragraph *c)*. Article 10(1) *c)* was a compromise between those experts who considered it crucial for the Convention to provide assistance to establish parentage and wanted a separate application for establishment of parentage (as appeared in the draft Convention in Prel. Doc. No 13 of January 2005[95]), and those who wanted parentage issues excluded completely from the Convention. Reasons given by some experts for opposing inclusion were that establishing parentage for the restricted purposes of maintenance was against public policy in their jurisdictions, or that the *erga omnes* effect of a decision on parentage prevailed in their jurisdiction, meaning that if parentage is established, it is established for all purposes, not just maintenance.

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

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

250. The existing rules on the law applicable to the establishment of parentage are variable. The applicable law may be: the law of the forum, or the law of the country of domicile or of nationality – of the child or of all the parties, the law applicable to the maintenance decision, or the law of the country of the child's birth.[96]

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

252. Each Contracting State should indicate in its country profile or in information provided under Article 57 how the establishment of parentage will be carried out in relation to Articles 6(2) *h)* and 10(1) *c)*. See also the explanation under Article 15(1).

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[95] "Working draft of a Convention on the International Recovery of Child Support and other Forms of Family Maintenance", prepared by the Drafting Committee, Prel. Doc. No 13 of January 2005 for the attention of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 13/2005). Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[96] Prel. Doc. No 4/2003, *op. cit.*, note 76, paras 25-33.

**Sub-paragraph *d)* – establishment of a decision in the requested State where recognition and enforcement of a decision is not possible, or is refused, because of the lack of a basis for recognition and enforcement under Article 20, or on the grounds specified in Article 22 *b)* or *e)*;**

253. This rule is confined to cases where the bases for not recognising or enforcing a decision are a lack of jurisdiction under Article 20 or either of the grounds specified in Article 22 *b)* or *e)* have been established.

254. There was strong support in Special Commission discussions and overwhelming support in the 2002 Questionnaire[97] for a rule in the Convention allowing establishment of a decision in the circumstances of sub-paragraph *d)*. It may also be argued that existence of this principle is implicit in Article 20(4).

255. Sub-paragraph *d)* is necessary to alleviate potential injustices, for example where a creditor in country A has a maintenance order from country B which is refused recognition and enforcement in country C, the country of the debtor's residence. Moreover, this is not a situation to which the *res judicata* rule applies. If a foreign decision cannot be recognised, the legal effect is that the decision does not exist for the requested State and a new decision can be established. Another example arises when an order for a percentage amount of salary as child support cannot be recognised and enforced because, according to some countries' laws, it is too vague. Fresh proceedings may be necessary to make a new decision with a specific amount.

256. The question arises whether an application under sub-paragraph *d)* can be sent before requesting or obtaining a decision on recognition and enforcement, when it is known in advance that recognition and enforcement will be refused (because the basis of recognition in Art. 20 cannot be met). For example, when a decision is obtained on the basis of creditor's jurisdiction, and it is known that such a decision cannot be recognised in the country in which the debtor now resides, should time be wasted by going through the formalities to obtain a refusal of recognition? The use of the words "is not possible" imply that there is no obligation in the Convention to first apply for recognition before applying for establishment, when it is known that recognition will be refused. However, the procedure for establishment would usually take longer than the procedure for recognition and enforcement. To avoid losing time, the applicant would submit an application to establish a decision. However, it is also permitted to submit an application for recognition of the previous decision, in case the requested country is able to find some other basis for recognition apart from creditor's jurisdiction. Unfortunately, translation and other costs for two applications could be prohibitive for a creditor.

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

257. The issues surrounding modification of a decision were examined in the Duncan Report,[98] and it was suggested "that one of the principal requirements for overcoming the problems associated with modification jurisdiction is the establishment of a fast and effective system of co-operation, combined with appropriate supports for the creditor or debtor, so that when a modification has to be applied for in what appears to one of the parties to be an inconvenient forum, the inconvenience is minimised for the applicant."[99] The issues were summarised again in the report on the 2003 Special Commission meeting in Preliminary Document No 5.[100]

258. Having regard to the existing rule in the 1956 New York Convention, the 2004 Special Commission meeting strongly supported the inclusion of an application for modification in the Convention and accepted that administrative co-operation is essential

[97] Noted in the Duncan Report, *op. cit.*, note 11, para. 24, at (v).
[98] *Ibid.*, Chapter IV, paras 103-134.
[99] *Ibid.*, para. 132.
[100] Prel. Doc. No 5/2003, *op. cit.*, note 21, paras 90-94.

for the process. The importance of administrative co-operation to minimise unfairness or inconvenience to either party is emphasised.[101]

259. Sub-paragraph *e)* provides for an application by the creditor to the originating jurisdiction to modify its own decision. The great advantage of modification in the originating country is that that there is only one order in existence, but the person seeking modification (the creditor in this case) will usually need to be assisted or legally represented in the requested State.

260. The basis or bases on which modification is allowed is governed by the law of the requested State. Some relevant principles were identified in the Duncan Report.[102] When the creditor seeks modification, it will usually be for an increase in maintenance. The usual rule is that modification is permitted if there has been a material change of circumstances of either the creditor or debtor.

261. The status of a decision modified by a provisional order under the so-called Commonwealth reciprocal arrangements is clarified through the rule in Article 31.

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

262. Although modification in the originating jurisdiction may be the preferred course for the majority of cases, the Convention needs flexibility to deal with those cases in which it is necessary or appropriate for the creditor to seek modification in a State other than the originating jurisdiction. Modification in these circumstances is provided for by sub-paragraph *f)*. The decision to be modified could have been made in a Contracting State or a non-Contracting State, but whether it can be modified depends on the law of the requested State. The application must be determined in accordance with Article 10(3).[103]

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

264. In some countries, the internal law of a State only allows courts to make a new decision, and not a modification decision. As the result would be the same regardless of the terms used, a State would be in compliance with its obligation to provide for modification decisions under the Convention if it made a new decision upon a request for a modification decision. The Diplomatic Session agreed that the word "modification" should include the concept of "making a new decision" if the internal law of a Contracting State permits only this concept instead of "modification".[104]

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

265. Paragraph 2 refers to the debtor, the person "against whom there is an existing maintenance decision". The chapeau sets out the threshold criteria to be met by the debtor when seeking the assistance of a Central Authority under paragraph 2: the applicant must reside in a Contracting State (the requesting State); the applicant must be the debtor against whom there is an existing maintenance decision; the application can only be for either recognition of a decision which is necessary to suspend or limit

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[101] *Ibid.,* paras 92-93.
[102] *Op. cit.*, note 11, at paras 132-133.
[103] There is no inconsistency in the treatment of a decision to be modified, and a decision to be recognised and enforced (see para. 240). Any decision (including one from a non-Contracting State) can be modified in a Contracting State and the new, modified decision can be sent for recognition and enforcement in another Contracting State. However, for recognition and enforcement, a different standard is expected: the decision to be recognised and enforced must have been made in a Contracting State.
[104] Minutes No 8, para. 53.

enforcement of a previous decision, or modification of a decision. The application for modification must also comply with the rules in Article 18 (Limit on proceedings) which limits the choice of jurisdiction in which modification by a debtor may be sought. The opening phrase of the chapeau of Article 10(2) was inserted following discussions at the 2006 Special Commission. The words "The following categories of application shall be available to a debtor" remove any doubt or ambiguity that a Contracting State must make available to a debtor all the applications listed in Article 10(2).

266. An application under Article 10(2) is subject to Article 10(3), according to which it is left to the law of the requested State to determine whether, in the particular circumstances, jurisdictional requirements are satisfied, as well as the extent to which modification is possible. The applications in Article 10(2) are Chapter III applications. They are therefore subject to the general obligation to provide assistance in accordance with Article 6 and to provide effective access to procedures in accordance with Article 14. It was considered important (but not by all delegations) to give debtors access to services of Central Authorities to help them comply with their maintenance responsibilities in accordance with their ability to pay. Assistance to debtors to modify a decision has the potential to reduce enforcement problems, and consequently, to reduce the burden on Central Authorities.

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

**Sub-paragraph *a)* – recognition of a decision, or an equivalent procedure leading to the suspension, or limiting the enforcement, of a previous decision in the requested State;**

268. The Diplomatic Session recognised the strong justification for allowing an application for recognition of a modification decision. For example, if the debtor has obtained a modification decision, he or she should be able to have it recognised in the State addressed. This will avoid the problem of conflicting decisions and may assist a debtor to formalise or regularise payments or bring some certainty to his or her financial situation. However, this application had to be qualified. The debtor should only be able to make a request for recognition of a decision that would lead to the suspension, or limitation of the enforcement of a decision. This would ensure that the debtor had a genuine interest in the effect of recognition. Secondly, the additional wording "or an equivalent procedure" would allow those States that did not have a procedure for simple recognition, or recognition of a decision at the application of a debtor, to use an equivalent procedure available in their internal laws. Such States should inform the Permanent Bureau of the nature of the said procedure in accordance with Article 57 of the Convention.

269. The drafting of paragraph 2 takes into account the different systems used in States regarding modification of decisions at the application of a debtor. The recognition and enforcement would be sought only if the previous decision was, or was to be, enforced in the requested State.[105] Furthermore, it should be made clear that Article 10(2) does not affect the limits established in Articles 18 and 22.

270. There was less support for an application for establishment by a debtor as many delegates believed that the same level of assistance for debtors as for creditors could not be justified. Therefore, such an application was not included in the Convention.

[105] Minutes No 22, para. 62.

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

271. Sub-paragraph *b)* provides for an application by the debtor, to the requested State as the originating jurisdiction, to modify its own order. If the debtor is able to apply for modification of the decision when there is a change of circumstances, he or she is more likely to pay maintenance voluntarily.

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

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

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

274. The choice of jurisdiction in which a debtor may apply for modification of a maintenance decision is limited by Article 18. Nevertheless, there may be circumstances in which a debtor applies for modification of a decision made in a State other than the requested State. For example, the original order is made in country A where at that time the creditor was living. The creditor moves to country B. The debtor applies to the authorities in country B to modify the order made in country A.

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

275. It is understood that the "law of the requested State" includes the conflict of laws rules. However, States bound by the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations will be applying the rules of that Protocol. Furthermore, the applications in Article 10(1) *c)* to *f)* and (2) *b)* and *c)* will be subject to the jurisdictional rules of the requested State. Thus, it is possible that in certain circumstances one of the applications in Article 10(1) *c)* to *f)* will not be available to certain persons because of the jurisdictional rules. Example 1: if an application is made under Article 10(1) *c)* for the establishment of a maintenance decision in relation to a student child aged 21 years, the requested State is not bound to admit the application if it does not have jurisdiction to establish a maintenance decision for a child over the age of 18 years. Example 2: In the United States of America, it is not possible to establish a maintenance decision based solely on the creditor's residence in the jurisdiction, or to have such a decision from another country recognised and enforced in the United States of America. Example 3: Under the Brussels regime, a creditor has the choice to seek modification in her / his own jurisdiction or in the debtor's jurisdiction. But the debtor can only seek modification in the creditor's jurisdiction.

276. It is not the aim of the Convention to harmonise the law of international maintenance. The Convention does however create partially harmonised procedures for recognition and enforcement of a decision in Chapter V. It is the intention of Article 10 to create an obligation to ensure the same categories of applications are available in every Contracting State. In Article 10, the combined effect of paragraphs 1, 2 and 3 is that all the categories of applications listed in paragraphs 1 and 2 must be made available by each Contracting State.

277. The physical presence of the applicant in the jurisdiction should not, as a general rule, be required for the legal proceedings. States should be careful not to insist on the presence of the applicant for any proceedings in the requested State, unless absolutely necessary. The costs of travel to, and remaining in, the requested State for the duration of any proceedings could be an insurmountable obstacle for most applicants. The physical presence of the applicant and child for recognition and enforcement proceedings is not required – see Article 29.

### *Article 11 Application contents*

278. Article 11 is intended to address the concerns about information and documentation identified in the Report and Conclusions of the 1999 Special Commission,[106] in particular, that receiving agencies often experience difficulties in obtaining a complete dossier, while transmitting agencies often do not know precisely what is required by the receiving agency.

279. The challenge in developing an application process for the Convention was described in the Duncan Report as being "how to reduce uncertainty, costs and delays arising from documentary requirements and, in particular: how to achieve clarity as to what documents are required in relation to a particular application; how to reduce documentary requirements to a necessary minimum; [and] how to bring some degree of uniformity or consistency in the documentary requirements of different States".[107]

280. A Forms Sub-committee (now the Forms Working Group) was first established by the Administrative Co-operation Working Group (ACWG) in November 2004[108] to prepare draft forms in order to assist the discussion by the 2005 Special Commission to develop an effective and efficient application process. The work of the Forms Working Group was pivotal to the development of Article 11. A complete set of forms for all applications under Article 10[109] was prepared for the Diplomatic Session.[110] In the Final Act of the Twenty-First Session, the Session made the following recommendations. It:

> "1. Commends the work of the Working Group on Forms established by the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance.
>
> 2. Gives its general endorsement to the forms set out in Preliminary Document No 31 of July 2007, "Report of the Forms Working Group – Report & Recommended Forms", in particular with regard to their uniform structure.
>
> 3. Recommends that the Working Group on Forms should continue its work and give further consideration to the draft forms, with a view to their adoption by a future Special Commission and publication by the Permanent Bureau of the Hague Conference on Private International Law in accordance with Article 11(4) of the *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*."

281. There are many advantages in using model forms, whether mandatory or recommended. Model or standard forms help develop uniform procedures, they foster predictability and certainty for applicants and authorities that will lead to a faster and cheaper service, they reduce translation costs, they allow Central Authorities to communicate more easily with each other on individual cases, and they meet the aims of the Convention for a simple, rapid and low cost procedure. In addition, they "facilitate the presentation of information and provide the opportunity to summarise and list documents. While they cannot act as substitutes for required documents, they may reduce the need for full translations of the original documents."[111] These advantages

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[106] *Op. cit.*, note 7, at para. 14, and noted in the Duncan Report (*op. cit.*, note 11), para. 37.
[107] The Duncan Report, *op. cit.*, note 11, para. 41.
[108] The Sub-Committee on Forms was made an independent Working Group at the Special Commission of 2005.
[109] The Forms Working Group also advised on the documents necessary for the purposes of Art. 25.
[110] Prel. Doc. No 31-B/2007, *op. cit.*, note 93.
[111] "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", *op. cit.,* note 7, para. 18.

were emphasised and enlarged upon by the Forms Working Group in its reports to the Special Commission in 2005 and 2006 and to the Diplomatic Session in 2007.[112]

282. The link was also made between the country profiles form (developed by the ACWG Country Profiles Sub-committee), the provision of information about laws, procedures and services required by Article 57, and the use of the forms. The information in country profiles could be used to provide the mandatory information (Art. 57(2)) as well as explain which parts of the forms were essential and which were optional for each country.

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

284. Some experts supported the recommendation of the Forms Working Group that the forms be mandatory and emphasised the benefits of using uniform application forms. However, other experts were concerned that if the forms were mandatory this could pose constitutional difficulties for their States particularly if later amendments to the forms were required. Mandatory forms that are part of the Convention will, if necessary, be amended in accordance with Article 55.

285. A compromise was reached whereby a mandatory cover letter (the Transmittal Form) with only basic information would be used to accompany a recommended form which contained the detailed information needed to support the application to the competent judicial or administrative authority (the decision making body) in the requested State. It was acknowledged that the recommended forms, if well developed, could become widely used if Contracting States wanted their applications to be processed quickly. Information or applications presented in other non-standard ways would take longer to process.

286. The Forms Working Group suggested that the Convention also needed to protect any personal information provided in or with applications or requests. To achieve this purpose, Article 38 (Protection of personal data), Article 39 (Confidentiality) and Article 40 (Non-disclosure of information) were drafted. Article 40 was redrafted to ensure that its protections extended to any information about any person (not just the applicant), provided it is gathered for the purpose of the Convention.

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

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

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[112] "Report of the Administrative Co-operation Working Group of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance", prepared by the Administrative Co-operation Working Group, Prel. Doc. No 15 of March 2005 for the attention of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 15/2005), paras 8 and 9; "Report of the Forms Working Group of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance", co-ordinated by the Permanent Bureau, Prel. Doc. No 17 of May 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance; and Prel. Doc. No 31-B/2007 (*op. cit.*, note 93).

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

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

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

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

290. The name and address of the applicant are essential basic items of information in any application. The contact details (such as telephone number and e-mail address) of the applicant are requested for the purpose of contacting the applicant quickly and cheaply (for example, in order to obtain additional information or to provide progress reports). The Forms Working Group in Preliminary Document No 15 noted that the Convention "does not prevent the Central Authority of the Requested State to contact directly the creditor / applicant [in the requesting State] in order to collect additional information if necessary as it is done in practice in a good number of States".[113]

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

292. The address of the applicant should not be disclosed by any authority to the respondent in some circumstances where "to do so could jeopardise the health, safety or liberty of a person". The Transmittal Form and the draft application forms contain a confidentiality and personal information protection notice which reflects the terms of Articles 38, 39 and 40. Article 40 emphasises the importance of non-disclosure of personal information if the health, safety or liberty of a party or child would be jeopardised.

293. It is important to note that in a domestic violence case, the contact information of the Central Authority, rather than the personal details concerning the applicant, can initially be included on the application. In a particular case, the competent authority in the requested State may insist on the applicant's personal contact information. In such a case, the applicant will need to decide whether he or she wishes to continue with the application.

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

294. The Forms Working Group, in developing the mandatory Transmittal Form (referred to in Art. 12(2)), recommended having the same personal details for applicants and respondents. Any information is valuable if it helps locate the respondent more quickly. Countries which have an "official identification number" should specify by declaration referred to in Article 11(1) *g)* if such information is required in the application.

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

[113] Prel. Doc. No 15/2005, *op. cit.*, note 112, para. 12.

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

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

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

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

298. It is desirable to clarify the meaning of the term "the grounds upon which the application is based", with regard to the different types of application that may be made under the Convention. For an application for recognition and enforcement of a decision, the "grounds" for the application might refer to the bases for recognition and enforcement under Article 20, *i.e.*, the grounds on which it is a decision entitled to recognition and enforcement under the Convention. For an application for modification of a decision, the "grounds" for the application might be that the applicant's circumstances have changed. The application might also refer to the grounds of the maintenance obligation in question, for example, parentage. The grounds in this context do not refer to jurisdictional grounds but to the legal basis of the maintenance order.

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

299. This provision was recommended by the Forms Working Group to expedite the transfer of child support payments. It is an obligation of the Central Authority to take appropriate measures to "facilitate the collection and expeditious transfer of maintenance payments" (Art. 6(2) *f)*) and for Contracting States to promote "the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance" (Art. 35).

**Sub-paragraph *g)* – save in an application under Article 10(1) *a)* and (2) *a)*, any information or document specified by declaration in accordance with Article 63 by the requested State;**

300. For any application other than an application for recognition, or recognition and enforcement of a maintenance decision made under Article 10(1) *a)* or (2) *a)*, a Contracting State may specify by declaration in accordance with Article 63 the additional information or documents required by its Central Authority to process the application, or by its judicial or administrative authorities to carry out the necessary procedures.

301. In an application for recognition, or recognition and enforcement of a maintenance decision made under Article 10(1) *a)* or (2) *a)*, only the information or documents referred to in Article 25 may be requested.

302. Another specific limitation on requests for information or documents concerns a power of attorney. According to Article 42, the Central Authority of the requested State "may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act".

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

303. Sub-paragraph *h)* was added at the suggestion of the Forms Working Group. It provides for the name and contact details of the person or unit from the Central Authority

of the requesting State who is responsible for processing the application and whose details are necessary for follow-up purposes under Article 12(3), (4), (5), (8) and (9).

304. The purpose of this provision is to improve and expedite communications between Central Authorities. It balances the obligation on the requested Central Authority in Article 12(3) to provide similar details.

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

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

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

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

307. These matters and others are covered by the Financial Circumstances Form which was developed by the Forms Working Group.[114] The form may appear complex but it is important to emphasise that not every part needs to be completed in every case.

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

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

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

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

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

[114] Prel. Doc. No 31-B/2007 (*op. cit.*, note 93), Annex E.

**Paragraph 3 – The application shall be accompanied by any necessary supporting information or documentation including documentation concerning the entitlement of the applicant to free legal assistance. In the case of applications under Article 10(1) *a)* and (2) *a)*, the application shall be accompanied only by the documents listed in Article 25.**

311. Whereas paragraph 1 states the essential minimum requirements of an application and paragraph 2 states the essential additional requirements as appropriate, the first sentence of paragraph 3 permits a requesting and requested State to include or require any additional "necessary supporting information or documentation", for applications other than those made under Article 10(1) *a)* or (2) *a)*.

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

313. Paragraph 3 refers to "documentation concerning the entitlement of the applicant to free legal assistance". This documentation will not be necessary in the majority of child support cases as free legal assistance must be provided in all such cases under Article 15, with limited exceptions. However, when an applicant does not qualify for free legal assistance, or the application is not one to which Article 15(1) refers, then the documentation supporting the applicant's entitlement to free legal assistance in the requesting State must be provided. The document in question could be a letter or statement from the authority which grants legal aid in the requesting State, and declaring that the applicant, if he or she were to apply, would be granted legal assistance in that State, or has benefited from such assistance in the State of origin. These words were included on the recommendation of the Forms Working Group. The Financial Circumstances Form devised by the Forms Working Group mentions the entitlement described in paragraph 3 and could, if necessary, be used to support a claim by the applicant for legal assistance, but it is not sufficient, by itself, to establish the applicant's entitlement to legal assistance. It is to be noted that the contents of the form are in conformity with the requirements of the *Hague Convention of 25 October 1980 on International Access to Justice* (hereinafter "1980 Hague Access to Justice Convention").

314. The first sentence of paragraph 3 does not apply to applications for recognition, or recognition and enforcement of a maintenance decision under Article 10(1) *a)* or (2) *a)*, as specific documentary requirements are prescribed in Article 25. Furthermore, the question of entitlement to legal assistance should not arise in an application under Article 10(1) *a)* or (2) *a)*. The procedure on an application for recognition and enforcement is prescribed by Article 23 and legal assistance should not be necessary unless the decision concerning recognition and enforcement is challenged or appealed. The documents required by Article 25 are: the maintenance decision or an abstract of it; a certificate of enforceability; evidence that the respondent was given notice of the proceedings or an opportunity to be heard; a statement of arrears; where necessary, evidence of automatic adjustment by indexation; where necessary, documentation concerning the entitlement of the applicant to free legal assistance. No other information may be required by the requested state in relation to an application for recognition, or recognition and enforcement of a maintenance decision.

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

315. The draft forms devised by the Forms Working Group are collected in Preliminary Document No 31-B of 2007.[115] The development of the recommended forms is referred to above at paragraphs 280 to 282. The words of Article 11(4) are drawn from Article 13(3) of the 2005 Hague Choice of Court Convention.[116] The application forms will be updated with a view to their adoption by a future Special Commission as recommended forms.[117]

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

316. The conclusion of the 1999 Special Commission that the Convention should improve on earlier instruments to achieve maximum efficiency was strongly supported in later meetings. In particular, advances could be made by establishing a clear procedural framework for the application process including time limits by which particular steps should be taken, bearing in mind the Convention's aims of a rapid, simple and low cost procedure. A lack of clarity in procedures was identified as one of the major concerns with other instruments, to be addressed by the Convention.[118] Another major concern with existing instruments was delays in processing applications for the recovery of maintenance and in enforcing decisions. The range of causes contributing to delays is described in the Duncan Report.[119]

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

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

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

319. To implement paragraph 1 there will be a reliance on the information in country profiles and on the obligations created by Article 11(1) *g)* and Article 57 to provide information about each country's laws and procedures to know what its information and documentation requirements will be. There may, of course, be additional information required for a particular case, and in addition to the information referred to in Article 11(2) *c)* and (3), Article 12(3) also envisages the possibility of requests for further information following receipt of an application.

320. The obligations imposed on Central Authorities by paragraph 1 are made mandatory by the words "shall assist". In general terms, it could be said that the

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[115] *Op. cit.*, note 93.
[116] 2005 Hague Choice of Court Convention. See also Art. 5 of the 1980 Hague Access to Justice Convention.
[117] Final Act of the Twenty-First Session, Part C, Recommendation No 3.
[118] At para. 36 (*op. cit.*, note 11).
[119] *Ibid.*, paras 25-27.

obligation is to assist the applicant to prepare the best possible application. The obligations may include: to assist the applicant to prepare or compile a complete application with all necessary information and documents; and, to discover from available sources or by enquiry to the requested Central Authority, the information and documentation requirements of the requested country. This does not mean that the Central Authority must prepare the application for the applicant. However, paragraph 1 recognises that a Central Authority will usually develop some expertise in handling international cases and dealing with foreign authorities. An applicant who is not experienced in such matters will benefit from that expertise if the Central Authority advises or assists him or her with preparation of the application. It will also be necessary to apply the language requirements of the Convention (in Arts 44 and 45) to those essential documents that accompany the application.

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

**Paragraph 2 – The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit the application on behalf of and with the consent of the applicant to the Central Authority of the requested State. The application shall be accompanied by the transmittal form set out in Annex 1. The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 16(3), 25(1) *a)*, *b)* and *d)* and (3) *b)* and 30(3).**

322. The use of the words "when satisfied" first specifies the time at which the application must be sent by the Central Authority, *i.e.*, when satisfied, and second, gives the Central Authority a discretion to refuse to transmit the application if it is not satisfied as to its compliance with the Convention. The application should contain a statement that it is "sent on behalf of and with the consent of the applicant".

323. A failure to comply with the Convention requirements is the only basis on which the requesting (sending) Central Authority may refuse to transmit the application. Consideration was given to the possibility of including a provision allowing the requesting Central Authority to refuse to transmit an application for other reasons. Article 4(1) of the 1956 New York Convention has such a provision. It states: "The Transmitting Agency shall transmit the documents to the Receiving Agency of the State of the respondent, unless satisfied that the application is not made in good faith." Previous drafts of Article 12(4) in Preliminary Document No 13 of 2005[120] and another proposal made during the Special Commission provided that an application which was not "well-founded" need not be accepted, either by the requesting or requested Central Authority. Except on the question of compliance with the Convention, the possibility of *ex officio* review (and the possibility of rejection or refusal) by the Central Authority was not supported (see also the explanation of Art. 12(8) and (9) below). It will be up to the requested Central Authority to determine whether it is satisfied that the requirements of the Convention are or are not fulfilled.[121]

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

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[120] *Op. cit.*, note 95.
[121] See Prel. Doc. No 36/2007, *op. cit.*, note 88, p. 25.

325. The Transmittal Form referred to in Article 12(2) is a mandatory form to be used as a cover letter setting out the minimum information required in an application, as application forms themselves are not mandatory. It was developed by the Forms Working Group and is designed to accompany any of the available applications.

326. The third sentence of Article 12(2) refers to the obligations in Articles 16(3), 25(1) and (3) and 30(3) to provide specific documents, concerning respectively, an attestation of a child's means, an application for recognition and enforcement of a decision, the abstract of a decision, or recognition and enforcement of a maintenance arrangement. In addition, it repeats in part Article 25(2), according to which a certified copy of the document concerned must be provided promptly to the requested State.

**Paragraph 3 – The requested Central Authority shall, within six weeks from the date of receipt of the application, acknowledge receipt in the form set out in Annex 2, and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.**

327. The need for clear time limits was referred to above at paragraphs 317 and 318. In order to avoid overburdening the requested Central Authority, it was considered that a period of six weeks would be sufficient to acknowledge receipt of the application and deal with the other matters listed in paragraph 3. The time limit of six weeks was a compromise between the shortest and the longest periods proposed. Within six weeks of receipt of the application, the requested Central Authority must take the following steps: acknowledge receipt, advise on initial steps, request further information or documents, and provide contact details of the responsible case officer or unit. It was considered a more efficient use of time if Central Authorities would send one communication only (e-mail, fax or letter), which contains an acknowledgment, with an outline of steps taken or to be taken, and a request for further information or documents if necessary. However, should the need arise, the requested Central Authority may also request further information or documents at a later stage. See also paragraph 346.

328. The Acknowledgement Form is a mandatory form, approved by the Diplomatic Session and contained in Annex 2 of the Convention. It was prepared by the Forms Working Group. It is designed to acknowledge receipt of the application within six weeks of the date of receipt. At the same time as sending the acknowledgement, or at a later time, but also within six weeks of receipt, the requested Central Authority must also inform the requesting Central Authority of the initial steps that have been or will be taken, and the contact details of the person or unit handling the application. The requested Central Authority may use the "informing" stage of the process to request additional information or documents. Paragraph 3 envisages at least one and possibly two communications from the requested Central Authority within six weeks of receiving the application. However an acknowledgment only and nothing further within six weeks, would <u>not</u> satisfy this obligation.

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

330. The Acknowledgement Form is intended to simplify and expedite the procedure established in paragraph 3. It could be used in conjunction with a Status of Application Form to report on the progress of an application. The Status of Application Form is

specifically adapted for each type of application. The forms are designed so as to require the minimum possible input by, or burden on, the Central Authority. The basic Central Authority contact details and details to identify the case must be entered on the form, and a checklist of possible actions which have been or will be taken is included. Only the relevant actions need to be indicated on the list.

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

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

332. The combined operation of paragraphs 3 and 4 serves as a type of quality control to ensure that the first steps were initiated, and a guarantee that the case is ongoing. Adherence to the two time limits will indicate significant progress towards achieving effective co-operation.

333. The Status of Application Report may be made on the form[122] developed by the Forms Working Group for this purpose. As with the Acknowledgement Form, the Status of Application Report is designed to achieve the maximum efficiency for minimum input by the Central Authority. The Status of Application Form will be discussed in a future Special Commission in accordance with Recommendation No 3 of the Final Act of the Twenty-First Session.

**Paragraph 5 – Requesting and requested Central Authorities shall keep each other informed of –**

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

**Sub-paragraph *a)* – the person or unit responsible for a particular case;**

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

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

337. The obligation imposed by this provision will be easily met by making regular status or progress reports on the Status of Application Report Form, and ensuring that the contact details on the form are amended as necessary.

**Sub-paragraph *b)* – the progress of the case,**

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

[122] Prel. Doc. No 31-B/2007, *op. cit.*, note 93, Annexes A-D.

progress. Following the acknowledgment and initial report within 6 weeks of the receipt of an application, and the follow-up report within three months after the acknowledgement, there is still an ongoing obligation to provide progress reports, as sub-paragraph *b)* emphasises. The Status of Application Form provides a quick method for Central Authorities to keep each other informed.

**and shall provide timely responses to enquiries.**

339. The obligation to provide timely responses to enquiries is an aspect of the obligation of co-operation, mentioned in Article 5 *a)* and relates to that object of the Convention referred to in Article 1 *a)* and in the Preamble. The need for expeditious procedures and responses is referred to above, at paragraphs 327 and 328.

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

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

341. The Convention aims to address the "chronic problems of delay in processing applications" and the reasons for such delay, referred to in the Duncan Report. That report also notes the universal consensus that "a primary objective of the new instrument must be to provide a faster moving and more responsive system for the processing of applications".[123] All the provisions of Article 12 are directed to this aim.

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

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

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

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

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

[123] The Duncan Report, *op. cit.*, note 11, para. 50.

Authority, as the application will already have been reviewed by the requesting Central Authority to ensure that it complies with the Convention.

345. The test for "manifest that the requirements of the Convention are not fulfilled" covers the situation where the Convention process is abused. For example, a requested Central Authority may refuse to process an application if a previous application by the same party concerning the same debtor had already been processed, and had failed on a specific ground; a subsequent application on the same grounds with no change of circumstances would be properly refused. At the same time, it was clear that experts did not want to retain "being without foundation" as the test for refusal of an application.[124] This would have given the requested Central Authority a wider discretion to refuse the application. It will be a matter for the requested Central Authority to determine whether it is manifest that the requirements of the Convention are not fulfilled.

346. It is always open to a requested Central Authority, if it is not satisfied, to request further information when necessary to establish that the application does in fact comply with the requirements of the Convention. Such a request should clarify for the requesting State where the application is considered to be defective or deficient so that the problems may be rectified. Even when some uncertainty remains as to whether an application satisfies the Convention requirements, it is preferable for the Central Authority to err on the side of caution and certainly not make any decision which should more properly be left to the authority deciding upon the application.

347. In the second sentence of paragraph 8, the requested Central Authority must inform the requesting Central Authority of its reasons for refusing to accept the application. The requested Central Authority is not required to inform the applicant, as Article 9 makes clear that an applicant in a requesting country cannot make a Chapter III application direct to the Central Authority of the requested country. Direct communication between the requested Central Authority and the applicant may be necessary in exceptional cases, and the Convention does not prohibit such communication (see also the explanation of contact details in Art. 11(1) *b)* at para. 290 above).

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

**Paragraph 9 – The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or information. If the requesting Central Authority does not do so within three months or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall inform the requesting Central Authority of this decision.**

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

350. If the document or information is not provided within three months from the time of the request, or any longer period permitted by the requested Central Authority, the requested Central Authority is not obliged to process the application any further. On the other hand, the words "may decide" give a discretion to the requested Central Authority: if it is willing to wait longer than three months for the document or information, it may

[124] However, Art. 15(2) provides that a State may refuse free legal assistance if the application or appeal is "manifestly unfounded".

do so. Processing of the application may be suspended until the information or document is received. It is reasonable to expect that the requested Central Authority would agree to an extension of time if the requesting Central Authority responded that it was unable to meet the three month deadline, but would provide the document or information at a later date.

### *Article 13 Means of communication*

**Any application made through Central Authorities of the Contracting States in accordance with this Chapter, and any document or information appended thereto or provided by a Central Authority, may not be challenged by the respondent by reason only of the medium or means of communication employed between the Central Authorities concerned.**

351. Article 13 was developed to help ensure that the Convention might gradually be able to operate in a medium-neutral environment. However, at the time of negotiations, not all Contracting States allowed the use of documents which have been transmitted by electronic means. It is to be understood that this provision has to be read in conjunction with Article 12(7) which provides that "Central Authorities shall employ the most rapid and efficient means of communication at their disposal".

352. This provision would allow any application and related documents or information transmitted by electronic means by the Central Authority of the requesting State to be used, where permitted under internal laws and procedures, in the courts or administrative authorities of the Contracting States irrespective of the medium or means of communication employed. It is noted that the words "by the respondent" were added to the text of Article 13 in order to clarify that only the respondent is prevented from challenging the document simply because of the form of its transmission and that a competent authority can always request a certified copy of the documents submitted in accordance with Article 25(2). However, domestic rules of evidence would still be applicable with regard to the substance of the documents and information.

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

354. An example of the operation of this provision is given in Preliminary Document No 26 of January 2007.[125] It is to be noted that at the time of negotiations, very few judicial or administrative authorities delivered and / or accepted electronic documents that meet the requirements of integrity, irrevocability and identification (authentication) for secured electronic transmission.

355. The language of Article 13 is borrowed from Article 30 of the 1980 Hague Child Abduction Convention, the inclusion of which is at the request of the Special Commission.

### *Article 14 Effective access to procedures*

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

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

[125] *Op. cit.*, note 33.

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

– At the same time the Convention, if it is to be attractive to a wide range of Contracting Parties, should not be seen to impose excessive financial burdens on them. This does not mean that the provision of services under the Convention will be free of cost to Contracting Parties, but rather that the costs of providing services should not be disproportionate to the benefits in terms of achieving support for more children and other family dependants and in consequence reducing welfare budgets."[126]

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

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

360. The Convention provides for minimum standards to ensure "effective access to procedures". Contracting States are always encouraged to provide services at a higher standard, if possible.

361. The manner in which the general principle of effective access to procedures should be spelled out in the form of specific provisions, particularly with regard to free legal assistance, remained the subject of disagreement until the closing stages of negotiations. A general consensus had already been reached that favourable treatment should be accorded to child support applications. There was also general agreement that there should be no obligation to provide free legal assistance where simple procedures operated, enabling an applicant to make a case without the need for legal assistance. However, for cases where legal assistance was required, there was reluctance on the part of several States to accept a broad requirement to provide free legal services. There were different reasons for this reluctance. Some States objected that the provision of free legal assistance in international cases would give rise to unacceptable discrimination between the treatment of domestic and international applicants. Some thought that a broad requirement of free legal services might be too costly. Others were concerned not to take on an obligation to provide free legal services for wealthy applicants. In addition there were concerns about the application of the general principle of free legal services to applications by public bodies or by debtors.

362. On the question of more favourable treatment for foreign applicants, an expert of the European Community noted that in the European Union, equal treatment of applicants is the accepted principle, but additional benefits for foreign applicants in cross-

[126] Prel. Doc. No 10/2004, *op. cit.*, note 85, at paras 39-40. See also para. 3.

border cases may be justified, in recognition of the greater difficulties and costs for cross-border litigants.[127]

363. As for public bodies, their applications are limited to recognition and enforcement and establishment of a decision under Article 20(4) when recognition is refused.[128] Therefore, there was no reason to treat them any differently from any other creditor and free legal assistance would be available to public bodies in all such recognition and enforcement cases.

364. As for debtors, the prevailing view in the Diplomatic Session preferred more favourable treatment of creditors. The reason in support of this approach was that creditors were usually the weaker party. Furthermore, the debtor received equal treatment in Articles 14 and 17, and a debtor in need could receive free legal assistance under Article 17 *a)*, whereas completely free legal assistance could encourage debtors to bring modification proceedings.

365. The main reason given in support of the equal treatment of debtors with creditors was that there is a lack of fairness to the debtor who faces the same obstacles in cross-border litigation as the creditor. The inability (or limited ability) of the debtor to modify a decision in his or her own jurisdiction (Art. 18) and a lack of assistance in the requested State (Art. 15(1)) puts the debtor in a difficult situation, and may lead to a stay on enforcement if the debtor cannot pay; the use of the "manifestly unfounded" rule in Article 15(2) will limit misuse of the Convention by the debtor. Furthermore, there could be a lack of confidence in the Convention amongst the public and the judiciary due to discrimination.

366. After the first week of negotiations in the Diplomatic Session, the complex issues around effective access to procedures remained unresolved. A Working Group was established to help find a compromise. It was chaired by Ms Danièle Ménard (Canada) and the following delegations participated: Australia, Brazil, Canada, Chile, China, European Community, France, Germany, Israel, Japan, Russia, Switzerland, the United Kingdom, the United States of America as well as the Permanent Bureau, the *Rapporteurs* and the Chair of the Drafting Committee.[129] The Working Group met on seven occasions and its proposals assisted the drafting of Articles 14 to 17.

367. There was a common interest in the Diplomatic Session to achieve a Convention which will work well and will benefit the largest number of children possible. The compromise reached in relation to effective access to procedures (Arts 14-17) achieved a great deal, most notably cost free services for the majority of children. It was recalled that this was a huge step forward from the position in 1999 when it was thought that it was impossible to advance on the existing instruments.[130]

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

368. Paragraph 1 imposes an obligation on the Contracting State to ensure that an applicant who has made an application of the kind referred to in Article 10(1) or (2) has effective access to the procedures of the requested State which may arise in connection with the particular application. "Applicant" may therefore include a creditor, a debtor or a public body. The procedures in question may be administrative or judicial. The

[127] Minutes No 1, para. 18.
[128] Minutes No 4, para. 45.
[129] *Ibid.*, para. 29.
[130] Minutes No 15, para. 46.

procedures include appeal procedures and any separate procedures that may be required at the enforcement stage.

369. The implementation of Article 14 is closely linked to Article 6(1) *b)* which imposes an obligation on the Central Authority to institute or facilitate the institution of legal proceedings, and Article 6(2) *a)* under which the Central Authority may, if the circumstances require, be required to provide or facilitate the provision of legal assistance. The manner in which each Contracting State intends to fulfil its obligations in Articles 6 and 14(1) must be explained in accordance with Article 57(1) *b)* and *c)*. This information can also be included in the country profile form referred to in Article 57(2).

**Paragraph 2 – To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14 to 17 unless paragraph 3 applies.**

370. Paragraph 2 confirms unambiguously how effective access to procedures referred to in paragraph 1 must be provided: the Contracting State "shall provide free legal assistance". There is a specific exception in paragraph 3 for simplified procedures, and there are other conditions on the provision of free legal assistance in Article 14(4) and (5) and Articles 15 and 17.

371. The phrase "legal assistance" is defined in Article 3 as "the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State" and "may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". In a particular case, one or more of the elements included in that definition may be relevant. The phrase "legal assistance" is also explained and discussed at paragraphs 126 to 134 of this Report in relation to Article 6(2) *a)*. The explanation of "legal assistance" in paragraphs 1 and 2 should therefore be read in conjunction with the explanation for Article 6(2) *a)*.

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

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

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

374. Paragraph 1 states the general and overarching principle that Contracting States must provide applicants with effective access to procedures. Paragraph 2 confirms that effective access to procedures means free legal assistance, and imposes some conditions. Paragraph 3 refers to a requested State with simplified procedures where the obligation to provide effective access does not always require the provision of free legal assistance.

375. Paragraph 3 clarifies that free legal assistance need not be provided by a State where its procedures "enable the applicant to make the case without the need for such assistance". The simplified procedures of administrative schemes operating in certain countries come within this description. As a general rule, administrative systems are able to make an enforceable maintenance decision without the need for legal representation and without the need for the applicant to appear in person. However, if an administrative decision has to be appealed to a court, simplified procedures may no longer be used and it is most likely that legal assistance or representation would be needed. Then the obligation referred to in paragraph 1 would apply. Paragraph 1 refers specifically to legal assistance for enforcement and appeal procedures.

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

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

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

**Paragraph 5 – No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.**

378. Paragraph 5 protects the applicant from any requirement of the requested Central Authority or State for an amount of money as a security, bond or deposit to guarantee the payment of any costs or expenses for legal proceedings. The purpose of the provision is to ensure the applicant is not faced with any financial obstacle or disincentive before being able to bring proceedings under the Convention.

379. This provision, which was originally confined to the creditor, derives from similar provisions in Article 9 of the 1956 New York Convention and in Article 16 of the 1973 Hague Maintenance Convention (Enforcement), although in those Conventions the provisions are not limited to proceedings brought by a creditor. At the Diplomatic Session it was agreed that the benefits of the provision should not be confined to the creditor but should be extended to other applicants.

380. The question of who would pay costs where the applicant loses the case is addressed by Article 43(2) which permits recovery of costs from the unsuccessful party.

### *Article 15 Free legal assistance for child support applications*

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

381. Paragraph 1 sets out a general rule that free legal assistance must be provided in all applications by a creditor in respect of child support under Chapter III. Reflecting the scope provision (Art. 2(1)), this obligation applies only in respect of "a person" below the

age of 21 years and only to maintenance obligations towards a child which arise from a parent-child relationship. The word “person” and not “child” is used in paragraph 1 to reflect the language used in Article 2.

382. The obligation to provide free legal assistance in child support cases is stronger than in other cases in that neither a means nor a merits test may be applied.

383. However, the Convention favours the creditor, and the debtor is guaranteed effective access to procedures but not automatic free legal assistance for child support cases, as is the creditor, under Article 15(1). Instead, the debtor who requests free legal assistance may be subject to a means and merits test in the requested State, in accordance with Article 17.

384. The general rule in Article 15(1) will not apply to direct requests concerning child support, as they are not made under Chapter III. Other exceptions to the rule are stated in Article 15(2) but they are unlikely to affect the majority of cases. The Diplomatic Session resolved that Article 15(1) should only apply to applications by creditors including public bodies.[131] Therefore, the provision will not apply to applications by debtors, as concerns were expressed that a debtor would receive free legal assistance to reduce his / her child support obligation through a modification application under Article 10(2). On the other hand, there was much support for the principle that debtors and creditors should both be assisted fairly and equitably. A debtor whose circumstances have changed and who can no longer afford to make payments at the original level is entitled to seek a reduction in his / her child support obligation, and avoid the consequences of an accumulation of arrears. However, the Session eventually accepted that a differentiation should be made between creditors and debtors in child support cases.

385. It is important to note that establishment of parentage (including genetic testing if necessary) is part of “legal assistance” which must be provided at no cost in child support cases, with few exceptions (see Art. 15(2)).

**Paragraph 2 – Notwithstanding paragraph 1, the requested State may, in relation to applications other than those under Article 10(1) *a)* and *b)* and the cases covered by Article 20(4), refuse free legal assistance if it considers that, on the merits, the application or any appeal is manifestly unfounded.**

386. Paragraph 2 establishes a limited exception to the general rule in paragraph 1. Paragraph 2 applies to applications for establishment or modification of a decision, or to appeals in relation to such applications. It does not apply to an application by a creditor for recognition and enforcement or for enforcement of a decision concerning child support, or to procedures for establishment of a decision following a refusal of recognition in the terms of Article 20(4).

387. The exception in paragraph 2 is necessary to protect Central Authorities and competent authorities in the requested State from the burden and costs of processing and providing free legal assistance for those applications which are “manifestly unfounded”. The Convention allows a new assessment at the stage of appeal of whether the application is manifestly unfounded.

388. Paragraph 2 should be read in conjunction with Article 12(8), according to which a requested Central Authority may refuse to process an application where it is “manifest that the requirements of the Convention are not fulfilled”. If the requirements of the Convention are met, the application must be accepted. But Article 15(2) gives the requested State a discretion. If the requested State is obliged to accept an application for

[131] Public bodies can only make an application under Art. 10(1) *a)* and *b)* and in the circumstances of Art. 20(4).

child support because it meets the Convention's requirements, but at the same time, that State believes the application is "manifestly unfounded", it may refuse free legal assistance. The applicant may still proceed with the application at his / her own expense.

389. The responsibility lies with the State and not the Central Authority to make the determination that the application (or appeal) is "manifestly unfounded" and free legal assistance is refused. It is a matter for the requested State to decide which competent authority should make the determination.

390. It is emphasised that the term "manifestly unfounded" should be construed narrowly, as it is intrinsically a term of limited application. The question of whether an application or appeal is "manifestly unfounded" would be decided on a case by case basis and in accordance with the internal law. The meaning of the term "manifestly unfounded" might best be explained by way of examples. For instance, an application may be "manifestly unfounded" if the means of the applicant are so excessive while the means of the debtor are so small that it has no chance of success. As another example, an application is manifestly unfounded when it appears from an analysis of its content that there is no legal justification for the maintenance claim. Nevertheless, a creditor should be allowed to go ahead with an application if his or her prospects of getting at least part of the claim are good.

391. Article 15(2), as originally drafted, had excluded the costs of genetic testing from the general rule on free legal assistance. The requested State was originally permitted to impose reasonable charges for genetic testing when such testing was necessary to establish a maintenance decision. This was a difficult question to resolve. On the one hand, it was recognised that in many States the costs could be quite high, and there was a concern to ensure that States would not be obliged to bear these costs, especially if the number of cases was also high. On the other hand, it is becoming more common, in cases where the parents are not married, for the alleged father to challenge paternity. Hence there is a serious concern that a failure to undertake genetic testing procedures simply because the applicant cannot afford the costs, will result in the failure of many valid applications for the recovery of maintenance. Furthermore, it would be a failure of the Convention to offer free legal assistance for all the less expensive steps leading to the recovery of maintenance and then refuse such assistance at arguably the most important step.

392. Following the recommendations of the Working Group on effective access to procedures in Working Document No 51, the question was resolved by the agreement of the Diplomatic Session to delete the provisions in Article 15 (formerly Art. 14 *bis*) concerning the imposition of costs for genetic testing. It was recognised that other solutions were available, and the issue only arose in the context of Article 6(2) *h)* (recovery of maintenance) and Article 10(1) *c)* (establishment of a decision).[132] An application submitted under Article 10(1) *c)* was thus entitled to free legal assistance under Article 15(1). States may recover the costs of genetic testing from the unsuccessful party under Article 43. This approach does not prevent a State from requiring advance payment from a debtor for genetic testing. However, subject to Article 15(2), such advance payment cannot be requested from the creditor in Article 15 situations. In some countries, a necessary solution will be to submit an application for judicial assistance for genetic testing under the 1970 Hague Evidence Convention in countries where this Convention applies, and this procedure will usually be free. Other countries which anticipate a high volume of cases could make bilateral arrangements for reciprocal free treatment of genetic testing cases.

[132] In the context of Art. 7, it is permitted to impose reasonable costs for genetic testing.

393. Paragraph 2, as originally drafted, also contained a provision to exclude the exceptionally wealthy applicant from enjoying free legal assistance at the expense of the State. This was eventually dropped in favour of provisions allowing recovery of costs from the unsuccessful party. See Article 43.

### *Article 16 Declaration to permit use of child-centred means test*

394. Article 16 is an alternative approach which was designed to allow States which cannot accept the principle of free legal assistance in Article 15 to apply a means test based on the means of the child. However, the majority of States supported the rule in Article 15 as the general rule and it is not anticipated that many States would need to adopt the child-centred means test.

395. The compromise reflected in Article 16 was developed by the Working Group on effective access to procedures to satisfy the internal legal requirements of certain countries, notably China, Japan and Russia. The compromise solution retained Article 15(1) as the main rule, and Article 16 as the option for States unable to apply Article 15(1). This ensured that there was greater flexibility in the Convention and therefore the widest possible ratification could be achieved.

**Paragraph 1 – Notwithstanding Article 15(1), a State may declare, in accordance with Article 63, that it will provide free legal assistance in respect of applications other than under Article 10(1) *a)* and *b)* and the cases covered by Article 20(4), subject to a test based on an assessment of the means of the child.**

396. The means test referred to in paragraph 1 may only be applied to applications for establishment or modification of a decision, or appeals in relation to such applications. It does not apply to an application by a creditor for recognition and enforcement or for enforcement of a decision concerning child support, or to procedures for establishment of a decision following a refusal of recognition in the terms of Article 20(4).

397. The declaration agreed to in paragraph 1 does not have reciprocal effect. For example, if State A (which follows the rule in Art. 15) receives an application from State B which made the declaration, State A is still bound by its obligations under Article 15.

398. Some concerns were expressed during the Diplomatic Session that a test based on the "means" of the child and not "income" could inadvertently exclude a large number of children who had small assets, such as a bank account. The Diplomatic Session agreed that the correct interpretation of Article 16(1) was that this test should only exclude the very wealthy child from receiving free legal assistance. The question was raised whether further safeguards were needed to ensure that a child is not made subject to a means test that is too stringent. However, it was agreed that this could be left to internal law.

**Paragraph 2 – A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's means will be carried out, including the financial criteria which would need to be met to satisfy the test.**

399. States which adopt the child centred means test must provide information to the Permanent Bureau to explain how the assessments of the child's means will be reached, *e.g.*, what are the financial criteria and threshold amounts for grants of free legal assistance. The information must be kept up to date, so that applicants who need to make the attestation of the child's means, referred to in paragraph 3, can be sure that their attestation is accurate in the light of the financial criteria required by the State.

**Paragraph 3 – An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a formal attestation by the applicant stating that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.**

400. An applicant seeking free legal assistance must make a statement that the child's means are below the threshold, and the requested State may request further information only if it has reason to believe the statement is inaccurate. The applicant should, at the time of making the initial application, submit the attestation or statement concerning the child's means. The use of the attestation or statement of the child's means is an efficient and expeditious method to provide the necessary information to the requested state. It is administratively simple and no additional documents are required, unless the statement appears to be inaccurate. The "reasonable grounds" for believing that information is inaccurate might be that it is a matter of public record that the child has personal wealth.

**Paragraph 4 – If the most favourable legal assistance provided for by the law of the requested State in respect of applications under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3, the most favourable legal assistance shall be provided.**

401. Paragraph 4 ensures that a child will always receive at least the most favourable legal assistance possible in the requested State. However, paragraph 4 should not be read in any way as derogating from paragraphs 1 and 2 of this Article.

### *Article 17 Applications not qualifying under Article 15 or Article 16*

402. Article 17 applies to applications not qualifying for free legal assistance under Articles 15 or 16. A person whose application meets this description may apply to the requested State for free legal assistance, but such request for assistance may be subject to a means or merits test (Art. 17 *a)*). Applications are not restricted to Chapter III applications and are not restricted to applications by creditors. The categories of applications within the scope of Article 17 include:

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

(b) an application for child support, or an appeal, by a person who is refused free legal assistance under Articles 15(2) or 16(1);

(c) an application by a debtor;

(d) an application for establishment or modification of spousal support, whether or not made in conjunction with an application for child support ;

(e) an application in respect of an obligation arising from another family relationship.[133]

[133] *I.e.*, where an appropriate extension of the Convention is made in accordance with Art. 2(3).

403. In relation to other forms of family maintenance, Article 17 will only apply between Contracting States which make the declaration referred to in Article 2(3) concerning "any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons". Contracting States may also declare that they will apply the Convention to children over the age of 21 years who need maintenance.

404. Where a declaration is made to extend the scope of the Convention, States must consider what other provisions of the Convention should apply, *e.g.,* will effective access to procedures apply to spousal support and public bodies. Such provisions do not apply automatically when scope is extended.

**In the case of all applications under this Convention other than those under Article 15 or Article 16 –**

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

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

406. In cases other than those under Article 15 or 16, applicants may be required to make a contribution to their legal costs based on their income, and a small income would mean either that no contribution or only a small contribution was required. Variations in practice are noted in the Report on Administrative and Legal Costs and Expenses under the new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, including Legal Aid and Assistance.[134]

407. Article 17 *a)* is not relevant to direct requests for recognition and enforcement – see Article 37(2) which refers only to Article 17 *b)* as being applicable to direct requests.

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

408. Paragraph *b)* applies to any applicant, including a direct request for recognition and enforcement (Art. 37(2)). Its purpose is to guarantee for the applicant, at the stage of recognition and enforcement, the same level of legal assistance which she / he enjoyed in the original proceedings. The applicant must have received the benefit before making the application for recognition and enforcement. When read in conjunction with Article 15, it is evident that Article 17 *b)* is only relevant to child support cases when an

[134] Prel. Doc. No 10/2004, *op. cit.*, note 85, at paras 20, 21, 24 and 25.

application is made by a debtor for recognition of a child support decision. Otherwise, it is only relevant to spousal support cases, and to other forms of family maintenance, including obligations in respect of vulnerable persons, in the event that a Contracting State extends the Convention to these categories of applicants.

409. Paragraph *b)* is also intended to address concerns about discrimination against debtors and to give them access to some financial relief when they seek recognition and enforcement of a decision. At the Diplomatic Session, Article 10(2) was extended to include a new application by the debtor for recognition and enforcement of a decision (see further explanation under Art. 10(2) *a)*).

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

411. The nature of the legal assistance is to be understood according to the definition in Article 3 *c)*. The free legal assistance to be expected is that "provided for by the law of the State addressed". If the law of the State addressed makes no provision for free legal assistance for direct requests, then the applicant will not receive anything. In particular, the provision does not oblige a State to introduce a system of free legal assistance for a direct request where such system does not exist and where all necessary assistance and services are available cost-free through Central Authority applications.[135]

412. In paragraph *b)* the term "State addressed" appears for the first time. This term is always used in relation to proceedings for recognition and enforcement, rather than the term "requested State". However, in the French text *"État requis"* is used for these two English terms.

413. This paragraph is inspired by Article 15 of the 1973 Hague Maintenance Convention (Enforcement). It was modified by the Drafting Committee to adopt the term "legal assistance" used throughout this Convention. Paragraph *b)* was also improved when a clearer definition of "legal assistance" was also proposed (see Art. 3) at the 2007 Special Commission. The term "legal aid" is not used in the Convention and has been replaced by "legal assistance".

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

[135] See Minutes No 22, paras 98-102.

## CHAPTER IV – RESTRICTIONS ON BRINGING PROCEEDINGS

### *Article 18 Limit on proceedings*

415. In the absence of positive direct rules of jurisdiction the Convention cannot address fully the problem of conflicting decisions which may arise out of modification proceedings.[136] The rule in Article 18(1), however, addresses the problem in one particular and frequently occurring set of circumstances. It operates by prohibiting the debtor from seizing another jurisdiction to modify a decision or obtain a new decision where the original decision has been made in a Contracting State in which the creditor is habitually resident.

416. Two examples illustrate the practical operation of this Article.

417. In the first case, a decision is given in State A where both creditor and debtor are resident. The debtor changes residence to State B. Because of the debtor's changed circumstances, he or she wishes to have the original decision modified. Under Article 18(1), as long as the creditor remains habitually resident in the originating country (State A), the debtor is obliged to bring modification proceedings in that country, and may not do so in any other Contracting State. This outcome is consistent both with jurisdictional regimes which favour the creditor[137] and with those which favour continuing jurisdiction in the originating court.[138]

418. In the second case a decision is likewise given in State A where both creditor and debtor are resident, but the creditor changes residence to State B. As the creditor no longer has a habitual residence in State A, the rule in Article 18(1) does not apply, and the debtor or creditor may bring proceedings to modify the decision in any State which, according to its own rules, may exercise jurisdiction. Such a decision will be recognised in other Contracting States provided that one of the bases for recognition and enforcement exists under Article 20.

419. There was no agreement on the inclusion in the Convention of positive direct rules of jurisdiction. However, the rule in Article 18 operates as a rule of negative jurisdiction. Its effectiveness is assured by Article 22 *f)*, which prevents recognition of a modification decision where the rule is broken.

420. The provision includes a general rule (para. 1) and the exceptions to the general rule (para. 2).[139]

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

421. As a general rule, once a decision has been given in the country of the habitual residence of the creditor,[140] the debtor may not, as long as the creditor maintains residence in that State, bring proceedings for a new or modified decision in any other Contracting State. It has to be underlined that in this case it is required that the residence of the creditor is "habitual".

422. This provision could be seen as a certain trend toward rules such as *perpetuatio jurisdictionis* and continuing exclusive jurisdiction, which constitute a benefit for the party remaining in the jurisdiction. It is also a guarantee for the judicial or administrative authority, which knows that it could modify the decision if circumstances so require.

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[136] See the Duncan Report, *supra*, note 11, at paras 121-133.
[137] For example, under the Brussels / Lugano scheme.
[138] For example, under the UIFSA regime and see the Duncan Report, *op. cit.*, note 11, at para. 124.
[139] The provision is based on a proposal by the delegation of the European Community during the Special Commission and from the observations of the United States of America in Prel. Doc. No 23/2006, *op. cit.,* note 87.
[140] It is the most frequent case. See the Duncan Report (*op. cit.*, note 11), and para. 21 of this Report.

**Paragraph 2 – Paragraph 1 shall not apply –**

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

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

424. The first case is where there is an agreement between the parties on the jurisdiction of the judicial or administrative authority of this other Contracting State, provided the agreement does not concern disputes relating to maintenance obligations in respect of children. The conditions are the same as those expressed in Article 20(1) *e)*.[141] But the purpose of the two provisions is different. Article 18(2) *a)* merely authorises the debtor to bring proceedings.

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

425. The second case is where the creditor submits to the jurisdiction in another Contracting State. In this case, the conditions are the same as those expressed in Article 20(1) *b)*.

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

426. In sub-paragraph *c)* a particular case is envisaged, when the judicial or administrative authority of the country of origin cannot, or refuses to, exercise jurisdiction to modify the previous decision or to give a new one, according to its internal law. For example, a State of origin would not be able to exercise jurisdiction to modify the decision where its laws require the debtor to be resident in the forum for modification proceedings to be brought. It should also be noted that sub-paragraph *c)* does not apply in cases where an application can be made in the State of origin, but is "refused" due to a lack of merit.

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

427. A last possibility is contemplated in sub-paragraph *d)*. This is the case where the decision rendered in the State where the creditor is habitually resident cannot be recognised or declared enforceable, by virtue of the grounds established in Article 22 in the State where proceedings to modify the decision or to adopt a new decision are attempted.

[141] See definition of "agreement in writing" in Art. 3 *d)*.

## CHAPTER V – RECOGNITION AND ENFORCEMENT

428. The scope of Chapter V on recognition and enforcement of decisions is more or less the same as the scope of the 1958 Hague Maintenance Convention and the 1973 Hague Maintenance Convention (Enforcement). Building on these two instruments, the Chapter sets out important improvements deriving from developments that have occurred in internal, regional or international systems of maintenance recovery,[142] such as the trend towards administrative systems of child support (Art. 19(1)), the possibility to cover authentic instruments and private agreements (Arts 3 *e)* and 19(4)),[143] the "fact-based approach" (Art. 20(3)), the possibility to register a decision for enforcement or to have it declared enforceable when an application has been made through a Central Authority (Art. 23(2)), the limitation of *ex officio* review (Art. 23(4)), and the possibility to use standardised forms (Art. 25). The Chapter is geared towards opportunities provided by advances in information technology facilitating electronic communications[144] while at the same time setting safeguards in relation to the transmission of documents (Arts 23(7) *c)*, 25(2) and 30(5) *b) ii)*). The Convention contains an efficient system for the recognition and enforcement of decisions; one that will provide the widest recognition of existing decisions. It eliminates the costs and delays that are incurred if the creditor has to pursue a fresh application because an existing decision cannot be recognised. In conjunction with Chapter IV, it will also help to reduce the problems arising from multiple conflicting orders.[145]

429. As stated before, this Chapter deals with the traditional question of private international law on recognition and enforcement. A distinction needs to be made here. The term "recognition" refers to the acceptance by the competent authority addressed of the determination of the legal rights and obligations made by the authorities of origin. The terms "recognition and enforcement" refer to the intermediate procedures in the State addressed to which a foreign decision is subject to establish the enforceability of the decision in that State. This Chapter applies both to situations where only recognition is sought (Art. 26) and to situations where recognition and enforcement are sought. It does not apply to the "enforcement" *stricto sensu*, which is covered by Chapter VI.

### *Article 19 Scope of the Chapter*

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

430. The first Article of the Chapter is devoted to determining the scope of application of Chapter V. To that end, paragraph 1 determines to which decisions this Chapter applies, without including a definition of "decision".[146]

431. As in the 1973 Hague Maintenance Convention (Enforcement) the Chapter will apply to a decision whether rendered by a judicial authority or an administrative authority. However, contrary to the 1973 Hague Maintenance Convention (Enforcement), the term "administrative authority" has been defined. This was at the request of States which are less familiar with the concept of administrative authority or that know of administrative

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[142] Developments as of 2003 in national, regional and international systems are described in the Duncan Report (*op. cit.*, note 11), at paras 13-14, 59-80, 108-118.
[143] It is to be noted that authentic instruments and private agreements were covered by way of a declaration under the 1973 Hague Maintenance Convention (Enforcement). Hopefully, the safeguards developed under Art. 30 will reassure the States that were reluctant to extend the application of the 1973 Hague Maintenance Convention (Enforcement) to that matter.
[144] See *supra*, at Part V of this Report.
[145] See *supra,* para. 21 of this Report.
[146] See *supra*, paras 60-76 of this Report, comments to Art. 3.

authorities that are different from the ones contemplated under the Convention. Hopefully this may help to attract certain States to become parties to the new Convention which were not willing to join the 1973 Hague Maintenance Convention (Enforcement). It was agreed that administrative decisions should be recognised and enforced in the same way as judicial decisions if the "administrative authority" which has rendered the decision meets the requirements set out in paragraph 3.

432. Several reasons militate in favour of an explicit inclusion of decisions given by an "administrative authority" in the scope of Chapter V. First, following the example of a number of Nordic States from the 1960's, an increasing number of jurisdictions such as New Zealand, Australia and states within the United States of America have introduced administrative systems for maintenance, in particular child support. While offering the same level of legal safeguards as judicial authorities, these specialised authorities can process applications faster and more efficiently. Second, it would be unfair to oblige a State with an administrative system to recognise and enforce foreign judicial decisions, while decisions of a State with an administrative system would not be recognised in a country equipped with a judicial system.

433. As in the 1973 Hague Maintenance Convention (Enforcement),[147] a decision will include a "settlement" or "agreement", as long as it is concluded before or approved by a judicial or administrative authority. The inclusion of both settlements and agreements will ensure a broad coverage of the Chapter as the two terms have different meanings in the different legal systems.

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

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

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

437. Finally, the determination of costs or expenses in proceedings may also constitute part of the decision. Therefore there is no need to have a separate rule for their recognition and enforcement. This rule is meant to cover also costs or expenses ordered in unsuccessful maintenance applications. See also paragraph 619 under Article 43 of this Report.

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

438. This rule comes from Article 3 of the 1973 Hague Maintenance Convention (Enforcement). It was included in Article 19 instead of Article 2 as the application of the rule is limited to Chapter V. This rule provides an important safeguard in relation to preliminary or ancillary questions. For example, if a maintenance decision also includes a decision in relation to the establishment of parentage, this latter decision would not necessarily have to be recognised and enforced under the Convention. This is very

[147] 1973 Hague Maintenance Convention (Enforcement), Art. 3.

important since in some States it would be contrary to public policy to recognise the establishment of parentage only for the purposes of maintenance where their domestic law would require that the recognition of parentage could only be done *erga omnes*. Therefore through this provision it would be possible for such States to recognise and enforce only the part of the decision that deals with the maintenance payment without giving effect to the establishment of parentage per se.

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

**Sub-paragraph *a)* – may be made the subject of an appeal to or review by a judicial authority; and**

**Sub-paragraph *b)* – have a similar force and effect to a decision of a judicial authority on the same matter.**

439. As explained in relation to paragraph 1, a decision within the scope of this Chapter can be one ordered either by a judicial authority or by an administrative authority. However, at the request of certain States, a definition of what constitutes an administrative authority has been included in the text. There are three elements: 1) The administrative authority has to be a "public body"; 2) the decision of the administrative authority may be subject to appeal before a judicial authority or to verification by such an authority – either directly or within the context of subsequent procedures; and 3) the decision of the administrative authority must have a similar force and effect as a decision of a judicial authority. It is to be noted that the use of the term "similar" instead of the expression "the same", which appeared in the previous version of the text, was suggested by the delegation of Switzerland[148] because it was explained that administrative decisions sometimes do not have the same force as a decision of a judicial authority but a comparable force under the laws of Switzerland. This modification, without affecting the substance of the rule will facilitate the implementation of the Convention for certain States.

**Paragraph 4 – This Chapter also applies to maintenance arrangements in accordance with Article 30.**

440. Under Article 25 of the 1973 Hague Maintenance Convention (Enforcement) it is possible to extend the application of the Convention by way of declaration to authentic instruments. The inclusion of "maintenance arrangements" in Article 30, as entitled to recognition and enforcement under Chapter V, requires this reference in Article 19.

**Paragraph 5 – The provisions of this Chapter shall apply to a request for recognition and enforcement made directly to a competent authority of the State addressed in accordance with Article 37.**

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

442. Article 37 (below) identifies clearly the provisions of the Convention that apply to direct requests to competent authorities.

[148] In Work. Doc. No 26 of the delegation of Switzerland.

### *Article 20 Bases for recognition and enforcement*

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

444. In contrast with the Chapters on administrative co-operation,[149] the term "habitually resident" is used throughout Article 20. In this context, the term relates to a particular set of facts relevant to habitual residence that must be assessed on a case-by-case basis in the light of the context of the new Convention. The criterion of habitual residence allows for the determination of a sufficient connection between the individuals concerned and the State of origin. During the negotiations several delegations expressed concern that the complex case-law surrounding the definition of "habitual residence" which has developed in the context of the 1980 Hague Child Abduction Convention should not be imported into this Convention. There was general agreement that, because the contexts are different, the approach to the application of the concept of "habitual residence" should also be different. In the 1980 Convention the law of the child's habitual residence determines whether "rights of custody" exist such that a child's removal to or retention in a new jurisdiction is unlawful. On the other hand, in the present context "habitual residence" is a connecting factor for the purpose of recognition and enforcement in a Convention whose purpose is to facilitate the recovery of maintenance in international cases. It has to be added that most applications for recognition and enforcement of maintenance decisions are likely to be uncontested. Finally, there is no evidence that the use of the term "habitual residence" created any difficulty under the 1973 Hague Maintenance Convention (Enforcement). For the discussion as to whether the Convention should contain a definition of "habitual residence", see above at paragraphs 62 and 63 under Article 3.

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

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

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

447. The list of grounds included in the Article is a closed list. Therefore, there will be no obligation to recognise and enforce a decision under the Convention if none of the grounds in the list exist.

448. It is to be noted that the application through the Central Authority (the administrative co-operation system) for recognition and enforcement is provided for under Article 10(1) *a)*, see paragraphs 237 to 241 of this Report.

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

449. The first ground of indirect jurisdiction is the habitual residence of the respondent in the State of origin. This very widely accepted ground of jurisdiction appears in Article 7(1) of the 1973 Hague Maintenance Convention (Enforcement). The existence of

[149] See, in particular, Art. 9 and comments under paras 228 *et seq.* of this Report.

the ground of jurisdiction and the factual elements leading to it have to be assessed at the time when proceedings were instituted, without taking into account any possible change thereafter.

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

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

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

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

452. The habitual residence of the maintenance creditor is a special ground of jurisdiction found in many regional instruments and internal systems of maintenance recovery, set to protect the creditor as a weaker party. This widely accepted ground of indirect jurisdiction is also included in Article 7(1) of the 1973 Hague Maintenance Convention (Enforcement). However, some States, in particular the United States of America, cannot accept this ground of jurisdiction because of the constitutional requirement of "due process". That is because the residence of the creditor alone does not provide any required nexus between the authority exercising jurisdiction and the debtor for enforcement of money orders. It is to accommodate these States that the possibility of making a reservation in respect of this ground of jurisdiction has been set out in paragraph 2 of this Article.[150] As with sub-paragraph *a)*, the existence of this ground of jurisdiction and the factual elements leading to it have to be assessed at the time when the proceedings were instituted, without taking into account any possible change thereafter. It is to be noted that the term "creditor" includes, without any doubt, the child for whom maintenance was ordered. This explains why a special rule for the child as a creditor is not included in the text.

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

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

454. This new ground of indirect jurisdiction proposed by the delegation of Switzerland received great support during the Third Meeting of the Special Commission in April 2005. The situation is clearly different from the one in sub-paragraph *c)* and it seems acceptable to countries of civil law and Common Law traditions, in particular the United States of America for which this new ground will create a bridge. This ground sets strict conditions: that the respondent has lived with the child in the State where the child was habitually resident at the time proceedings were instituted or has lived in that State and provided support for the child there. It reflects a frequent situation where the debtor has been living in the same country as the child, paid maintenance and afterwards, for work related reasons, has moved to another country. This new basis for recognition involves a nexus between the debtor and the jurisdiction in which the child has his or her habitual residence. For States for which sub-paragraph *c)* is acceptable (*forum actoris*) this additional ground does not give added value and is superfluous. The solution in sub-paragraph *d)* aims to limit the need for the application of the reservation in relation with

[150] See Art. 19(2), and comments at para. 438 of this Report.

sub-paragraph *c)*, mentioning the situations where a *forum actoris* would be acceptable for States which would otherwise object to it.

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

455. The agreement to the jurisdiction by the parties has been discussed taking into account if party autonomy provides an adequate basis for jurisdiction in maintenance. It was agreed to include this possibility with the exception of disputes relating to maintenance obligations in respect of children. If a Protocol to the Convention were to be developed in respect of "vulnerable persons", it might be necessary to examine whether this special rule for children should be extended to "vulnerable persons", as mentioned in Article 2(3)[151].

456. Attention has to be paid to the fact that submission by the respondent in sub-paragraph *b)* is not the same as agreement to the jurisdiction in sub-paragraph *e)*.

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

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

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

459. However, consideration has been given to additional wording to reduce the risk of including cases where the originating authority has exercised an exorbitant jurisdiction on a matter of personal status, for example where jurisdiction has been exercised solely on the basis of nationality. This explains the addition of the terms "unless that jurisdiction was based solely on the nationality of one of the parties",[152] at the end of the provision as it could constitute an exorbitant ground of jurisdiction.[153]

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

**Paragraph 2 – A Contracting State may make a reservation, in accordance with Article 62, in respect of paragraph 1 *c)*, *e)* or *f)*.**

461. As noted in the previous paragraphs, some of the grounds of jurisdiction are not acceptable to some countries. This is why the possibility of making a reservation has been set out in paragraph 2. It will facilitate the acceptance of the Convention for more States. The possibility to make a reservation, in accordance with Article 62, is accepted for paragraph 1 *c)*, *e)* and *f)*.

462. It is important to note that reservations under this Article, in accordance with Article 62(4), have no reciprocal effect.[154] That is because according to the practice under Hague Conventions it is possible, as in this case, to negotiate and adopt a system of non-reciprocal reservations. This solution provides an answer to the question

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[151] See para. 55 of this Report.
[152] See in this respect Art. 8 of the Brussels IIa Regulation.
[153] A different solution is in Art. 8 of the 1973 Hague Maintenance Convention (Enforcement), which provides that "[w]ithout prejudice to the provisions of Article 7, the authority of a Contracting State which has given judgment on a maintenance claim shall be considered to have jurisdiction for the purposes of this Convention if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognised as having jurisdiction in that matter, according to the law of the State addressed", which means that the maintenance decision is recognised under the Convention only if divorce is recognised according to the internal law of the State addressed.
[154] See Prel. Doc. No 23/2006, *op. cit.*, note 87.

concerning the unintended consequences of coupling Article 20(2) and Article 62. For example, the United States of America may make a reservation in relation to Article 20(1) *c)* (jurisdiction based on creditor's habitual residence) because this ground of jurisdiction does not meet their due process requirement that there be a nexus between the defendant and the forum. This would not release other Contracting States from the obligation to recognise a decision made in the United States of America when the creditor was in fact resident there, even though the ground of jurisdiction actually relied on by the authority of the United States of America is not one included in Article 20 (*e.g.*, tag jurisdiction).

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

463. Paragraph 3 provides for a solution with regard to the effect of making a reservation in relation to grounds of jurisdiction set out in paragraph 2. This is in line with the spirit of the Convention, that is, to recognise and enforce as many maintenance decisions as possible. The so-called "fact-based approach" from the United States of America, which is a new development introduced in this Convention, is the essential element of this Article, and is based on a proposal made by the European Community.[155] Just as the residence of the creditor does not sit well with some countries, the "fact-based approach" is unknown to others. In order to be a useful ground to facilitate the recognition and enforcement of decisions it has to be correctly understood. Under this approach, a foreign decision is recognised if made in factual circumstances that would, *mutatis mutandis*, be a basis for jurisdiction in the State addressed. In consequence, the ground of direct jurisdiction on which the judge of origin acted is disregarded and attention is only paid to the links of factual proximity. The delegation of the United States of America indicated that with this approach, very few foreign decisions on maintenance are not recognised in the United States of America.

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

465. It is interesting to note that a rule similar to the "fact-based approach" has been adopted in some bilateral treaties entered into by the United States of America.[156]

**Paragraph 4 – A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 19(5) or to claims for support referred to in Article 2(1) *b)*.**

[155] See the Duncan Report, *op. cit.*, note 11, paras 87 and 88.
[156] See Annex 4 to the Duncan Report (*op. cit.*, note 11). See also the agreement between the US and the Netherlands of 30 May 2001, Arts VII and VIII, in the *Netherlands Journal of Private International Law*, Vol. XLVIII, 2001, p. 383.

466. Paragraph 4, like paragraph 3, provides another solution, in the case of States which have made a reservation in relation to grounds of jurisdiction set out in paragraph 2, to ensure the recovery of maintenance by creditors. Where recognition of a decision "is not possible as a result of a reservation", the State shall take all appropriate measures to establish a decision, if the debtor's habitual residence is in the State that made the reservation.[157] In that case, as the provision does not apply to direct requests, it will be the Central Authority which will proceed with the necessary applications in order to establish a new decision,[158] without the need for a new application from the creditor. Where the "fact-based" approach would not produce any result, for example in the very difficult case of pure creditor based jurisdiction (*i.e.*, without any other *nexus*) this fall-back rule will increase the chance of recovery of maintenance.

467. In the case of a direct request for recognition and enforcement the creditor cannot rely on the automatic action of the Central Authority to establish a decision, and will have to make an application under Article 10(1) *d)* if he or she wishes the assistance of the Central Authority. Therefore, if a direct request for recognition and enforcement is rejected as a consequence of a reservation to this ground of jurisdiction, the applicant who acted directly may either continue to act directly in instituting new proceedings to establish a new decision before the competent authority, or may apply to the Central Authority under Article 10 for the establishment of a new decision.

468. The mechanism foreseen by this provision does not apply to claims for spousal support either, if recognition and enforcement of a decision on such a claim was refused. That is because in some countries it is not possible for Central Authorities to establish spousal support even where recognition and enforcement of spousal support is sought in combination with a claim for maintenance in respect of a person under the age of 21 years.[159]

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

469. The Working Group on Applicable Law found that the difference in approach between States that apply in principle, the law of the creditor's habitual residence and those which always rely on the law of the forum is liable to produce, in certain specific cases, unfair results.[160] This is the case in particular when a decision issued in the State of the creditor's residence cannot be recognised in the State of the debtor's residence for lack of indirect jurisdiction resulting from the reservation under Article 20(1) *c)*, *e)* or *f)*. In that case, the maintenance creditor is compelled to bring his or her claim in a country other than that of his or her own residence. This solution is acceptable if the *lex fori* grants the creditor a standard of protection equivalent to, or higher than, that to which he or she would have been entitled on the basis of the law of his or her own residence. On the other hand, application of the *lex fori* leads to unfair results if it is less favourable for the creditor, and in particular if it considers the creditor to be ineligible for maintenance, for instance by reason of age. In such case, the creditor is unable to institute proceedings in the debtor's country. In the light of these findings, it was agreed

[157] This provision is not in contradiction with Art. 18, even if this situation is not included under the exceptions of Art. 18(2), as that provision is addressed to the debtor and limits only his or her actions.
[158] In accordance with Art. 6 of the Convention. See comments under paras 105 *et seq.* of this Report.
[159] Minutes No 20, paras 40-49.
[160] "Proposal by the Working Group on the Law Applicable to Maintenance Obligations", Report presented to the Special Commission, Prel. Doc. No 14 of March 2005 for the attention of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance, para. 62. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

to include in the text of the Convention a rule to provide a solution for children under the age of 18 years.[161]

470. The term "eligibility" was the subject of discussions which were inconclusive. It will be for the competent authority of the State addressed to interpret and apply this term in accordance with its internal laws and procedures.

471. As mentioned in relation to Article 2(1),[162] the fact that the Convention applies to children under the age of 21 years does not mean that States are obliged to modify their laws if maintenance is limited to children under the age of 18 years. The only obligation under the Convention will be to recognise and enforce a foreign decision for a child under the age of 21 years. Therefore, if the "eligibility" is accepted according to the law of the State of origin for a child under 21 years but older than 18 years, the result would be to oblige the State addressed to take all appropriate measures (for example, to permit an action) to establish a decision for the benefit of the child. In order to avoid such situations, Article 20(5) establishes a different age limit.

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

472. During the discussions in the 2005 Special Commission meeting, special attention was paid to distinguishing the conditions under which a foreign decision is recognised and the conditions under which a foreign decision is enforced. This raises the question of the distinction between recognition and enforcement.[163]

473. Consensus exists as to requiring less for recognition than for enforcement. As for recognition, it is sufficient that the decision has effect in the State of origin (legal force, or *res judicata*), whereas in the case of recognition and enforcement, it is required that the decision be enforceable in the State of origin. However, the possibility of seeking enforcement when the decision in the country of origin is only provisionally enforceable is not excluded.

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

### *Article 21 Severability and partial recognition and enforcement*

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

475. Whereas Article 19(2) limits the application of Chapter V to the elements of the decision that deal with maintenance obligations, this paragraph limits the recognition and enforcement to any severable parts of the decision that can be recognised and enforced in the State addressed. This wording is a clear improvement in comparison with Article 10 of the 1973 Hague Maintenance Convention (Enforcement) that is to the same effect. For example, a decision grants maintenance to a mother who is a registered partner and her child. However, if maintenance obligations between registered partners are not within the scope of the Convention for the State addressed, the part of the decision awarding maintenance to the mother will not be entitled to recognition and enforcement. On the other hand, it will still be possible to recognise and enforce the part

[161] *Ibid*.
[162] Comments under paras 46 *et seq.* of this Report.
[163] See para. 429 of this Report.

of the decision concerning the child. “Severable” means that the part of the decision in question is capable of standing alone.

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

476. The wording of this paragraph is borrowed from Article 14 of the 1973 Hague Maintenance Convention (Enforcement). It may be that the creditor, for different reasons, would prefer to tone down the application for recognition and enforcement. For example, fiscal considerations could compel the creditor not to seek full recognition and enforcement of the decision.[164] The rule is only of practical value if a similar provision does not already exist in the law of the State addressed.

### *Article 22 Grounds for refusing recognition and enforcement*

477. One of the objectives of the new Convention is to recognise and enforce as many maintenance decisions as possible. However, recognition or enforcement may be refused in the limited circumstances set out in Article 22. The use of the term “or” at the end of paragraph *e) ii)* shows clearly that the conditions for non-recognition and enforcement are not cumulative but alternative. Furthermore, even if one of the conditions is met, the requested competent authority is under no obligation to refuse recognition and enforcement. The verb “may” expresses the idea of possibility and not of obligation. That would have been expressed by “must” or “shall”. It is to be noted that recognition and enforcement of decisions are rarely refused on the basis of the grounds set out in this provision.

**Recognition and enforcement of a decision may be refused if –**

**Paragraph *a)* – recognition and enforcement of the decision is manifestly incompatible with the public policy (“*ordre public*”) of the State addressed;**

478. As in other Hague Conventions, such as the 1973 Hague Maintenance Convention (Enforcement) and other international instruments, the first ground of non-recognition or non-enforcement of decisions relating to maintenance is the fact that it is manifestly contrary to public policy (*ordre public)* in the State in which recognition or enforcement is sought. In its application of this provision, the competent authority should verify whether the recognition and enforcement of a specific decision would lead to an intolerable result in the requested State. A discrepancy of any kind with the internal law is not sufficient to use this exception. Verifying whether a decision is contrary to public policy should not serve as a pretext for embarking on a general review on the merits, something which is expressly forbidden under the Convention (see Art. 28 and para. 548 of this Report). The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement).

479. Some delegations expressed their concerns during the Special Commission regarding the possible systematic use of the public policy exception in relation to issues of personal status. It would, for example, be inappropriate for a State systematically to refuse to recognise and enforce child support orders on the basis that, under its law, a father has no obligation to maintain a child born out of wedlock. The public policy exception should in any case have only a very limited application.

**Paragraph *b)* – the decision was obtained by fraud in connection with a matter of procedure;**

480. This ground for non-recognition was the subject of lengthy discussions since it appears that there are important differences among the different States as to the meaning of fraud and as to its relation with other exceptions. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served on the wrong address, or where the party seeks

[164] Verwilghen Report (*op. cit.*, para. 15), at para. 80.

to corrupt the authority or conceals evidence, etc.[165] The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement).

481. Discussions in the Special Commission revealed some confusion as to what is fraud and how it is different from *ordre public*. The two concepts are different. Cases of fraud are not necessarily covered by the public policy exception as shown in the above examples. The concept of fraud presupposes the presence of a subjective element of wilful misrepresentation or fraudulent machinations, not simply a mistake or negligence, on the part of the party seeking recognition and enforcement. It is important to note that in this paragraph reference is made only to fraud in connection with a matter of procedure which is different from the exception of "*fraude à la loi"* in choice of law questions.

482. The recent 2005 Hague Choice of Court Convention includes as a ground for the refusal of recognition and enforcement the case where "the judgment was obtained by fraud in connection with a matter of procedure" (Art. 9 *d)*).[166]

**Paragraph *c)* – proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;**

483. The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement). This ground to some extent integrates in the Convention the concept of *lis pendens* at the time of recognition and enforcement, where it is usually provided under the direct jurisdiction rules. However, it is not strictly *lis pendens* as the provision only covers proceedings for the same "purpose". The particularities of maintenance should be underlined. In maintenance the "cause of action" is always the same (*i.e.*, maintenance), the only differences being whether the request is for maintenance, or for its modification or, if the action is introduced by the debtor, for a declaration about the nonexistence of an obligation to pay maintenance. This is a different situation by comparison with other civil and commercial matters where really different causes of action can arise.

484. The Convention does not include any rule indicating when proceedings are pending in a State. One will have to refer to the internal law of the requested State on this matter.

**Paragraph *d)* – the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;**

485. The case of conflicting decisions is another ground for not recognising or enforcing a foreign decision. The decision has to be rendered between the same parties and for the same purpose. The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement). For the case where the decision has been given in the State addressed, no other condition is needed and it is connected with paragraph *c)*. Where the decision has been rendered in a different State than the State addressed, it is necessary for this decision to fulfil the conditions to be recognised or enforced in the State addressed. Nothing is said in the Convention about the date on which the decision has been given in this third State. The question was discussed during the Diplomatic Session[167] and the conclusion was that it was not convenient to have a time factor determined in paragraph *d)*. It would be left to the wisdom of the judge or the authority to decide in each individual case which of the incompatible decisions has priority.

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[165] See Art. 10(1) *d)* (Available applications) and comments under paras 253 *et seq.* of this Report.
[166] Explanatory Report, T. Hartley and M. Dogauchi (*op. cit.*, note 43), para. 189.
[167] Minutes No 10, paras 47 and 55.

**Paragraph *e)* – in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin–**

486. The chapeau of paragraph *e)* is drawn from a proposal made in Working Document No 70[168] that was considered acceptable for application to both sub-paragraphs *i)* and *ii)* as a result of discussions in Plenary.[169] In fact, the problem was to draft the chapeau in a way that made it applicable to both judicial and administrative systems. In the latter system, the merits of a matter are initially considered in the absence of a defendant. The chapeau also deals with the situation where the respondent was not represented in proceedings in the State of origin.

> **Sub-paragraph *i)* – when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or**

487. Sub-paragraph *i)* is geared towards judicial systems or even administrative systems where the defendant is heard before the authority. The term "proper notice" signifies that it is sufficient that the defendant be notified in a way to provide an opportunity to react, but it is not necessary for the defendant to have been duly served.

> **Sub-paragraph *ii)* – when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or**

488. Sub-paragraph *ii)* is adapted to administrative systems where decisions are rendered *ex-parte* and due process is respected by allowing the defendant to challenge the decision on fact and law after the decision is rendered. This is the case in administrative systems such as in Australia and Norway.

**Paragraph *f)* – the decision was made in violation of Article 18.**

489. Article 18 contains an obligation for Contracting States not to take jurisdiction in violation of Article 18. Non-compliance with this rule may result in the non-recognition of a decision made in violation of that rule.[170]

### *Article 23 Procedure on an application for recognition and enforcement*

490. This Article governs certain aspects of the procedure to be followed for recognition and enforcement of a foreign decision when either recognition or recognition and enforcement are requested. The objective is to establish a procedure which is simplified, speedy and low cost. The new procedure is designed to overcome the complexity and costs associated with many procedures in international cases – which have resulted in their serious under-use. The objective is an ambitious one, and one which is more difficult to achieve at the international level than at regional levels where the development of simplified systems is easier.[171] Nevertheless, the development of a streamlined and partially harmonised procedure at the international level was seen as a necessity if the maintenance rights of average creditors are to be given real effect at the international level. By contrast, certain States maintained concerns about undue interference with domestic laws and procedures and this is the reason for the addition, in the course of the Diplomatic Session, of the alternative procedure in Article 24.[172] Articles 23 and 24 have to be read jointly with Article 52 (Most effective rule) in the sense that a State may adopt simplified, more expeditious procedures, provided that these are compatible with the protection given to the parties under Articles 23 and 24 (see Art. 52(2)).

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[168] See Work. Doc. No 70 of the delegations of Canada, China, Haiti, Israel, Japan, Russian Federation and Switzerland.
[169] Minutes No 20, paras 50-69.
[170] See para. 419 of this Report.
[171] See, for example, Brussels / Lugano, UIFSA and Canadian regimes.
[172] For further explanation of the two Articles, adopted finally on 21 November 2007, see Minutes No 22, paras 24-49. For the origin, see Work. Doc. No 62, containing a compromise proposal by an informal working group of delegations. The informal group was composed of delegations from Canada, China, the European Community, Japan, Russian Federation, Switzerland and the United States of America.

491. Important features of the Article 23 procedure are:

(a) a rapid and simple procedure for the registration of a foreign decision for enforcement (or for a declaration of its enforceability) excluding submissions from the parties and allowing only limited *ex officio* review (see below under para. 4), and

(b) the onus of raising objections to the registration (or declaration) is placed on the debtor whose right to challenge or appeal is limited both as to time and as to the grounds.

492. In the usual case of an application for recognition and enforcement made through the Central Authorities under Chapter III, the starting point for this Article is that the application has been processed, and not rejected, by the requested Central Authority under Article 12.[173] The application will be accompanied by the documents specified in Article 25. This Article specifies which actions are then to be performed by the requested State's authorities, and the courses of action open to the applicant and the respondent.

493. The phrase "procedure on an application for recognition and enforcement" includes all the possibilities existing in the different States: registration for enforcement, declaration of enforceability, *exequatur*, etc.

494. A distinction is made between the case where the application has been made through Central Authorities (para. 2) and the case where it has been made directly to a competent authority (para. 3). See also Article 37.

**Paragraph 1 – Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.**

495. This Article is not to be confused with Article 32, which refers to enforcement measures, which means enforcement *stricto sensu* and not the intermediate procedure to which a foreign decision is submitted before being enforced under internal law.

**Paragraph 2 – Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –**

**Sub-paragraph *a)* – refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or**

**Sub-paragraph *b)* – if it is the competent authority take such steps itself.**

496. Paragraphs 2 and 3 govern the process of recognition of enforcement or declaration of enforceability. They are drafted flexibly to accommodate different procedures of *exequatur*, but at the same time they require prompt action.

497. For the cases where the application is made through the Central Authority in the State of origin, paragraph 2 makes reference to the two different possibilities according to the particularities of the States. It is possible that in some States it is the Central Authority of the requested State which determines if the decision may be registered for enforcement or declared enforceable. In other States, it may not be possible for the Central Authority to make this determination and, in those cases, the Central Authority must promptly refer the application to the competent authority in the requested State. In both cases, the responsible authorities must act "promptly" or "without delay" in registering or declaring enforceable the decision.

**Paragraph 3 – Where the request is made directly to a competent authority in the State addressed in accordance with Article 19(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.**

498. The authority of the requested State must give its decision "without delay", a term which is not equivalent to "immediately [on completion of the formalities in Article 53]"

[173] See comments on Art. 12.

as in Article 41 of the Brussels Regulation. The reason is that it was not considered realistic to introduce such a rule in a worldwide Convention, just as it was not considered advisable to set a time limit. The aim of the term "without delay" is to lead the authority in the State addressed to decide on the application as soon as possible, in the same way that the term "expeditiously" is used in other Conventions.[174] But it is the internal law of the State addressed which determines the practical effect of this expression.

499. "Without delay" in paragraphs 2 *a)* and 3 and "promptly" in paragraph 2 have the same meaning.

**Paragraph 4 – A declaration or registration may be refused only on the ground set out in Article 22 *a)*. At this stage neither the applicant nor the respondent is entitled to make any submissions.**

500. This paragraph specifies the only ground upon which the relevant authority in the requested State may review *ex officio* the application for recognition and enforcement, namely incompatibility with the public policy of the requested State as specified in Article 22 *a)*.

501. At the stage of registration or declaration, neither the applicant nor the respondent have any possibility to make submissions. The reason for this is that the procedure has to be as fast and as simple as possible and, probably, in the great majority of cases, no further submissions would be made.

502. It is to be noted that at the time of the *ex officio* review, if there are serious questions concerning the integrity or authenticity of a document, the competent authority may ask for the complete certified copy of the document. See below paragraphs 510 and 511, 538 to 540.

**Paragraph 5 – The applicant and the respondent shall be promptly notified of the declaration or registration, made under paragraphs 2 and 3, or the refusal thereof in accordance with paragraph 4, and may bring a challenge or appeal on fact and on a point of law.**

503. The declaration of enforceability or the registration made according to paragraph 2 or 3 will be "promptly" notified both to the applicant and to the respondent. The use of the term "promptly" responds to the same interest and difficulties seen in paragraphs 2 and 3 and seeks to express the idea that the notification has to be made as soon as possible.

504. The rule in paragraph 5 allows the applicant and the respondent to challenge or to appeal against the decision for or against registration or a declaration. But the only grounds for the appeal are those cited in paragraph 7 or 8 below. This limitation on the possible grounds of appeal should be seen in the light of the control (save in the case of "direct" requests) which has been exercised by the Central Authorities in processing the application, and in the light of the standard limitations set out in Articles 27 and 28. The terms "challenge" and "appeal" are used with the objective of recognising an important distinction between judicial and administrative systems. The objective of both terms is the same, to allow the possibility to oppose the decision first adopted. In administrative systems this means the possibility to "challenge" the decision.[175] In a judicial system it means the possibility to "appeal" against the decision.

505. The right to challenge or appeal "on fact and on a point of law" means that the challenge or appeal may be on fact, on a point of law, or on fact and on a point of law. It is not a review of the merits or a new finding of facts, prohibited by Articles 27 and 28. The challenge or appeal may only be on grounds set out in paragraph 7 or, in the case of the respondent, also in paragraph 8.

506. At the stage of challenge or appeal, the procedure is adversarial. It is what in France or in other countries of civil law is known as "*contradictoire*", which means that both parties have the opportunity to be heard. It should be made clear that "adversarial"

[174] Art. 14 of the 2005 Hague Choice of Court Convention.
[175] Challenge of a decision may include both bringing the decision before a second instance as well as a review of the decision by the authority which made the decision.

or "*contradictoire*" must not, under any circumstances, be equated with "contentious". In some States of civil law tradition the term "*contradictoire*" means contentious as well as adversarial, whereas this is not the case in other States. Hence, although the procedure must always be adversarial, whether or not it is also contentious will depend on internal law of the forum which also determines other matters of procedure (*lex fori regit processum).*

**Paragraph 6 – A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.**

507. An important improvement in this Convention is the establishment of a time-limit in which the parties may lodge a challenge or an appeal against the declaration of enforceability or registration for enforcement. This follows the Convention objective of making the decision on maintenance effective as soon as possible. Any undue delay has to be avoided and a long delay for such a challenge or appeal may be damaging for the maintenance creditor.

508. Since the great majority of applications for recognition and enforcement will be successful, it is logical that the time allowed for appeal should be brief, 30 days from the date of notification of the decision.[176] If the contesting party is resident in a Contracting State other than that in which the decision authorising recognition and enforcement was given, the time for appealing is longer, 60 days. No habitual residence is required as it is only a question of challenge. The time-limit is the same for both parties, applicant and respondent. However, the Convention does not prevent the applicant from introducing a new application.

**Paragraph 7 – A challenge or appeal may be founded only on the following –**

**Sub-paragraph *a)* – the grounds for refusing recognition and enforcement set out in Article 22;**

**Sub-paragraph *b)* – the bases for recognition and enforcement under Article 20;**

**Sub-paragraph *c)* – the authenticity or integrity of any document transmitted in accordance with Article 25(1) *a)*, *b)* or *d)* or (3) *b)*.**

509. The aims of the Convention and the limitations on the right to challenge or appeal in paragraph 6 result in the only grounds for challenge or appeal being those set out in paragraph 7. These are: in sub-paragraph *a)*, the grounds for refusing recognition and enforcement set out in Article 22, and in sub-paragraph *b)*, the bases for recognition and enforcement under Article 20. Finally, another ground for challenge or appeal refers to the authenticity and integrity of certain documents.

510. This last ground is necessary since it was agreed to do away with the requirement, at the first stage of the application, to provide for originals or certified copies[177] of certain documents listed under Article 25. But this does not mean that any document has to be accepted under the Convention. The system put in place under Article 25 of the Convention will ensure at a first stage the swift transmission (whatever the medium employed) of applications, including accompanying documents, between Central Authorities, while recognising the need for sometimes making available at a later stage, usually for evidence purposes, a complete copy certified by the competent authority of certain documents (Art. 25(3)).[178] The ground for challenge or appeal under Article 23(7) *c)* serves as a safeguard against, for example, documents the origin of which may be disputed (authenticity) or documents that may have been tampered with, for example, the text of which could have been truncated or deleted (integrity). It is to

[176] The time periods in this paragraph were suggested by the International Association of Women Judges during the Special Commission.
[177] It is important to note that under Art. 25(3) *a)* a Contracting State may specify in accordance with Art. 57 that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application.
[178] In that respect, maintenance claims share many features of uncontested claims.

be understood that if a certified copy of the document is transmitted at the first stage, as specified under Article 25(3) *a)*, it should not be challenged or appealed under Article 23(7) *c)*.

511. The documents covered by Article 23(7) *c)* are the complete text of the decision (Art. 25(1) *a)*) or, if the State in question has so specified, the abstract or extract of the decision (Art. 25(3) *b)*), the document stating that the decision is enforceable in the State of origin (Art. 25(1) *b)*) and, finally, where necessary, the document showing the amount of any arrears (Art. 25(1) *d)*).

**Paragraph 8 – A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.**

512. Paragraph 8 adds a ground of challenge or appeal only available to the respondent. If the respondent has discharged the debt, this is a clear reason for opposing recognition and enforcement in so far as the decision concerns that past debt. This ground is different from the one established in paragraph 7 *c)* in relation to Article 25(1) *d)*, where the challenge or appeal may be based on the authenticity or integrity of the document showing the amount of any arrears.

**Paragraph 9 – The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.**

513. As well as the applicant and the respondent having to be notified of the declaration or registration or the refusal thereof, they must also be promptly notified of the decision on the appeal or the challenge in order to decide whether to accept the decision or consider further appeal under paragraph 10 where this is possible. The notification may be effected directly or through the Central Authority. The Convention does not specify the methods of notification to be used.

**Paragraph 10 – A further appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.**

514. Paragraph 10 addresses the question of any possible further appeal by the applicant or respondent. The text only accepts further appeal if it is permitted by the law of the State addressed, which in effect reflects the general rule set out in Article 23(1). Consideration should be given to the potential for abuse of appeal procedures. In fact, the possibility of multiple opportunities to challenge a decision could undermine the efficiency of the application of the Convention. This would have a negative effect on the mutual confidence of States in the application of the Convention. Further, the costs and delays that may be involved in further appeals may inhibit applications. In order to avoid these unfortunate consequences, a prohibition on stay or suspension of enforcement while a further appeal is pending has been introduced, although at the same time it is accepted that there may sometimes exist exceptional circumstances in which a stay or suspension of enforcement may be justified.

**Paragraph 11 – In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.**

515. The objective of achieving a rapid procedure is further underlined by the rule in paragraph 11, establishing that the competent authority shall act “expeditiously”. This rule should be read in conjunction with the rule in Article 52(1) *b)* (Most effective rule). The rule in Article 52(1) *b)* allows a Contracting State to introduce simpler or more expeditious procedures unilaterally or under an international agreement between the requesting State and requested State.

### *Article 24 Alternative procedure on an application for recognition and enforcement*

516. Article 24 presents an alternative procedure for recognition and enforcement. While the procedure in Article 23 was supported by the great majority of delegates, certain delegations were of the view that it did not take sufficient account of certain systems which currently employ a single-stage procedure, not involving a separate registration or declaration of enforceability, but rather a single application to the court for enforcement of a foreign decision. Article 24 was drafted to accommodate such systems.[179] It was envisaged that Contracting States would for the most part use the procedure set out in Article 23, but that where this is not possible the procedure in Article 24 could be opted for by declaration. The Article 24 procedure contains elements, reflecting Article 23, designed to ensure that the procedure is expeditious, that the possibilities for *ex officio* review are limited (though less so than in Art. 23) and that the burden of raising certain defences will fall on the debtor.

**Paragraph 1 – Notwithstanding Article 23(2) to (11), a State may declare, in accordance with Article 63, that it will apply the procedure for recognition and enforcement set out in this Article.**

517. The general principle that procedures for recognition and enforcement shall, subject to the provisions of the Convention, be governed by the law of the State addressed, applies equally to the procedure set out in Article 24. The declaration under Article 24 cannot affect this principle, which is set out in Article 23(1). As with all other declarations (Art. 63(1)), a declaration made by a State under Article 24 may be modified or withdrawn at any time, which might be the case if circumstances change in that State and it becomes possible to accept the procedure in Article 23.

**Paragraph 2 – Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –**

**Sub-paragraph *a)* – refer the application to the competent authority which shall decide on the application for recognition and enforcement; or**

**Sub-paragraph *b)* – if it is the competent authority, take such a decision itself.**

518. Article 24(2) is the equivalent of Article 23(2) with minor modifications to fit the different context.

**Paragraph 3 – A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.**

519. In the two-stage procedure set out in Article 23 neither the applicant nor the respondent is entitled to make submissions at the first stage. This principle cannot apply in a one-stage procedure in which the rights of defence should be assured. Hence the requirements relating to notice and the right to be heard.

**Paragraph 4 – The competent authority may review the grounds for refusing recognition and enforcement set out in Article 22 *a)*, *c)* and *d)* of its own motion. It may review any grounds listed in Articles 20, 22 and 23(7) *c)* if raised by the respondent or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 25.**

[179] *Ibid.*, note 172.

520. In the two-stage procedure set out in Article 23 *ex officio* review is allowed at the first stage but only on the basis of public policy. Further limited bases for challenge or appeal may be raised by the respondent at the second stage. Within the single-stage procedure set out in Article 24 a different approach is adopted. The grounds for review are divided into two groups.

521. First, there are the grounds that the competent authority may review of its own motion (*i.e.*, *ex officio*). These are public policy, proceedings pending before an authority of the State addressed or the existence of an incompatible decision (Art. 22 *a)*, *c)* and *d)*).

522. Second, there is the longer list of grounds which the competent authority may review in either of the following circumstances: (a) if the ground is raised by the respondent or, (b) if doubts relating to these grounds arise from the documents submitted in accordance with Article 25. In this second case the concern must arise "from the face" of the document, which means that it must be evident from the contents of the document that a ground for review may exist.

**Paragraph 5 – A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.**

523. This rule corresponds to paragraph 8 of Article 23,[180] with the difference that in paragraph 5 it appears as a ground for refusing recognition and enforcement, without specifying whether it must be raised by the respondent, or whether the competent authority may raise it of its own motion.

**Paragraph 6 – Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.**

524. The text of the paragraph follows that of Article 23(10). See comments in paragraph 514.

**Paragraph 7 – In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.**

525. The text of the paragraph follows that of Article 23(11). See comments in paragraph 515.

### *Article 25 Documents*

526. According to this Article, the application for recognition and enforcement under Article 23 has to be accompanied by the documents enumerated therein. A certain degree of flexibility has been introduced in this Article, by allowing Contracting States that would prefer to receive an abstract or extract of the decision in lieu of a complete text of the decision to specify it in accordance with paragraph 3 of this Article.

**Paragraph 1 – An application for recognition and enforcement under Article 23 or Article 24 shall be accompanied by the following –**

527. Paragraph 1 contains the classical solution, according to which a party seeking recognition and enforcement has to produce some documents. In all circumstances the documents listed in sub-paragraphs *a)* and *b)* have to be produced. However, the documents in sub-paragraphs *c)*, *d)*, *e)* and *f)* have to be produced only if necessary, depending on the circumstances.

528. The documents accompanying an application for recognition and enforcement do not need to be certified when initially transmitted by a Central Authority or produced for the first time directly by an applicant in accordance with Article 37. As for Article 12(2), the aim of the new wording of Article 25 is to ensure in a first stage the swift and low

[180] See comments to Art. 23(8), under para. 512 of this Report.

cost transmission (whatever the medium employed) of applications, including accompanying documents, while recognising the need for sometimes making available at a later stage a complete copy certified by the competent authority in the State of origin of any document specified under Article 25(1) *a)*, *b)* and *d)*. Under Article 25, it is only upon a challenge or appeal under Article 23(7) *c)* founded on the authenticity or integrity of the document or upon request by the competent authority in the requested State, that a complete copy of the document concerned, certified by the competent authority in the State of origin, is required (para. 2). However, it would be possible for some States to specify in accordance with Article 25(3) that they would prefer to receive a complete certified copy of the decision at all times (see para. 542).

529. It is relevant to note that the Forms Working Group has developed forms for most of the documents that are required under this Article.[181] The forms in question use tick boxes as much as possible and open text as little as possible, usually limited to numbers, addresses and names, thus limiting the need for translation. These forms, which follow very closely the terminology of the Convention, are available in English, French and Spanish templates and could be translated into any other language. As a consequence, a form which has been completed in French could for the most part be read in Spanish without the need for translation.

**Sub–paragraph *a)* – a complete text of the decision;**

530. "Complete text" refers to the whole judgment and not just to the final order (*dispositif).* It has to be underlined that this rule simply requires the production of the maintenance "decision" not a "copy", nor the "original". Therefore, it will be possible and easy to produce the electronic version of a decision. That will be the case especially since production of a certified copy of the decision will not be systematically required by the State addressed. As mentioned above, if the authenticity or integrity of the decision is challenged a complete certified copy of the decision will be provided by either the Central Authority of the requesting State, in the case of an application under Chapter III, or by the applicant where the application for recognition and enforcement is made directly to the competent authority of the State addressed.

531. For the requirement of a complete copy of the decision certified, see paragraph 3 *a)* and comments in paragraph 542.

**Sub-paragraph *b)* – a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements;**

532. To fulfil the requirements of this Article, a document stating that the decision is enforceable in the country of origin has to be produced in all cases.

533. Taking into account that a decision of an administrative authority can also be recognised and enforced under the Convention, it seems necessary to recall that the requirements of Article 19(3) have to be fulfilled. The last part of sub-paragraph *b)* allows a State to specify that the decisions of its administrative authorities always meet those requirements. It responds to a proposal[182] to avoid a case-by-case presentation of this document if, with a spirit of trust and understanding, some contracting States make such a specification. It is a specification made by the requesting State, while specifications in paragraph 3 are specifications made by the requested State. In both cases, they are specifications made to the Permanent Bureau of the Hague Conference on Private International Law according to Article 57(1) *e)*.

[181] See Prel. Doc. No 31-B/2007 (*op. cit.*, note 93).
[182] Proposal made by Australia, p. 48 of Prel. Doc. No 36/2007, *op. cit.*, note 88, and see Minutes No 5, para. 58.

**Sub-paragraph *c)* – if the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law;**

534. Sub-paragraph *c)* reproduces the requirements of Article 22 *e)*. It is important to produce this document since the absence of this document may lead to non-recognition and enforcement under Article 22.

**Sub-paragraph *d)* – where necessary, a document showing the amount of any arrears and the date such amount was calculated;**

535. As the Convention covers arrears (Art. 6(2) *e)* and Art. 19(1)) a special rule has been set out for the production of a document to facilitate the recovery of arrears. It will be important to indicate the date at which the amount has been calculated in order to account for any subsequent payments made by the debtor in determining the current amount which may be owed.

**Sub-paragraph *e)* – where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;**

536. Taking into account the rule in Article 19(1)[183] a special formal requirement is needed for cases where the decision provides for automatic adjustment by indexation. As the calculation of indexation adjustments may be rather difficult, any information provided by the Central Authority of the requesting State could assist the authorities of the State addressed. It would not be necessary to send a formal document. Any informal document, such as an e-mail or a fax may suffice.

**Sub-paragraph *f)* – where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.**

537. If the applicant received legal assistance in the State of origin, he / she will need to produce the appropriate documentation in order to have the same right in the State addressed. This documentation requirement will give effect to the rule set out in Article 17 *b)* which is the only situation to which it will be applicable. All other situations will be covered by Articles 14, 15 and 16.

**Paragraph 2 – Upon a challenge or appeal under Article 23(7) *c)* or upon request by the competent authority in the State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –**

**Sub-paragraph *a)* – by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;**

**Sub-paragraph *b)* – by the applicant, where the request has been made directly to a competent authority of the State addressed.**

538. Paragraph 2 requires the provision of a complete certified copy of any document referred to in Article 25(1) *a)*, *b)* or *d)* in certain cases where its authenticity or integrity is in question. The Central Authority is responsible for providing the copy in two cases: (a) where there has been a challenge or appeal by the defendant under Article 23 and the application has been brought under Chapter III; and (b) upon the request of a competent authority at any time, including at the stage of *ex officio* review. In the case of direct requests under Article 37, it is the applicant who must produce the copy.

539. The object is to establish the authenticity of the documents in accordance with the law of the State in which the decision was given. The text of this rule refers only to a

[183] See *supra*, Art. 19(1) at paras 430 *et seq.* of this Report. This provision was proposed by the United States of America in Prel. Doc. No 23/2006, para. 5 (*op. cit.*, note 87).

"complete copy of the document concerned", simplifying previous drafting in which the more strict terms "original" or "true copy" were used.

540. During the Special Commission meeting which discussed this provision, the question arose whether the certification should be by the originating authority or by another competent authority. It was felt that if the application is processed through the Central Authority, it was not necessary to expressly designate who will be responsible for the certification under sub-paragraph *a)*. However, if the request is a direct one, some difficulties may arise. The applicant will have to ascertain which are the competent authorities to certify the requested or challenged documents.

**Paragraph 3 – A Contracting State may specify in accordance with Article 57 –**

541. Paragraph 3 includes three different possible specifications to be made by the Contracting States to the Permanent Bureau of the Hague Conference on Private International Law in accordance with Article 57. These specifications, unlike the declarations under Article 63, do not have to be communicated to the depositary. They are specifications made by States in relation to their role as requested State. See Article 57(1) *e)*. The specifications might also be included in each State's country profile.[184]

**Sub-paragraph *a)* – that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application;**

542. In general, only "a complete text of the decision" is required (para. 1 *a)*), but as a result of the concerns expressed by some States,[185] the possibility now exists for States to require in all cases the production of a complete copy of the decision certified by the competent authority.

**Sub-paragraph *b)* – circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision drawn up by the competent authority of the State of origin, which may be made in the form recommended and published by the Hague Conference on Private International Law; or**

543. The wish to simplify and make more cost-efficient the procedure for recognition and enforcement was discussed on many occasions. This led to the idea that it might only be necessary to produce an abstract or extract of the decision instead of the complete text of the decision. However, this is a solution that cannot be imposed on everybody. An argument in favour of this solution is that it will result in serious savings with regard to the translation of documents.[186] The proposed solution[187] consists in inviting States, if they so wish, to accept an abstract or extract of the foreign decision. It is to be noted that the Forms Working Group has developed a model form of an abstract.[188] The solution has great advantages, where for example, in a long judgment with regard to a divorce, only a few paragraphs are devoted to support. Another advantage results from the use of standard forms that would guarantee the inclusion of all the necessary data.

544. An "abstract" means a summary or résumé of the decision, whereas "extract" means a verbatim excerpt from the decision. A specification could provide that a Contracting State could accept one or the other or both.

**Sub-paragraph *c)* – that it does not require a document stating that the requirements of Article 19(3) are met.**

545. See paragraph 533 under paragraph 1 *b)* of this Article.

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[184] See Art. 57(2).
[185] Minutes No 5, paras 55-92.
[186] See *infra*, Arts 41 and 42.
[187] This solution was proposed by the International Association of Women Judges during the Special Commission.
[188] See Prel. Doc. No 31-B/2007 (*op. cit.*, note 93), Annex A.

### *Article 26 Procedure on an application for recognition*

**This Chapter shall apply *mutatis mutandis* to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.**

546. Usually an application is for both recognition and enforcement, which is the subject matter of Article 23. But it is also possible that the applicant asks only for recognition, although this is unusual in matters of maintenance. In this case, Article 26 provides for the application *mutatis mutandis* of Chapter V. The use of the expression "*mutatis mutandis*" creates some uncertainty. It is clear that the requirement that the decision be enforceable (Art. 23(2)) is replaced by a requirement that the decision "has effect" in the State of origin. Beyond this, uncertainty arises from the difficulty of translating in simple terms the Latin expression "*mutatis mutandis*". It means changing those provisions which can be and need to be changed, taking into account the differences between recognition and enforcement. It implies also making changes which are necessary to make sense. Put simply, the provision applies, with the necessary changes.

### *Article 27 Findings of fact*

**Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.**

547. What was a novel provision (Art. 9) in the 1973 Hague Maintenance Convention (Enforcement) in relation to recognition and enforcement is now a common provision. The court addressed has to accept findings of fact made by the court of origin. More specifically, the authority of the requested State is bound by the findings of fact on which the authority of origin has based its jurisdiction. In that context, the term "jurisdiction" means jurisdiction under the Convention. If, for example, the authority of the State of origin decides, on the basis of the facts presented to it, that the creditor was habitually resident in that State, the authority of the requested State will not be able to review the facts upon which that decision was based. It speaks for itself that the authority of the requested State will not have to take into account findings of facts resulting from fraud. There are a number of occasions where judicial or administrative authorities do not indicate the facts upon which jurisdiction is based. Even if this observation may limit the practical reach of the rule, it is not sufficient to condemn its principle. This rule is encountered in other Conventions.[189] An indication by competent authorities of the facts upon which jurisdiction is based could constitute in the future a good practice.

### *Article 28 No review of the merits*

**There shall be no review by any competent authority of the State addressed of the merits of a decision.**

548. The prohibition of a review of the merits of a decision is also a standard provision in conventions on recognition and enforcement of decisions.[190] Without it, foreign judgments might in some countries be reviewed by the court addressed as if it were an appellate court hearing an appeal from the court of origin. It is without prejudice to the review, necessary to apply the provisions of this Chapter (Chapter V), although this is not expressly stated.[191] This prohibition concerns recognition and enforcement under Articles 20 and following and would also apply to a procedure on an application for recognition under Article 26. This prohibition extends both to registration systems and to systems based on declarations of enforceability (see Art. 23(3)).

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[189] Art. 28(2) of the Brussels and Lugano Conventions.
[190] Art. 27 of the 1996 Hague Child Protection Convention and Art. 26 of the 2000 Hague Adults Convention.
[191] As it is in Art. 27 of the 1996 Hague Child Protection Convention and Art. 26 of the 2000 Hague Adults Convention.

### *Article 29 Physical presence of the child or the applicant not required*

**The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter.**

549. This provision reflects the practice of many States. Requiring the presence of the child or the applicant would be contradictory to the objectives that are sought by the Convention with respect to providing a swift, efficient and accessible system of recovery of maintenance. This provision would apply in both the situations where the request for recognition and enforcement is made directly to a competent authority of the requested State or through an application under Article 10 to be processed through Central Authorities.

550. This provision is in line with the 1956 New York Convention where the presence of the applicant for recovery of maintenance is not necessary as the receiving agency would have received sufficient information as required under Article 3 of that Convention to proceed with either the recognition of a decision or the establishment of a maintenance order or the confirmation of a provisional order such as one under the REMO[192] system, as the case may be. Under the 1956 New York Convention it is possible for the applicant, without being present in the State addressed, to seek the assistance of the receiving agency in order to take all appropriate steps for the recovery of maintenance including the settlement of the claim, institution and prosecution of an action and the execution of any other judicial act for the payment of maintenance.

### *Article 30 Maintenance arrangements*

551. Article 30 is the result of long discussions on the inclusion of authentic instruments and private agreements in the scope of the Convention.[193] For some countries, authentic instruments are unknown.[194] On the other hand, some countries are not familiar with private agreements, which are well known in other systems where they are treated under certain conditions as decisions.[195] The present text achieved a high degree of consensus at the Diplomatic Session of November 2007.[196]

552. Great advantages come from the inclusion of these instruments, as there is a growing tendency to promote amicable solutions and to avoid contentious procedures in several States. In view of the movement towards alternative methods of dispute resolution, it is important to have a mechanism that provides for the recognition and enforcement of private agreements and authentic instruments which may result from these dispute resolution systems. The absence of Article 30 would have been a great loss for the Convention and would have limited its usefulness.

553. The solution in the Convention is to use the term "maintenance arrangement", as defined in Article 3 *e)*, including in Article 30 the rules under which such an arrangement is to be recognised and enforced. The possibility of a reservation is available to the Contracting States.

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[192] Reciprocal Enforcement of Maintenance Orders, see abbreviations and references under para. 15 of this Report.

[193] "Settlements" were included in the 1973 Hague Maintenance Convention (Enforcement) (see Art. 21).

[194] In the European instruments, authentic instruments are included, although they are not known in some Member States of the European Union, see Art. 50 of the Brussels and Lugano Conventions and Art. 57 of the Brussels I Regulation and also in the EEO Regulation where a definition of authentic instrument is included in Art. 4, para. 3. Also, the judgment of the European Court of Justice of 17 June 1999, Case C-260/97, *Unibank A/S* v. *Flemming G. Christensen*, European Court Reports (ECR), 1999.

[195] Private agreements are used in countries such as Canada.

[196] Proposal made in Work. Doc. No 59 of the delegations of Canada and the European Community, see Minutes No 17, paras 31 *et seq.*

**Paragraph 1 – A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.**

554. Paragraph 1 includes the general statement that maintenance arrangements are entitled to recognition and enforcement. The principal condition is that in the State of origin such an authentic instrument or private agreement is enforceable as a decision in the State of origin. It follows that if, as is the case in some countries, an agreement is enforceable as a contract rather than a decision, it will not fall within the scope of the chapter.

**Paragraph 2 – For the purpose of Article 10(1) *a)* and *b)* and (2) *a),* the term "decision" includes a maintenance arrangement.**

555. This paragraph ensures that the obligation to make available applications for recognition and enforcement, or for enforcement, within Chapter III (Applications through Central Authorities) applies not only to "decisions", but also to "maintenance arrangements".

**Paragraph 3 – An application for recognition and enforcement of a maintenance arrangement shall be accompanied by the following –**

556. Paragraphs 1 and 3 of Article 25 do not apply to maintenance arrangements. This is why paragraph 3 enumerates the required documents to accompany an application for recognition and enforcement of a maintenance arrangement.

**Sub-paragraph *a)* – a complete text of the maintenance arrangement; and**

557. In sub-paragraph *a)* it is required that a complete text of the maintenance arrangement be produced. For the same reasons as stated in relation to Article 25, it is not required that the copy be "certified as true" by the competent authority of the State in which it was made (the State of origin).

**Sub-paragraph *b)* – a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.**

558. In sub-paragraph *b)* a document is required from the competent authority in the State of origin stating that the particular maintenance arrangement is enforceable as a decision in that State, in the sense of Article 19. It has to be underlined that what is important for the Convention is not that a certain form of arrangement is enforceable according to the law of the State of origin, but that the arrangement in the concrete case meets the requirement of enforceability as a decision in the State of origin.

**Paragraph 4 – Recognition and enforcement of a maintenance arrangement may be refused if –**

**Sub-paragraph *a)* – the recognition and enforcement is manifestly incompatible with the public policy of the State addressed;**

**Sub-paragraph *b)* – the maintenance arrangement was obtained by fraud or falsification;**

**Sub-paragraph *c)* – the maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.**

559. The procedure for the recognition and enforcement of a maintenance arrangement will be relatively simple and quick. Not all the grounds of refusal in Article 22 apply. In fact, only three grounds for refusal are included in paragraph 4. The first (sub-para. *a)*) is incompatibility with the public policy (*ordre public)* of the requested State, equivalent to paragraph *a)* in Article 22. The second (sub-para. *b)*) is fraud, in principle equivalent to paragraph *b)* of Article 22, but, taking into account the particularities of maintenance arrangements, the ground for the refusal is the fact that the arrangement "was obtained

by fraud or falsification". Finally, sub-paragraph *c)* adopts the "incompatibility" principle which is expressed in similar terms to paragraph *d)* of Article 22. As in Article 22, the three grounds "may" be used to refuse recognition and enforcement.

**Paragraph 5 – The provisions of this Chapter, with the exception of Articles 20, 22, 23(7) and 25(1) and (3), shall apply *mutatis mutandis* to the recognition and enforcement of a maintenance arrangement save that –**

560. Not all the provisions in Chapter V should be applied to the recognition and enforcement of maintenance arrangements. This is why, in paragraph 5, Articles 20, 22, 23(7) and 25(1) and (3) are excluded. The rest of the Chapter "shall" be applicable *mutatis mutandis*,[197] subject to sub-paragraphs *a)*, *b)* and *c)*.

**Sub-paragraph *a)* – a declaration or registration in accordance with Article 23(2) and (3) may be refused only on the ground set out in paragraph 4 *a)*;**

561. If the accepted procedure for recognition and enforcement is the one established in Article 23, the only ground for refusal at the first stage will be public policy, according to Article 30(4) *a)*. With this solution, a narrow basis for *ex officio* review has been adopted, which would permit refusal only for reasons of public policy. The possibility of permitting refusal for any of the reasons specified in paragraph 4 was rejected.

**Sub-paragraph *b)* – a challenge or appeal as referred to in Article 23(6) may be founded only on the following –**

> **Sub-paragraph *i)* – the grounds for refusing recognition and enforcement set out in paragraph 4;**
>
> **Sub-paragraph *ii)* – the authenticity or integrity of any document transmitted in accordance with paragraph 3;**

562. Sub-paragraph *b)* confirms that the procedure for challenge or appeal in Article 23(6) also applies in the case of maintenance arrangements, and the grounds for appeal are all those that appear in Article 30(4) as grounds for non recognition or enforcement. Equally, the authenticity or integrity of the documents transmitted according to Article 30(3) will serve as a basis for a challenge or appeal under Article 23(6).

**Sub-paragraph *c)* – as regards the procedure under Article 24(4), the competent authority may review of its own motion the ground for refusing recognition and enforcement set out in paragraph 4 *a)* of this Article. It may review all grounds listed in paragraph 4 of this Article and the authenticity or integrity of any document transmitted in accordance with paragraph 3 if raised by the respondent or if concerns relating to those grounds arise from the face of those documents.**

563. This rule is necessary if a contracting State has declared that it will apply the procedure for recognition and enforcement set out in Article 24. For these States sub-paragraph *c)* replaces sub-paragraphs *a)* and *b)*. Sub-paragraph *c)*, with the same structure as Article 24(4), sets out the circumstances in which the competent authority may of its own motion, or if raised by the respondent, review the maintenance arrangement.

**Paragraph 6 – Proceedings for recognition and enforcement of a maintenance arrangement shall be suspended if a challenge concerning the arrangement is pending before a competent authority of a Contracting State.**

564. By definition, a maintenance arrangement will not have been approved by a judicial or administrative authority in the State of origin (if that were the case it would constitute a "decision" for the purpose of Chapter V) (see Art. 19). In paragraph 6 a rule is introduced to give the opportunity to suspend proceedings for recognition and

[197] On this expression, see comments on Art. 26 at para. 546 of this Report.

enforcement if proceedings concerning the validity of the maintenance arrangement are pending "before a competent authority". The location of the competent authority is not specified.

**Paragraph 7 – A State may declare, in accordance with Article 63, that applications for recognition and enforcement of a maintenance arrangement shall only be made through Central Authorities.**

565. Paragraph 7 allows a Contracting State to declare that it will not permit direct requests (in the sense of Art. 37) for the recognition and enforcement of maintenance arrangements. The effect of such a declaration is that all applications would have to be processed through Central Authorities. Some States are of the view that this filtering process constitutes a necessary additional safeguard in the case of maintenance arrangements. This declaration has to be made to the depositary, according to Article 63.

**Paragraph 8 – A Contracting State may, in accordance with Article 62, reserve the right not to recognise and enforce a maintenance arrangement.**

566. The mandatory inclusion of maintenance arrangements in the scope of the Convention was not acceptable for all delegations. Two options were discussed. The first was the possibility for States to make a reservation in respect of maintenance arrangements. The second, to leave out these instruments and to allow States to make an opt-in declaration. Finally, the first option was accepted. The result is, in consequence, that maintenance arrangements are in the scope of the Convention for all States that do not make a reservation in accordance with Article 62.

### *Article 31 Decisions produced by the combined effect of provisional and confirmation orders*

**Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order –**

**Paragraph *a)* – each of those States shall be deemed for the purposes of this Chapter to be a State of origin;**

**Paragraph *b)* – the requirements of Article 22 *e)* shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order;**

**Paragraph *c)* – the requirement of Article 20(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State; and**

**Paragraph *d)* – Article 18 shall not prevent proceedings for the modification of the decision being commenced in either State.**

567. Article 31 is designed to introduce a consistent rule to apply where a decision is produced by the combined effect of a provisional order and an order confirming the provisional order. A particular situation where it has not always been clear in the past where the order is made, concerns provisional orders of the Commonwealth jurisdictions. The common practice has been that provisional orders are usually made in the creditor's jurisdiction, but have no force and effect until confirmed (with or without modification) by the State addressed, usually the debtor's jurisdiction. Article 31 gives effect to a proposal made by the Commonwealth Secretariat,[198] to resolve the confusion about provisional orders. Originally, the title was "Commonwealth arrangements for the reciprocal enforcement of maintenance obligations", known as REMO arrangements, but it was

[198] Work. Doc. No 81, 2006.

changed after realising that these arrangements sometimes apply to States other than Member States of the Commonwealth.

568. During the discussion in Plenary, an example was given which illustrates the operation of this provision. A wife is living in Jamaica and her husband in England stops sending maintenance payments. She goes to her local court and presents a claim there. On the basis of her submissions the Jamaican court makes a provisional order. This decree has no effect at that stage of proceedings, but will be sent to the local court in England where the husband's side of the argument is heard and a decision would then be made to confirm or modify the Jamaican order. There is in fact a divided hearing, and it is possible that the case may be referred back to the court in Jamaica, and so on. The final outcome is thus the result of the combined work of the two courts. If Jamaica were not a Party to the Convention but the United Kingdom were, the decision could be enforced in another Contracting State because the United Kingdom was party to the Convention. It should also be noted that in this case, Jamaica would not have a Central Authority as it is not a Party to the Convention.

569. Paragraph *d)* has been introduced to deal with an additional problem.[199] The provisions of Article 18, concerning restrictions on bringing proceedings, are not easily accommodated where a decision is produced by two States. In the example given in the previous paragraph, the wife continues having her habitual residence in Jamaica and the husband wants to initiate proceedings to modify the decision. According to Article 18(1), this action of the debtor is only possible in Jamaica, but Jamaica is not a party in the Convention and this action would not be possible in England. Paragraph *d)* ensures that Article 18 does not prevent the commencement of proceedings for modification in either of the States involved in the reciprocal system, as both States are considered as the "State of origin" for the purposes of this Chapter of the Convention. In this example, the effect of paragraph *d)* would be that the husband could commence the proceedings for modification in England. If the habitual residence of the wife had been in Australia, State party to the Convention, the husband would have had the possibility to commence proceedings for the modification of the decision either in Australia or in England. The term "commenced" was preferred to "brought", since proceedings for modification could be commenced in the court addressed in the second stage of the proceedings for establishment.

[199] See Work. Doc. No 9 of the delegations of Australia, Canada and New Zealand and of the Observer for the Commonwealth Secretariat and discussion in Minutes No 11.

## CHAPTER VI – ENFORCEMENT BY THE STATE ADDRESSED

570. Once a decision has been recognised and declared enforceable in the requested State, measures have to be adopted in order actually to enforce the decision and effectively recover the maintenance. It is recognised that the best international procedures for recognition and enforcement may be frustrated if, in the end, internal measures of enforcement are ineffective. This is why this Convention, for the first time in the history of Hague Conventions, contains a separate chapter on enforcement by the requested State. Chapter VI applies to applications through Central Authorities as well as to direct requests.

### *Article 32 Enforcement under internal law*

**Paragraph 1 – Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.**

571. The general rule is that the law of the requested State determines the measures to enforce the foreign decision. This Article refers to the enforcement measures, which means, the enforcement *stricto sensu* and not the intermediate procedure to which a foreign decision is submitted before being actually enforced, to which Article 23 is devoted.[200]

**Paragraph 2 – Enforcement shall be prompt.**

572. In line with other parts of the Convention, this paragraph stipulates that enforcement has to be as quick as possible, or "prompt". This creates a link between Chapters V and VI in the sense that at every stage, as well as between stages, in the enforcement process, speed is essential.

**Paragraph 3 – In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.**

573. Paragraph 3 is designed to ensure that the whole of the procedure on an application for recognition and enforcement, including *exequatur* and enforcement under internal law, is treated as a continuum, not requiring further applications at different stages. As well as contributing to a speedy conclusion, the rule in paragraph 3 prevents unnecessary additional burdens being placed on the creditor at the final stages of the procedure. This rule only applies where the application has been made through Central Authorities, because in the case of a direct request there is no public authority (such as the Central Authority) involved on behalf of the applicant to oversee the proceedings and guarantee their continuation. In such cases a new request for enforcement, following a declaration of enforceability of a decision, may very well be necessary, depending on the procedural requirements of the State addressed.

**Paragraph 4 – Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.**

574. In some cases the applicable law will not necessarily be the law of the State addressed. This is the case with the exceptions included in paragraphs 4 and 5. The reason is that it was necessary to include in this Chapter some mandatory provisions on applicable law, although the Convention does not include a mandatory general regime on applicable law.

575. The first exception to the application of the law of the requested State relates to the duration of the maintenance obligation. It is a problem that appears at the moment of enforcement and that cannot be solved by the law of the State addressed, but by the law of the State of origin of the decision. The wording "any rules applicable in the State of origin" is purposely vague, in order to include internal laws of the State of origin as well as its rules of private international law.

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[200] See *supra*, paras 490 *et seq.* of this Report.

576. The rule in Article 32(4) only applies in a particular Contracting State to a case which, for that State, falls within the scope of the Convention under Article 2. Article 32(4) cannot be read as extending the obligations of a particular Contracting State beyond those which fall on that State by virtue of Article 2. The following example will illustrate this point. State A has ratified the Convention and by virtue of Article 2(2), has reserved the application of the Convention's child support provisions to persons below 18 years. State B has ratified the Convention, but has made no such reservation, preferring to accept the Convention's general principle that child support obligations apply to children up to the age of 21 years. A child support decision has been made in State B in favour of a child who at the time of the decision is 17 years old. The order has been enforced in State A against a father living there, and the question arises whether the authorities in State A will or will not be obliged to continue enforcement after the child attains the age of 18 years. The answer is negative, because for State A this would go beyond the scope of the obligations it has accepted. The rule in Article 32(4), which admittedly appears on a literal reading to suggest a contrary outcome, must be read in the light of and subject to the scope provisions of Article 2.

577. The situations which may be affected by Article 32(4) are ones which, for the two States concerned, fall within the scope of the Convention, but where the exact duration of a maintenance obligation is not defined by scope. The following is an example: State A permits spousal support for an indefinite duration following divorce. State B limits spousal support to a period of five years following divorce. An order is made in State A and is to be enforced in State B. By virtue of Article 32(4) the authorities in State B would be obliged to continue enforcing the order beyond five years because there is no limitation under the law of the State of origin of the decision.

**Paragraph 5 – Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.**

578. The second possible exception to the application of the law of the requested State relates to the period for which arrears may be enforced. In this case, the applicable law will be alternatively the law of the State of origin of the decision or the law of the State addressed, whichever provides for a longer period. The rule clearly favours the creditor.

579. The limitation rule only applies to arrears and not to retroactive maintenance. At the enforcement stage only arrears would be taken into consideration since any retroactive maintenance would be already included in the decision. As to the distinction between arrears and retroactive maintenance, see Article 19(1).[201]

### *Article 33 Non-discrimination*

**The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.**

580. The general meaning of this rule is that the enforcement methods applied to foreign decisions, once they are entitled to be enforced in the requested State, cannot be less than those which apply to internal decisions. The use of the expression "at least" suggests that the requested State may discriminate positively in favour of foreign decisions by applying to them a broader range of enforcement methods than apply to internal decisions. This is unlikely to be a common occurrence. However, the peculiar characteristic of international maintenance claims may sometimes require the application of special techniques of enforcement.

581. This Article specifies that the rule applies only for cases under the Convention.

[201] See *supra*, paras 430 *et seq.* of this Report.

### *Article 34 Enforcement measures*

**Paragraph 1 – Contracting States shall make available in internal law effective measures to enforce decisions under this Convention.**

582. Taking into account the objects of the Convention, the Contracting States have to ensure the effective recovery of maintenance and, to that end, to make available effective measures to enforce the decisions. The philosophy behind this provision is to make available the most effective measures, without any kind of limitation. The State addressed makes the measures available, and it is for internal law to determine precisely which measures are authorised and whose responsibility it is to activate different enforcement measures and in what order.

**Paragraph 2 – Such measures may include –**

**Sub-paragraph *a)* – wage withholding;**

**Sub-paragraph *b)* – garnishment from bank accounts and other sources;**

**Sub-paragraph *c)* – deductions from social security payments;**

**Sub-paragraph *d)* – lien on or forced sale of property;**

**Sub-paragraph *e)* – tax refund withholding;**

**Sub-paragraph *f)* – withholding or attachment of pension benefits;**

**Sub-paragraph *g)* – credit bureau reporting;**

**Sub-paragraph *h)* – denial, suspension or revocation of various licenses (for example, driving licenses);**

**Sub-paragraph *i)* – the use of mediation, conciliation or similar processes to bring about voluntary compliance.**

583. The list in paragraph 2 is illustrative and not exhaustive. It describes the kind of measures which a Contracting State may consider in fulfilment of its general obligations to make effective measures available. In some cases the direct objective is to make the payment effective (*e.g.*, wage withholding), but in other cases there are measures which seek to put pressure on the debtor and, indirectly, induce her or him to pay (*e.g.*, the suspension of the driving license). Mediation, conciliation or other similar measures, by encouraging voluntary payment of maintenance obligations, may help to secure the objective of Article 34. Strictly speaking, they are not measures of enforcement, but they encourage voluntary payment. To this end, the Central Authority could seek an amicable solution after recognition and a declaration of enforceability, but before actual enforcement.

### *Article 35 Transfer of funds*

**Paragraph 1 – Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.**

584. If the objective of the Convention is to make the recovery of maintenance easier, then it is consistent with this objective to facilitate the transfer of funds. It has a pedagogical effect to induce Contracting States to facilitate this transfer in order to really enforce the decision on maintenance and to ensure that the funds are received by the creditor as quickly as possible, and without excessive additional costs such as bank fees. To that end, see the document of Philippe Lortie with reference to the Model Law of UNCITRAL on Credit Transfers and examples of electronic communications.[202]

[202] Prel. Doc. No 9/2004 (*op. cit.*, note 73) and annex, especially paras 20 *et seq.* for the Model Law of UNCITRAL on Credit Transfers and paras 47 *et seq.* for examples of electronic communications.

**Paragraph 2 – A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.**

585. Paragraph 2 reproduces in full Article 22 of the 1973 Hague Maintenance Convention (Enforcement), which follows the wording of the 1956 New York Convention, with minor changes of form to adapt it to the context. There is no direct sanction if this priority is not accorded, but the article has a moral weight.[203] In the 1950's this rule was introduced to provide a solution in relation to States which had established transfer restrictions aimed at protecting their currency. In recent years, this rule has gained importance as laws have been adopted in many States to control the cross-border movement of funds with a view to stop the funding of terrorist activities. In some States, it could be necessary to relax these rules in order to facilitate the transfer of funds relating to maintenance obligations.

[203] Verwilghen Report, para. 100: "Although it is not possible to establish a direct sanction in case of violation of this rule, the formal international agreement to accord the highest priority to transfers of funds payable as maintenance is of some weight."

## CHAPTER VII – PUBLIC BODIES

586. The origin of this Chapter is Chapter IV (Arts 18 to 20) of the 1973 Hague Maintenance Convention (Enforcement). But after more than 30 years, the provisions have been modernised. Attention has to be paid also to the fact that, in 1973, another Hague Convention on the law applicable to maintenance obligations was adopted and it contains provisions on the applicable law in relation to public bodies (in particular, Arts 9 and 19(3)).

587. Although the principal responsibility for maintenance rests with the debtor, public bodies may be called upon to provide maintenance, either temporarily or definitively, in place of the debtor. Systems around the world differ largely from one to another. So, in some countries, the public body will only pay if a previous attempt has been made to obtain maintenance from the debtor, and the attempt has failed. On the contrary, in other systems, the public body pays maintenance and tries to solve the question with the debtor afterwards.

### *Article 36 Public bodies as applicants*

**Paragraph 1 – For the purposes of applications for recognition and enforcement under Article 10(1) *a)* and *b)* and cases covered by Article 20(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.**

588. Article 36 is intended to cover claims for maintenance by a public body, by including such body in the concept of "creditor". In principle, it covers child support cases on a mandatory basis. Claims concerning other family relationships would be dealt with on a reciprocal basis, and would only be possible between two countries which have made the necessary declaration in relation to the same categories of maintenance obligations and to public bodies in Article 2(3).

589. Article 36 places some limits on the situations in which the claims may be made by public bodies.

590. The first limitation in paragraph 1 is on the nature of the application. In principle, only in an application for recognition and enforcement under Article 10(1) *a)* or an application for enforcement under Article 10(1) *b)* may a public body be regarded as a creditor. This provision therefore appears to exclude a public body from making an application under the Convention to establish a decision. However, there is one special case where a public body may apply for establishment of a decision. This is where the situation envisaged in Article 20(4) arises. If the application of a public body for recognition and enforcement of a decision is not possible as a result of a reservation made under Article 20(2), and if the debtor is habitually resident in the State addressed, that State must take all appropriate measures to establish a decision for the benefit of the creditor, even though the application has been brought by a public body.

591. The second limitation in paragraph 1 is that the public body must be either: (i) acting in place of the individual to whom the maintenance is owed (the creditor), or (ii) itself seeking reimbursement for benefits already provided to a person in place of maintenance. After some discussion, it was evident that public bodies would rarely, if ever, need to establish or modify a decision in a requested State. Rather, it would always be preferable if the public body obtained such decisions in its own country, to be followed by recognition and enforcement in the requested State. Therefore, the Diplomatic Session saw no need to extend to public bodies the full range of applications.

**Paragraph 2 – The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.**

592. According to this paragraph, the law to which the body is subject will govern the right of the public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits paid to an individual in place of maintenance. But it has to be clear that the law applicable to the maintenance obligations will also apply to the existence of the obligation of maintenance and the extent of this obligation.

**Paragraph 3 – A public body may seek recognition or claim enforcement of –**

593. Paragraph 3 envisages the two possible situations in which a public body may seek recognition or enforcement of a maintenance decision. No reference is made to the applicable law, and as a consequence it is possible to apply the substantive internal law, the autonomous conflict of law rule or the conflict of law rule included in an international Convention (*e.g.*, the States Party to the 1973 Hague Maintenance Convention (Applicable Law) or to the Protocol to this Convention on the law applicable to maintenance obligations will apply the rules included in that Convention or Protocol).

594. Attention has to be paid to the fact that Article 18 in the 1973 Hague Maintenance Convention (Enforcement) was drafted in a broader way. In the current Convention it is said that the public body seeks the reimbursement of the benefits paid "in place of" maintenance, whereas the 1973 Hague Maintenance Convention (Enforcement) only speaks of "reimbursement of benefits provided for a maintenance creditor".[204] The current Convention is more precise and restricting, in specifying that only those benefits which were paid "in place of" maintenance may be sought. It is a practical policy decision in the current Convention not to go so far as the 1973 Hague Maintenance Convention (Enforcement).

**Sub-paragraph *a)* – a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;**

595. Sub-paragraph *a)* envisages the situation in which the public body was the applicant (and presumably the debtor was in most, if not all, cases the respondent) in the proceedings in which a decision was rendered against the debtor. Provided the law to which the public body is subject permits such an application, the public body may apply under Article 10(1) *a)* of this Convention for the recognition and enforcement of this decision in another Contracting State.

**Sub-paragraph *b)* – a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.**

596. In the case of sub-paragraph *b)*, the decision has been given between a creditor and the maintenance debtor. The intervention of the public body is limited to seeking recognition and enforcement of the decision, but only to the extent of the benefits already provided to the creditor in place of maintenance.

597. The effects of sub-paragraph *b)* are that a public body cannot act for or on behalf of a creditor simply to obtain recognition and enforcement of a decision. The public body can only act when benefits have been provided to the creditor in place of maintenance. This should not cause any injustice in the majority of cases as the creditor will usually apply in his or her own name for recognition and enforcement.

[204] Art. 18.

**Paragraph 4 – The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.**

598. Without prejudice to the requirements of Article 25, this paragraph establishes the requirement to prove the fulfilment of the conditions of paragraphs 2 and 3. The necessary proof need only be provided “upon request” and may be “any document” which establishes the public body’s right to act in place of the individual or seek reimbursement, or to show that the benefits have been provided to the maintenance creditor.

## CHAPTER VIII – GENERAL PROVISIONS

599. The Chapter on general provisions contains all provisions applicable to the previous Chapters, whether on co-operation, modification, recognition and enforcement, and public bodies. The Chapter deals with questions of direct requests to competent authorities, protection of personal information, confidentiality and privacy, the exemption of legalisation, issues of representation related to both administrative co-operation and direct requests to a competent authority, questions of cost recovery, and questions in relation to language requirements and translation. The Chapter also includes provisions in relation to uniform interpretation and as to the application and the interpretation of the treaty in relation to non-unified legal systems. Provisions dealing with the co-ordination of the Convention in relation to other instruments that are applicable to maintenance are also included in this Chapter. In this respect it provides for the relationship with older Hague Conventions on the same subject matter, the use of the most efficient rules provided by other instruments, the possibility for Contracting States to continue using existing schemes and to become parties to future treaties and also the possibility to conclude supplementary agreements under the Convention in order to improve the application of the Convention among themselves. A provision concerning the review of the practical operation of the Convention, which has been integrated in Hague Conventions on a regular basis since 1993, is also part of this Chapter as well as the procedure for amendment of forms, which is linked to the convening of such Special Commissions to review the operation of the Convention. The Chapter includes transitional provisions. Finally, the Chapter includes a provision listing all the information concerning laws, procedures and services that have to be provided under different articles of the Convention to the Permanent Bureau by the time Contracting States deposit their instrument of ratification or accession.

### *Article 37 Direct requests to competent authorities*

**Paragraph 1 – The Convention shall not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by the Convention including, subject to Article 18, for the purpose of having a maintenance decision established or modified.**

600. As mentioned in the comments under Article 1, nothing in that Article precludes "direct requests", even though they are not mentioned in Article 1 (see comments in para. 38 of this Report).

**Paragraph 2 – Articles 14(5) and 17 *b)* and the provisions of Chapters V, VI, VII and this Chapter, with the exception of Articles 40(2), 42, 43(3), 44(3), 45 and 55, shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.**

601. The question of which provisions of the Convention should be applied in the cases of direct requests was the subject of long discussions in the Special Commission and the Diplomatic Session. The final result is in Article 37(2).

602. The provisions on effective access to procedures contained in Chapter III (which concerns applications through Central Authorities) do not as a whole apply to direct requests. Nevertheless, the specific provisions set out in Article 14(5) (prohibiting a requirement for a security bond or deposit to guarantee payment of costs and expenses) and Article 17 *b)* (guaranteeing for an applicant in the State addressed legal assistance equivalent to that provided in the State of origin, as provided by the law of the State addressed under the same circumstances) do apply to direct requests for recognition and enforcement. This preserves the position under the 1973 Hague Maintenance Convention (Enforcement), Articles 15 and 16. Article 37 does not oblige a State to provide free legal

assistance for a direct request where all necessary assistance and services are available cost-free through Central Authority applications.[205]

**Paragraph 3 – For the purpose of paragraph 2, Article 2(1) *a)* shall apply to a decision granting maintenance to a vulnerable person over the age specified in that sub-paragraph where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment.**

603. Paragraph 3 in effect extends the scope of the Convention to maintenance obligations in respect of vulnerable persons, but only in very limited circumstances. The extension applies only:

(a) in the case of a direct request for recognition and enforcement of a maintenance decision in favour of a vulnerable person;

(b) where the original decision was rendered at a time when the vulnerable person was still a child within the meaning of Article 2(1) *a)*, and

(c) where the original decision provided for maintenance beyond childhood by reason of an impairment.

604. It is of course open to States to extend the scope of the Convention on a much broader basis (but having only reciprocal effect) to obligations in respect of vulnerable persons where such obligations arise from any of the relationships referred to in Article 2(3).

### *Article 38 Protection of personal data*

**Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.**

605. The protection of personal data, especially when it is computerised, is an important matter. This rule appears in all the modern Hague Conventions.[206] It is to be noted that in these Conventions, the term “protection of personal data” was used instead of “personal information” which nowadays is the terminology used in most internal laws. However, for the sake of consistency with the existing Hague Conventions it was decided to keep the older terminology. The term “personal data” includes personal data such as: name, date of birth, address, and other contact detail information.

606. The inclusion of this provision in the Convention establishes a minimum safeguard between the Contracting States as internal laws in the area may not all be at the same level of development. It is important to provide safeguards in relation to the treatment of personal data under the Convention. If not, less information will be provided by the parties concerned and the final result could be detrimental to the successful recovery of maintenance. The provision will equally apply to Central Authorities, competent authorities, public bodies or other bodies subject to the supervision of the competent authorities of either the requesting State or requested State. As mentioned above, the provision concerning the treatment of personal data will be applied whatever the medium or means of communications used. In that respect authorities involved with the electronic transmission of such data shall take appropriate measures vis-à-vis their service providers in order to meet the requirements of the Convention.

[205] See Minutes No 22, paras 98-102.
[206] Art. 41 of the 1996 Hague Child Protection Convention, Art. 39 of the 2000 Hague Adults Convention. In substance, also Art. 31 of the 1993 Hague Intercountry Adoption Convention.

### *Article 39 Confidentiality*

**Any authority processing information shall ensure its confidentiality in accordance with the law of its State.**

607. Article 38 having established the scope of the personal data covered by the provision, Article 39 provides that the confidentiality of this information shall be ensured in accordance with the law of the State of the authority processing this information. However, in implementing this provision States should ensure that this protection of confidentiality would not run against the right to a fair defence by the respondent in a particular case, be it the creditor or the debtor. This rule also appears in modern Hague Conventions.[207] It will need to be closely monitored as electronic transmissions develop. This obligation of confidentiality also rests on the authority transmitting the information.

### *Article 40 Non-disclosure of information*

**Paragraph 1 – An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.**

608. This provision is to be read in conjunction with the provision relating to confidentiality. Where information will be provided to parties to maintenance proceedings in order to produce their defence, this provision will ensure that information that could lead to the location of any party or child may not be disclosed to the respondent by the authority if this could cause danger to a person. It is a very useful and important provision the objective of which is to protect the child or any other person against dangers that can result from the transmission or disclosure of information to the wrong person.

609. The general rule in paragraph 1 is accompanied by two specifications in paragraphs 2 and 3. Paragraph 2 is included to draw the attention of the authorities receiving the information to the assessment of the risk made by the transmitting authority.[208] Paragraph 3 clarifies that the non-disclosure of information in relation to third persons shall not impede the communication of information between the authorities.[209]

**Paragraph 2 – A determination to this effect made by one Central Authority shall be taken into account by another Central Authority, in particular in cases of family violence.**

610. In order to work effectively, this provision requires the full co-operation and trust necessary between the authorities concerned. The Central Authority of the requested State must, in general, respect the opinion of the requesting Central Authority that if information is disclosed to the respondent it could harm any other party or the child concerned by this case. It could be the case, for example, in a situation of domestic violence where it could be dangerous if the debtor had knowledge of the address of child and creditor.

611. The words “taken into account”[210] allow a certain flexibility to the Central Authority in the State addressed. It is not bound by the determination made by the Central Authorities in the requesting State.

612. Special concerns were expressed as to a Central Authority refusing to process an application on the basis that an address has not been included in the application. The view was that a Central Authority may not refuse to process an application on the sole

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[207] Art. 30 of the 1993 Hague Intercountry Adoption Convention, Art. 42 of the 1996 Hague Child Protection Convention and Art. 40 of the 2000 Hague Adults Convention.

[208] The assessment of risk made by the relevant authority must be noted on the mandatory Transmittal Form and the Acknowledgement Form or the other recommended forms.

[209] See the observations of the United States of America in Prel. Doc. No 23/2006, *op. cit.*, note 87.

[210] Introduced as a consequence of Work. Doc. No 36 of the delegation of the European Community and see Minutes Nos 19 and 20.

basis that a personal address has not been included in the application. For those cases, it was strongly recommended by a number of delegations to include in the application what is called an "in the care of" address so that the applicant could be reached with progress reports and other documents. In many States, the applicant's "in the care of" address is the address of the Central Authority. This is a useful practice. It would not be wise to exclude it. However, the requested Central Authority might not be able to institute proceedings on the basis of a "care of" address if national law requires the personal address of the applicant to be provided in order to file a claim. In this case, the requesting Central Authority can choose either to provide the personal address or to refrain from pursuing the application. Where this information must be provided to the competent authority it should not be disclosed to the respondent by the authority if this could cause danger to a person.

**Paragraph 3 – Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.**

613. The provision in paragraph 3 would still permit the full and complete transmission of information between authorities, thus requiring a high level of trust and co-operation in the treatment of this information. Both the requesting and the requested authorities would be entitled to make the determination of non-disclosure of personal information, but limited to the fulfilment of their obligations under the Convention. It was underlined during the Diplomatic Session that this Article should not be used to protect debtors from enforcement actions.

### *Article 41 No legalisation*

**No legalisation or similar formality may be required in the context of this Convention.**

614. According to a well-established practice in the Hague Conventions, Article 41 provides that all documents forwarded or delivered under the Convention must be exempt from legalisation or any analogous formality, including in the latter case the Apostille.[211] It is another well-established practice that documents that are transmitted or exchanged by States or between their governmental institutions are exempt from legalisation or any analogous formality. In the 2005 Hague Choice of Court Convention, the drafting of Article 18 includes this clarification, stating that "All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille", but this mention seems superfluous as Apostille is an "analogous formality".

615. Legalisation is excluded in Article 17 of the 1973 Hague Maintenance Convention (Enforcement) and also in bilateral treaties. Moreover, the countries of common law tradition usually exclude legalisation.

616. This Article applies also to direct requests.

### *Article 42 Power of attorney*

**The Central Authority of the requested State may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.**

617. The objective of Article 42 is to reduce the formalities that could be imposed on an applicant in order to seek the assistance of the requested Central Authority. This is again in line with the objective of the Convention to set up a swift and efficient system where only the necessary applications, authorisations and documentation would be required. It is to be noted that according to current practice under the 1956 New York Convention

[211] Under the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

authorities of certain States act on behalf of the claimant without the need of having formal documentary requirements to do so and it is hoped that this practice will continue.

618. There is a difference between Article 8, which deals with the relationship between the applicant and the Central Authority, and Article 42, where the Central Authority represents the applicant before other authorities.

### *Article 43 Recovery of costs*

**Paragraph 1 – Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.**

619. It is important to distinguish between costs in this Article and costs in Article 19(1). Costs in Article 19(1) are the costs associated with the decision rendered in the State of origin, while costs in Article 43 are any costs incurred in relation to the general operation of the Convention. As the phrase "recovery of any costs incurred" is set against the phrase "recovery of maintenance", it seems that this provision is referring only to claims against the debtor. For example, a Central Authority seeking recovery of costs for genetic testing (under Art. 7 or in accordance with Art. 10(1) *c)*) could not claim those costs ahead of the debtor's payments to the creditor. In relation to a direct request referred to in Article 37, it is also possible for the requested authority to recover legal costs incurred, for example in the legal process to locate the debtor's assets. Those costs, not being costs in Article 19(1), could be claimed under Article 43.

**Paragraph 2 – A State may recover costs from an unsuccessful party.**

620. As a result of Article 19(1),[212] costs in relation to judicial proceedings are also included in the term "decision". This rule has to be interpreted as covering orders for costs in unsuccessful maintenance applications. Paragraph 2 would refer to both debtors and creditors (*e.g.*, a creditor in an unsuccessful modification application or an unsuccessful establishment application where a debtor successfully contested parentage). On the other hand, this provision is not intended to be used to recover costs from an unsuccessful creditor who acted in good faith (*e.g.*, a creditor who would recover less maintenance than she / he asked for should not be subject to repaying costs).

621. States were divided on whether or not an "exceptionally wealthy applicant" exception was needed. The Working Group on effective access to procedures, referred to in paragraph 366 of this Report, concluded that no State should subsidise a wealthy applicant. If such an exception was included in the Convention, it would be necessary to define "wealthy applicant" and establish a system for filtering out the rare undeserving cases. As it was unlikely that a wealthy applicant would use the Central Authority route when he / she could make a direct request, any advantages of such a system were far outweighed by the disadvantages, namely the complexity and possible costs involved as well as the danger of delaying the application process for the deserving cases. A better solution was to recover the costs from the wealthy applicant or respondent under Article 43.

622. Working Document No 51 clarified how the recovery of costs provisions would work and noted that

> "[I]f a wealthy person applies for establishment or modification of a child support order through the Central Authority channel, the costs incurred through the provision of free legal assistance should be recoverable by means of an

[212] See comments under paras 430 *et seq.* of this Report.

order for costs made following the decision concerning maintenance. For example, where the applicant is successful in her / his child support application the costs may be awarded against the debtor, and any danger that the liability for costs will affect the recovery of maintenance is already avoided by Article 40(1) [now Art. 43(1)]. Where a wealthy applicant fails to obtain the order sought on the basis that her / his financial circumstances do not justify it, the State addressed has the discretion to recover the costs of providing free legal assistance from the applicant.

The Working Group was of the view that this approach would be in conformity with the Convention as presently drafted. In particular, the existing Article 40(2) [now Art. 43(2)] explicitly authorises a system of costs recovery from unsuccessful parties. Moreover, Article 16(1) [now Art. 19(1)] makes clear that an order for costs can be included in a maintenance decision (which includes a decision not to award maintenance), which would then be entitled to recognition and enforcement in other Contracting States under Chapter V.

It was accepted that the Convention should not attempt to harmonise procedures for the recovery of costs, which differ from country to country and are a matter for internal law. However, it would be important to draw attention in the Explanatory Report to the importance of avoiding a system of costs that penalises an applicant whose lack of success has nothing to do with the merits of her case."

**Paragraph 3 – For the purposes of an application under Article 10(1) *b)* to recover costs from an unsuccessful party in accordance with paragraph 2, the term "creditor" in Article 10(1) shall include a State.**

623. Paragraph 3 was added to clarify that a State may use the Central Authority route to pursue an application for the enforcement of an order for costs made against an unsuccessful party.

**Paragraph 4 – This Article shall be without prejudice to Article 8.**

624. The recovery of costs permitted by Article 43 does not include the Central Authority costs referred to in Article 8(1). Likewise, the costs of Central Authority services may not be recovered from an applicant (Art. 8(2)) making an application under Article 10. See also the explanation for Article 8 (Central Authority costs).

### *Article 44 Language requirements*

625. The translation of documents into the official language or one of the official languages in the requested State is a practical problem that arises in relation to several Chapters of the Convention, hence the inclusion of this rule in Chapter VIII (General Provisions). During the Special Commission of 2004, a proposal was adopted which was in line with traditional Hague Conference provisions in relation to translation of documents. The traditional rule found in the Hague Conventions is to ask for the translation of the documents into the official language of the requested State. But in some circumstances it may be very difficult for the requesting State to arrange for a translation into the language of the requested State. In these situations it is possible for the requesting State to send the documents translated into either English or French, which happen to be the two official languages of the Hague Conference. But there is another important reason: that is because English and French rank first and second among the most spoken and understood languages in the world, immediately followed by Spanish which ranks third.[213] On the other hand, Spanish is not an official language of

[213] In the Special Commission meeting of June 2004 Chile, Argentina and Mexico asked for the incorporation of Spanish as a language of the Convention. For Chile, language could be an inconvenience for the exercise of access to justice, which is a human right. The term "most spoken and understood languages" does not mean that they are the most spoken languages in the world, but the languages most used for international communication by people having another language as mother tongue.

the Conference even though, for the entire negotiation of the new Convention, interpretation and translation into Spanish was provided. As mentioned in the introduction of this Report, it is the first time that the Final Act of a Diplomatic Session[214] provides that the development of a Hague instrument should take place as far as possible in Spanish.

626. Taking into account the problems and doubts in relation to the text as initially drafted, the Drafting Committee prepared an alternative proposal that received large support. In this respect the particularities of the co-operation system under the Convention have been taken into account. Two articles are devoted to this question, Article 44, that refers to the requirements of translation, and Article 45, that includes rules to achieve the objectives of Article 44.

**Paragraph 1 – Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or another language which the requested State has indicated, by way of declaration in accordance with Article 63, it will accept, unless the competent authority of that State dispenses with translation.**

627. This paragraph takes into account the difficulties that some States have in accepting applications and related documents in a language other than their own official language, establishing the need to accompany the application and related documents with a translation into the official language of the requested State. The competent authority in the requested State has, however, the possibility of dispensing with translation. Paragraph 1 includes the possibility of indicating other languages, by way of a declaration under Article 63, in which applications and related documents may be accepted. Nothing in this paragraph prevents the authorities of the requesting State drawing up the application and other relevant documents in the official language of the requested State, if they are allowed to do so according to their own law.

628. This rule should also apply to direct requests for recognition and enforcement not made through Central Authorities.

**Paragraph 2 – A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall, by declaration in accordance with Article 63, specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.**

629. A rule is also included for countries, like Belgium, Canada, Spain and Switzerland, where various languages are only official in a part of the territory. A proposal was made by the delegations of Belgium and Switzerland during the Special Commission meeting of 2005. Another possibility was to include a rule like Article 25 of the 1980 Hague Access to Justice Convention because the situation differs to a great extent from one country to the other.[215] This last solution has been introduced in paragraph 2, including a system of declarations in accordance with Article 63 by virtue of which States can specify the language or languages in which they can accept the translation and the part of their territory in which it applies.

**Paragraph 3 – Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or French. However, a Contracting State may, by making a reservation in accordance with Article 62, object to the use of either English or French.**

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[214] See *supra*, note 1.

[215] Art. 25 of the 1980 Hague Access to Justice Convention says: "A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents referred to in Articles 7 and 17 drawn up in one of those languages shall by declaration specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory."

630. Paragraphs 1 and 2 refer to the language requirements for applications and related documents, for which more formalities are required as to the question of translation. But the Convention also requires regular, close and simple communication between the Central Authorities of both the requested State and the requesting State. In principle, the communications will take place in one of the official languages of the requested State or either in English or in French. It is accepted that a Contracting State may make a reservation excluding the use of either English or French, but not both.

631. Nothing excludes the possibility for Central Authorities to agree on the use of other languages in which it is possible for them to communicate. It is to be noted in this case that it is not an agreement of the Contracting States, but is an agreement between the Central Authorities that can be changed at any moment. For example, it can change if a new person in the Central Authority has knowledge of other different languages.

### *Article 45 Means and costs of translation*

**Paragraph 1 – In the case of applications under Chapter III, the Central Authorities may agree in an individual case or generally that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If there is no agreement and it is not possible for the requesting Central Authority to comply with the requirements of Article 44(1) and (2), then the application and related documents may be transmitted with translation into English or French for further translation into an official language of the requested State.**

632. It is easy to imagine that in many situations it is difficult to find in the State of origin a translator who can translate into the language of the requested State.[216] But in this latter State it may be easier to find a translator from any other foreign language. This is why it would be possible to agree that the translation will be made in the requested State, from the original language or from any other agreed language. Two elements have to be underlined. First, that the possibility of such an agreement is limited to applications made under Chapter III, that is to say, through Central Authorities. Second, the agreement is between the Central Authorities, on a case-by-case basis or in general on a bilateral basis.

633. But if such an agreement is not reached, a solution has to be found and this is why, in the second part of paragraph 1, a solution is adopted when it is not possible to make the translation for the requesting State into the language of the requested State. The starting point is a traditional Hague Conference solution: the application and related documents may be transmitted with translation into English or French. However, something new is added: it is for further translation into an official language of the requested State. It is a new rule, which is unknown in other Conventions but which seems very useful for this Convention.

**Paragraph 2 – The cost of translation arising from the application of paragraph 1 shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.**

634. As a supplement to paragraph 1, paragraph 2 establishes that the cost of the translation will be borne by the requesting State, unless otherwise agreed by the Central Authorities of the States concerned. This way, it is also easier for the requested State to accept the translation task. It will be possible to achieve other arrangements by agreement between the Central Authorities of the States concerned.

**Paragraph 3 – Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except in so far as those costs may be covered by its system of legal assistance.**

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[216] And, sometimes, the translation made in the requiring State is impossible to understand.

635. Paragraph 3 clarifies that the costs of translation do not have to be covered by the Central Authority. However, the requesting Central Authority has the possibility to charge an applicant for the costs of translation. This rule is needed if one takes into account that the general principle, according to Article 8, is that the Central Authorities shall not impose any charge on an applicant for the provision of their services.

636. However, the applicant should not be charged if those costs may be covered by the system of legal assistance.

### *Article 46 Non-unified legal systems – interpretation*

637. The rule is drawn from Article 25 of the 2005 Hague Choice of Court Convention.[217] These clauses for non-unified legal systems are now a regular feature of Hague Conventions after some thirty years of practice by States, but they are perfected from one Convention to another. Their drafting is adapted to the purposes of each Convention. Articles 46 and 47 address the difficulties that may result from the fact that some States are composed of two or more territorial units, each with its own judicial or legal systems. It occurs in the case of States such as Canada, China, the United Kingdom and Spain without regard to the organisation of the different States. This can create a problem because one has to decide in any particular case whether the reference is to the State as a whole or whether it is a particular territorial unit within that State. Article 46 provides interpretations for terms included in the Convention when they are applied in the context of States that have a non-unified legal system.

**Paragraph 1 – In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –**

**Sub-paragraph *a)* – any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;**

**Sub-paragraph *b)* – any reference to a decision established, recognised, recognised and enforced, enforced or modified in that State shall be construed as referring, where appropriate, to a decision established, recognised, recognised and enforced, enforced or modified in the relevant territorial unit;**

**Sub-paragraph *c)* – any reference to a judicial or administrative authority in that State shall be construed as referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;**

**Sub-paragraph *d)* – any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;**

**Sub-paragraph *e)* – any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in the relevant territorial unit;**

**Sub-paragraph *f)* – any reference to location of assets in that State shall be construed as referring, where appropriate, to the location of assets in the relevant territorial unit;**

**Sub-paragraph *g)* – any reference to a reciprocity arrangement in force in a State shall be construed as referring, where appropriate, to a reciprocity arrangement in force in the relevant territorial unit;**

**Sub-paragraph *h)* – any reference to free legal assistance in that State shall be construed as referring, where appropriate, to free legal assistance in the relevant territorial unit;**

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[217] See Explanatory Report, T. Hartley and M. Dogauchi (*op. cit.*, note 43), paras 259-265. Similar terms, although not identical, to those of Art. 47 of the 1996 Hague Child Protection Convention and Art. 45 of the 2000 Hague Adults Convention.

**Sub-paragraph *i)* – any reference to a maintenance arrangement made in a State shall be construed as referring, where appropriate, to a maintenance arrangement made in the relevant territorial unit;**

**Sub-paragraph *j)* – any reference to recovery of costs by a State shall be construed as referring, where appropriate, to the recovery of costs by the relevant territorial unit.**

638. Paragraph 1 was the object of consideration during the negotiations of the Diplomatic Session. The list aims to be as comprehensive as possible and to provide an answer to all the possibilities that may arise.

639. The text solves the problem by providing that in those cases, the Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate ("relevant territorial unit" are the words used in the Convention). As to the reciprocity arrangements, see comments to Article 52.

**Paragraph 2 – This Article shall not apply to a Regional Economic Integration Organisation.**

640. A Regional Economic Integration Organisation (REIO[218]) is not a non-unified legal system. Therefore this paragraph clarifies that the Article does not apply to an REIO, but only to States in the international sense.

### *Article 47 Non-unified legal systems – substantive rules*

**Paragraph 1 – A Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.**

641. This is the traditional rule according to which the States with a non-unified legal system are not obliged to apply the Convention to purely internal situations between territorial units, although nothing prevents them doing so.

**Paragraph 2 – A competent authority in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.**

642. Paragraph 2 deals with the territorial extent of recognition and enforcement in non-unified legal systems while Article 61 is concerned with the territorial application of the Convention. This paragraph provides that a court in a territorial unit of a Contracting State is not bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced under the Convention in another territorial unit of the first Contracting State. But nothing in the Convention prevents it from doing so. The objective of the rule is that, for example, if a foreign maintenance decision is recognised and enforced in Macao, it does not mean that it will be recognised and enforced in Hong Kong. The competent authorities in Hong Kong must decide for themselves whether the conditions for recognition or enforcement under the Convention are met in their jurisdiction. This rule was included in Article 25 of the 2005 Hague Choice of Court Convention.

**Paragraph 3 – This Article shall not apply to a Regional Economic Integration Organisation.**

643. A Regional Economic Integration Organisation is not a non-unified legal system. Therefore this paragraph clarifies that the Article does not apply to an REIO, but only to States in the international sense.

[218] See abbreviations and references under para. 15 of this Report.

### *Article 48 Co-ordination with prior Hague Maintenance Conventions*

**In relations between the Contracting States, this Convention replaces, subject to Article 56(2), the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.**

644. Articles 48 to 51 concern the relationship between this Convention and other international instruments.[219]

645. Article 48 addresses the relationship between this Convention and the two previous Hague Conventions on recognition and enforcement of decisions concerning maintenance obligations, the 1973 Hague Maintenance Convention (Enforcement) and the 1958 Hague Maintenance Convention. The general principle is that this Convention replaces the former ones, but taking into account the limits of the scope of this Convention,[220] the replacement only takes place for the recognition and enforcement of decisions relating to maintenance obligations towards children "in so far as their scope of application as between such States coincides with the scope of application of this Convention". Such a rule is needed taking into account the different scope of the Conventions. As for the 1958 Hague Maintenance Convention, it is limited to *"enfant légitime, non légitime ou adoptif, non marié et âgé de moins de 21 ans accomplis*"[221] and as for the 1973 Hague Maintenance Convention (Enforcement), it applies to maintenance obligations arising from "a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate", although some reservations are possible in relation to some groups of persons,[222] as some of the States Party to the Convention have done.

646. As the rules on the law applicable to maintenance obligations are not included in the Convention but are the subject of the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, a similar rule in relation to the 1956 Hague Maintenance Convention and the 1973 Hague Maintenance Convention (Applicable Law) is found in that Protocol.[223]

### *Article 49 Co-ordination with the 1956 New York Convention*

**In relations between the Contracting States, this Convention replaces the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.**

647. This rule was introduced at a late stage in the Diplomatic Session. As the Secretary General explained,[224] the reason was that the Permanent Bureau had to secure the prior consent and support of the United Nations Legal Advisor in order to enable the Permanent Bureau to propose a reference to the 1956 New York Convention in the text of this Convention. The rationale behind the rule is that the co-ordination with the New York Convention would further consolidate the object of this Convention as a truly global one. In a situation where the scope of application of this Convention coincides with that of the New York Convention, the new Convention would apply. A reference to the 1956 New York Convention is also made in the Preamble of the Convention.

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[219] See "Co-ordination between the maintenance project and other international instruments", document drawn up by P. Lortie, First Secretary, Prel. Doc. No 18 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance. Available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[220] See Art. 2 (Scope) and comments under paras 45-59 of this Report.

[221] Art. 1. Note that this Convention was drawn up in French only.

[222] Art. 1 and Art. 30.

[223] Art. 18.

[224] Minutes No 12, para. 11, introducing Work. Doc. No 38 of the Permanent Bureau.

### *Article 50 Relationship with prior Hague Conventions on service of documents and taking of evidence*

**This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.**

648. The introduction among the functions of Central Authorities (Art. 6) of the functions "*c)* to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets", "*g)* to facilitate the obtaining of documentary or other evidence", "*h)* to provide assistance in establishing parentage where necessary for the recovery of maintenance" and "*j)* to facilitate service of documents" as well as Article 7, gave rise for some delegates to the issue of the relationship of this Convention with the 1965 Hague Service Convention and with the 1970 Hague Evidence Convention (see also Art. 7 with regard to these functions). The Proposal found in Working Document No 15 from the European Community was made with a view to clarifying that this Convention does not affect these Conventions. The idea was accepted by broad consensus. For the same reasons it was also agreed to add to the provision a reference to the 1954 Hague Civil Procedure Convention.

649. The three Conventions all provide for very detailed and specific rules with respect to the transmission of documents for service abroad and methods of co-operation for the taking of evidence abroad, whereas this Convention does not include any procedural rules in this respect but only provides for the Central Authority to facilitate service of documents or the taking of evidence. It is important to note that the term "abroad" is not used in sub-paragraphs *g)* and *j)* of Article 6(2). That is because a Central Authority will probably, in most cases, be asked to facilitate the taking of evidence or the service of documents within its own jurisdiction; a Central Authority will less frequently be asked to facilitate the taking of evidence or service abroad.

650. During the Diplomatic Session some examples were given of the possible application of the 1965 Hague Service and the 1970 Hague Evidence Conventions. These examples are included and explained in the comments on Article 6(2) *g)* and *j)*.[225] These examples illustrate that there are many situations covered by the present Convention that will neither require the transmission of documents for service abroad nor the taking of evidence abroad. In such circumstances, there is of course no need to have recourse to the 1954 Hague Civil Procedure, the 1965 Hague Service or the 1970 Hague Evidence Conventions.

651. It may be noted that it is possible to designate a Central Authority under the 2007 Hague Maintenance Convention as Central Authority under the 1965 Hague Service Convention to receive documents relating to maintenance matters.[226] A similar possibility applies in the case of the 1970 Hague Evidence Convention.[227]

### *Article 51 Co-ordination of instruments and supplementary agreements*

652. As there are numerous international instruments which relate to different aspects of the recovery of maintenance obligations, a rule on co-ordination of instruments is necessary. A clause of this kind is included for the first time in Article 9 of the Hague Convention of 15 April 1958 on the law governing transfer of title in international sales of

[225] See paras 164-167 and 182-185 of this Report.
[226] This designation can be done either as "the" or "a" Central Authority under Arts 2, 18(3) and 21, or as an "other" authority under Arts 18(1) and 21 of the 1965 Hague Service Convention.
[227] This designation can be done either as "the" or "a" Central Authority under Art. 2, or as an "other" authority under Arts 24 and 25 of the 1970 Hague Evidence Convention.

goods,[228] afterwards in the Maintenance Conventions[229] and in all recent Hague Conventions dealing with subjects for which a prior Convention existed.[230]

653. As demonstrated in Preliminary Document No 18 of June 2006,[231] Article 30 of the *Vienna Convention on the Law of Treaties of 23 May 1969* (hereinafter "1969 Vienna Convention") does not suffice on its own to co-ordinate existing international instruments in the area of maintenance. It was therefore decided to include a specific co-ordination provision in the Convention.

**Paragraph 1 – This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.**

654. This paragraph concerns only prior agreements. It is in line with the usual compatibility clauses which are found in numerous conventions with the exception that this provision would cover instruments concluded before this Convention but that are not yet in force. Usually this kind of provision only covers instruments that are in force. The question of determining when one treaty is prior to another raises considerable difficulties in international law. It may depend on which one was concluded first or which one entered into force first. It was felt very important to include the terms "concluded before this Convention" in order to safeguard the revised Lugano Convention, concluded on 30 October 2007, although not yet in force, even though the provision would cover other concluded instruments not yet in force such as the *Ottawa Convention of 10 June 1996 between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Assistance in Maintenance* and the *Rome Convention of 6 November 1990 between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments*. Doing so, the negotiators accepted to take a small risk.

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[228] This article was included to safeguard the Nordic agreement or the Benelux agreement (*Actes et documents de la Huitième session,* Tome I, pp. 88-91).

[229] See Art. 23 of the 1973 Hague Maintenance Convention (Enforcement) and Art. 18 of the 1973 Hague Maintenance Convention (Applicable Law).

[230] The provisions included are Art. 9 of the Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods, Art. 18 of the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, Art. 12 of the *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, Art. 14 of the *Hague Convention of 25 November 1965 on the Choice of Court*, Art. 25 of the 1965 Hague Service Convention, Art. 18 of the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Art. 15 of the *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, Arts 24, 25 and 26 of the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Art. 39 of the *Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons*, Art. 15 of the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*, Art. 20 of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 21 of the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Art. 22 of the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, Arts 34 and 36 of the 1980 Hague Child Abduction Convention, Art. 21 of the 1980 Access to Justice Convention, Art. 25 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Art. 22 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (hereinafter "1986 Hague Sales Contracts Convention"), Art. 23 of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Art. 39 of the 1993 Hague Intercountry Adoption Convention, Art. 52 of the 1996 Hague Child Protection Convention, Art. 49 of the 2000 Hague Adults Convention. For the first time in a Hague Convention, Art. 18 of the 2006 Hague Securities Convention allows a Regional Economic Integration Organisation to become party to the Convention. Art. 36 of the 2005 Hague Choice of Court Convention envisaged the question paying special attention to the complexity of the subject matter.

[231] *Op. cit.*, note 219.

**Paragraph 2 – Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.**

655. As is usual in the Hague Conventions, a possibility is open to Contracting States to conclude agreements improving the application of the Convention, as well as making more expeditious and effective the system for recognition and enforcement of maintenance decisions or for the provision of an advanced level of services. This rule allows two Contracting States or a group of them to conclude among themselves an agreement that covers the same area as the Convention. The requirements for such agreements are found in Article 41 of the 1969 Vienna Convention, which provides that "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: *(a)* the possibility of such a modification is provided for by the treaty [which is the case at point]; or *(b)* the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole," which is in effect what the rule included in Article 51 provides.

656. A copy of the agreement must be transmitted to the depositary of the Convention.

**Paragraph 3 – Paragraphs 1 and 2 shall also apply to reciprocity arrangements and to uniform laws based on special ties between the States concerned.**

657. This paragraph assimilates to the agreements referred to in paragraphs 1 and 2, uniform laws and reciprocity arrangements based on the existence of special ties among the States concerned. This provision is particularly interesting for the Scandinavian States, among others.

**Paragraph 4 – This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is a Party to this Convention, adopted after the conclusion of the Convention, on matters governed by the Convention provided that such instruments do not affect, in the relationship of Member States of the Regional Economic Integration Organisation with other Contracting States, the application of the provisions of the Convention. As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, the Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of the Convention.**

658. The last paragraph in Article 51 deals with the situation where an REIO becomes a Party to the Convention. It is possible that legal norms adopted by the REIO might conflict with the Convention. A similar rule was included in Article 26(6) of the 2005 Hague Choice of Court Convention.[232]

659. The first situation is the relationship of the Convention with instruments adopted by the REIO after the conclusion of the Convention.[233] It is not applicable to instruments adopted before. The underlying principle is that where a case is purely "regional", *i.e.*, within the REIO, the Convention gives way to the regional instrument, but that such

[232] See Explanatory Report, T. Hartley and M. Dogauchi (*op. cit.*, note 43), especially paras 306-311.
[233] For example, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, of 10.1.2009.

instrument cannot affect the relationship of Member States of the REIO with other Contracting States.

660. The second situation is the relationship of the Convention with instruments related to recognition and enforcement of decisions as between Member States. Paragraph 4 also provides that the Convention will not affect the application of the rules of the REIO as concerns the recognition or enforcement of decisions as between Member States. It is the case of the Brussels I Regulation that includes maintenance obligations in its scope of application.[234] It is important to underline that there is no provision that the decision may not be recognised or enforced to a lesser extent than under the Convention. The provision applies irrespective of whether the rule of the REIO is adopted before or after the Convention.

661. Such a rule is especially useful in relation to the European Community instruments, in particular the Brussels Convention, Brussels I Regulation and EEO Regulation, in which very simple systems for recognition and enforcement of maintenance decisions are included.[235]

### *Article 52 Most effective rule*

662. Article 51(2) provides for the possibility of Contracting States to conclude agreements among themselves. But Article 52 goes further because it refers not only to an international instrument, multilateral or bilateral, but also to reciprocity arrangements in force for the requested State. Furthermore, it envisages that such instruments will be applicable if and only if they provide a more beneficial system than those provided by the Convention for the recognition and enforcement of maintenance decisions. It is the application of the "most effective rule".

**Paragraph 1 – This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a reciprocity arrangement in force in the requested State that provides for –**

**Sub-paragraph *a)* – broader bases for recognition of maintenance decisions, without prejudice to Article 22 *f)* of the Convention;**

**Sub-paragraph *b)* – simplified, more expeditious procedures on an application for recognition or recognition and enforcement of maintenance decisions;**

**Sub-paragraph *c)* – more beneficial legal assistance than that provided for under Articles 14 to 17; or**

**Sub-paragraph *d)* – procedures permitting an applicant from a requesting State to make a request directly to the Central Authority of the requested State.**

663. The origin of the text of paragraph 1 is in Working Document No 37 from the delegation of Canada and Working Document No 69 from the delegation of the United States of America. The possibility to use simpler or more expeditious procedures is the objective of this Article and it has to be considered jointly with Articles 23 and 24.[236] Provinces and territories in Canada have their own system of recognition and enforcement of decisions. They have concluded among themselves "reciprocity arrangements",[237] but they have also reciprocity arrangements with the United States of America, Hong Kong and Germany, to mention some examples. The aim of this paragraph is to maintain and reinforce this possibility. In this sense, Canada and the United States of America referred to arrangements that were implemented between the United States of America and Canadian provinces and territories and which had a reciprocal effect.

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[234] This Regulation will be superseded within the Community as regards maintenance by new Regulation (EC) No 4/2009 (see preceding note).
[235] The rule will be relevant after the adoption of the new Regulation on maintenance (see preceding note).
[236] This provision is without prejudice to the safeguards of Arts 23 and 24.
[237] See Art. 46 of the Convention and comments to Art. 46 under paras 637 *et seq.* of this Report.

**Paragraph 2 – This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1 *a)* to *c)*. However, as regards simplified, more expeditious procedures referred to in paragraph 1 *b)*, they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.**

664. The Convention allows in paragraph 2 the possibility to apply other laws in force in the requested State if they include more effective rules as referred to in paragraph 1 *a)* to *c)*. There is no reason to prohibit the adoption of such unilateral measures, but some guarantees have to be maintained. This is why it is stated that, as to the simplified and more expeditious procedure for recognition and enforcement referred to in paragraph 1 *b)*, the guarantees for the parties provided for in Articles 23 and 24, concerning the procedure for enforcement, have to be respected. The rule is sufficiently flexible not to prevent the simplification of the procedure in accordance with internal law. However, the law in the requested State has to be "compatible" with the protection offered by the Convention, in particular in relation to the rights of defence.

### *Article 53 Uniform interpretation*

**In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.**

665. Article 53 states that in the interpretation of the Convention, regard must be had to its international character and to the need to promote uniformity in its application. This provision is meant for authorities applying the Convention on a day to day basis. It requires them to interpret it in an international spirit so as to promote uniformity of application. Therefore, where reasonably possible, foreign decisions and writings could be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all the authorities apply it in an open-minded way.

666. In practice, it means that according to the circumstances of the case and the countries involved, the operation of the Convention takes into account "consistency". But the use of the term "uniform interpretation" is preferred because it is seen in other Conventions: Article 16 of the 1986 Hague Sales Contracts Convention, where the provision was accepted without discussion,[238] Article 13 of the 2006 Hague Securities Convention, and Article 23 of the 2005 Hague Choice of Court Convention.

667. This Article has to be read jointly with Article 54 (Review of practical operation of the Convention) because both articles have the objective of a proper and uniform application of the Convention.

### *Article 54 Review of practical operation of the Convention*

**Paragraph 1 – The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.**

**Paragraph 2 – For the purpose of such review, Contracting States shall co-operate with the Permanent Bureau of the Hague Conference on Private**

[238] In the Explanatory Report by Arthur T. von Mehren on the 1986 Hague Sales Contracts Convention, para. 157 says that "Article 16 draws upon Article 7(1) of the 1969 Vienna Convention. The Special Commission's version was accepted subject to minor drafting changes. The provision is designed to encourage the courts to take into account, with a view to maintaining the maximum feasible degree of uniformity in the Convention's interpretation and application, the interpretation and application already given the Convention by the courts of other legal orders. The provision is, of course, only hortatory."

**International Law in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.**

668. The monitoring of the Convention is the object of Article 54.[239] The same rule appears in Article 42 of the 1993 Hague Intercountry Adoption Convention, Article 54 of the 1996 Hague Child Protection Convention and Article 52 of the 2000 Hague Adults Convention. There is only benefit to be derived from the organisation by the Conference, at regular intervals, of meetings to examine the practical operation of the Convention and, as appropriate, making suggestions to improve it. A slightly different rule can be found in the recent 2005 Hague Choice of Court Convention, in which Article 24 provides that the Secretary General "shall at regular intervals make arrangements" for the review of the operation of the Convention and for the need to make amendments. It is explained by the different nature of the Convention as there is no system of co-operation between Central Authorities in that Convention. In the previously mentioned Conventions on Abduction or Adoption, the meetings to examine the practical operation of the Conventions have proven to be essential for the long-lasting smooth application of the Conventions. As previously mentioned in the Background to this Report,[240] the importance of the 1995 and 1999 Special Commission meetings on the application of the Conventions on maintenance obligations has been underlined as a starting point for the elaboration of this new Convention.

669. In the past, Conventions were concluded and only afterwards the States and the Permanent Bureau thought about the application of the Conventions. Nowadays, monitoring of the Conventions is the core activity of the Permanent Bureau. The Permanent Bureau, in co-operation with Central Authorities, NGOs, academics, etc., accomplishes a large spectrum of activities, such as the following: (a) promotion and publication of the Conventions; (b) help to States in the initial implementation of the Conventions; (c) technical advice;[241] (d) promotion of consistent interpretation through development of case law database and *The Judges' Newsletter*;[242] (e) judicial training;[243] (f) improving administrative practice, by training, publication of guides to good practice; (g) building of co-operative networks;[244] (h) promoting correct enforcement;[245] (i) monitoring of the Convention; (j) developing electronic case management systems[246] and other software in support of Conventions.[247]

670. In this case it has to be underlined that a second paragraph has been added to the said Articles in order to emphasise the fact that the States Parties to the Convention must also be involved in the task of the proper functioning of the Convention[248] and, to that end, they have to co-operate with the Permanent Bureau in the gathering of information, including statistics and case law. It is useful to state this expressly, because up to now the Permanent Bureau has been sending requests for information to the Contracting States under several Conventions that are not always fully complied with or answered by all the Contracting States. This way, the importance of answering is made yet clearer in order to make the correct operation of the Convention easier.

671. This Article has to be read jointly with Article 53 (Uniform interpretation) because both Articles have the objective of a proper and uniform application of the Convention.

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[239] In relation with Art. 5 *a)*.
[240] See *supra*, under Part I of this Report.
[241] For example, the Guides to Good Practice to the 1980 Hague Child Abduction Convention.
[242] For example, INCADAT (the International Child Abduction Database of the Hague Conference on Private International Law).
[243] For example, *The Judges' Newsletter*.
[244] Although the idea of having a Standing Committee was supported by some delegations, it has not been included in the Convention. The co-operation between Central Authorities for the correct application of the Convention beyond what is established in this article is only possible under Art. 5 *a)* and *b)*.
[245] Although it is difficult, because it is left to internal law.
[246] See for example iChild (the Electronic Case Management System for the 1980 Child Abduction Convention of the Hague Conference on Private International Law).
[247] See for example INCADAT.
[248] See Art. 5 *a)* and *b)* and comments under paras 98-104 of this Report.

***Article 55 Amendment of forms***

**Paragraph 1 – The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Members shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.**

**Paragraph 2 – Amendments adopted by the Contracting States present at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the depositary to all Contracting States.**

**Paragraph 3 – During the period provided for in paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 62, with respect to the amendment. The State making such reservation shall, until the reservation is withdrawn, be treated as a State not Party to the present Convention with respect to that amendment.**

672. It is not the first time that a Hague Convention includes or recommends forms to facilitate the use of the Convention. In this case, the Forms Working Group has prepared two forms that are included as an annex to the Convention, which is easier than to have them in a separate document apart from the Convention. It will be easier for the operators and users of the Convention. However, at this point, a number of other forms will be model forms that will not necessarily be attached to the Convention.

673. The problem in relation with the amendment of the forms, is that it has to be sufficiently formal, but not requiring a formal modification of the Convention, with all the requirements that are necessary for the amendment of a Treaty as if the form would be an integral part of the treaty. The question is easy for some States but in other ones the Constitutional requirements are complicated. It is why Article 55(1) establishes the procedure for amending the forms through a decision of a Special Commission convened by the Secretary General to which the Contracting States of the Convention and the Member States of the Hague Conference on Private International Law will be invited. In the agenda for the meeting, this special point will be included.

674. Paragraph 2 establishes that the amendment of the form will come into force for all Contracting States on the first day of the seventh calendar month after the communication by the depositary of the amendment adopted by the Contracting States present at the Special Commission. During this period, the Contracting States may make a reservation, in accordance with Article 62, with respect to the amendment (para. 3).

675. This option is inspired by Articles 5 and 28 of the 1980 Hague Access to Justice Convention.[249]

***Article 56 Transitional provisions***

676. The general rule is contained in paragraph 1 and special rules are included in paragraphs 2 and 3.

**Paragraph 1 – The Convention shall apply in every case where –**

**Sub-paragraph *a)* – a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;**

**Sub-paragraph *b)* – a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.**

[249] These paragraphs formed part of Art. 11 (Option 2) of Prel. Doc. No 13/2005 (*op. cit.*, note 95).

677. According to the general rules on the law of the treaties[250] the Convention would have no retroactive effect. Two possible situations have to be contemplated. The first one concerns the situation where the application is made through a Central Authority and the second one concerns direct requests.

678. In the case of applications through a Central Authority, the Convention applies if the request has been received by the Central Authority in the requested State after the Convention has entered into force between the two States, *i.e.*, the requesting State and the requested State.

679. In the case of direct requests, the Convention applies if the application is received by the competent authority in the State addressed after the Convention has entered into force between the State of origin and the State addressed.

680. With this clear and simple rule it is not necessary to provide that the Convention shall apply irrespective of the date on which a decision was rendered, a decision was modified, an authentic instrument or private agreement is made or the reimbursement to a public body is owed.

**Paragraph 2 – With regard to the recognition and enforcement of decisions between Contracting States to this Convention that are also Parties to either of the Hague Maintenance Conventions mentioned in Article 48, if the conditions for the recognition and enforcement under this Convention prevent the recognition and enforcement of a decision given in the State of origin before the entry into force of this Convention for that State, that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.**

681. This is a particular rule for a concrete situation. Although it does not seem that it could happen frequently, it is possible to imagine that a decision given in a State Party to this Convention would not be enforceable in another contracting State, but that this decision would be enforceable under the 1958 Hague Maintenance Convention or the 1973 Hague Maintenance Convention (Enforcement). In that case, the Convention in force at the time the decision was rendered will apply. The objective of the Convention is to ensure effective international recovery of maintenance and this solution is in response to this objective.

**Paragraph 3 – The State addressed shall not be bound under this Convention to enforce a decision or a maintenance arrangement, in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed, except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.**

682. Paragraph 3 includes a transitional provision for the particular case where payments fall due prior to the entry into force of the Convention between the two States – the State of origin and the State addressed. The solution adopted is that, in those cases, the State addressed "shall not be bound" to enforce the decision in so far as it relates to payments falling due before the Convention entered into force between the two States concerned. However those prior payments could be enforced under internal law. This provision does not apply for maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

### *Article 57 Provision of information concerning laws, procedures and services*

683. The experience with other Hague Conventions has shown the value of an exchange of information on laws and procedures in different Contracting States. The States, and specially those that do not have a tradition of implementing legislation, would benefit from a requirement to provide certain basic information about how the Convention is to

[250] Art. 28 of the 1969 Vienna Convention, "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

be implemented before the entry into force of the Convention. It would oblige them to think through certain practical issues at that point in time. The information obligation would rest upon States and not on Central Authorities.

**Paragraph 1 – A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 61 of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –**

**Sub-paragraph *a)* – a description of its laws and procedures concerning maintenance obligations;**

**Sub-paragraph *b)* – a description of the measures it will take to meet the obligations under Article 6;**

**Sub-paragraph *c)* – a description of how it will provide applicants with effective access to procedures, as required under Article 14;**

**Sub-paragraph *d)* – a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;**

**Sub-paragraph *e)* – any specification referred to in Article 25(1) *b)* and (3).**

684. It is important that the information concerning laws, procedures and services on maintenance be kept up to date by the Contracting States, an obligation established in Article 57(3). A flexible solution has been adopted. All this information will be sent to the Permanent Bureau of the Hague Conference on Private International Law and not to the depositary. The country profile will be used to present this information.

685. The possible specifications of the Contracting States in relation to the documentation to accompany an application for recognition and enforcement have made necessary the inclusion of the rule in sub-paragraph *e)*. It is not the same to make the specification under sub-paragraph *e)* than to keep up to date the information in accordance with paragraph 3.

**Paragraph 2 – Contracting States may, in fulfilling their obligations under paragraph 1, utilise a country profile form recommended and published by the Hague Conference on Private International Law.**

**Paragraph 3 – Information shall be kept up to date by the Contracting States.**

686. It is worth underlining the importance of the country profile, as it ensures that the Convention is implemented correctly and that it will be applied properly. In the long term, the country profile will save a lot of time as it will provide many answers in advance to requesting Central Authorities in their day-to-day operations before sending applications to requested Central Authorities, therefore reducing the amount of written queries and follow-ups for additional information missing in the initial application. Information found in the country profile may also be a source of good practices.

687. The use of the country profile to meet the obligations under paragraph 1 provides a flexible means by which to keep the required information up to date. Country profiles will be accessible on the website of the Hague Conference and via the iSupport case management and communication system. It will be possible for Contracting States to complete or modify country profiles on line through a secured Internet access.

## CHAPTER IX – FINAL PROVISIONS

688. These articles are modelled on previous Conventions, but include modifications arising from the special characteristics of the Convention or recent developments.

### *Article 58 Signature, ratification and accession*

**Paragraph 1 – The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.**

689. The solution adopted in paragraph 1 is a traditional one, opening the Convention to the signature of all the Members of the Hague Conference of Private International Law, and the States which participated in the Twenty-First Session as Observers. The United States of America signed the Convention on the day of its adoption.

**Paragraph 2 – It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.**

690. As is usual with Hague Conventions, the decision whether to ratify, accept or approve the Convention will be made in accordance with the internal rules of the respective States. For the entry into force, see Article 60.

**Paragraph 3 – Any other State or Regional Economic Integration Organisation may accede to the Convention after it has entered into force in accordance with Article 60(1).**

691. Following the traditional system of the Hague Conventions, any other State or, as the case may be, any other Regional Economic Integration Organisation may accede to the Convention after the entry into force of the Convention. Article 60(1) only requires two ratifications, acceptances or approvals of the Convention for the entry into force. It is foreseeable that the entry into force will take place in a relatively short time and that the possibility to adhere, subject to the limits in paragraph 5, will be open shortly.

**Paragraph 4 – The instrument of accession shall be deposited with the depositary.**

692. As is made clear by paragraph 2, the depositary of the Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

**Paragraph 5 – Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the 12 months after the date of the notification referred to in Article 65. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.**

693. Paragraph 5 makes a distinction for bilateralisation purposes between Member States and States participating in the Session, on the one hand, and third States, on the other hand. Only Member States of the Conference and the States which participated in that Session can sign and ratify, accept or approve the Convention (paras 1 and 2), as in rules drawn from Article 43 of the 1993 Hague Intercountry Adoption Convention, whereas non-Member States can only accede to it after the Convention enters into force (paras 3 and 4).

694. The solution adopted is drawn from Article 44 of the 1993 Hague Intercountry Adoption Convention, Article 58 of the 1996 Hague Child Protection Convention and Article 54 of the 2000 Hague Adults Convention. The accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in a certain period. In this case, a period of 12 months has been adopted, a longer period for the receipt of objections than the six-month period which had been proposed during the negotiations.

### *Article 59 Regional Economic Integration Organisations*

695. Article 59 makes provisions for an REIO to become a party to the Convention. There are two possibilities. The first one (object of Art. 59(1) and (2)) is where both the REIO and its Member States become parties as a consequence of the fact that they enjoy concurrent external competence over the subject matter of the Convention (joint competence) or if some matters fall within the external competence of the REIO and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole). The second one (object of Art. 59(3)) is where the REIO alone becomes a party, which might occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the Member States would be bound by the Convention by virtue of the agreement of the REIO.

**Paragraph 1 – A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Convention.**

696. Article 59(1) and (2) is drawn from Article 29 of the 2005 Hague Choice of Court Convention. This Article enables each REIO[251] constituted solely by sovereign States to sign, accept, approve or accede to the Convention,[252] but only to the extent that it has competence over matters covered by the Convention. The European Community, for example, has adopted several legal instruments that deal with matters covered by this Convention.[253] In consequence, the Community has competence to conclude international agreements that affect those instruments. For this reason (and because the European Community is not a non-unified legal system within the meaning of the Convention[254]), it is necessary to include a provision in the Convention permitting the European Community (and any other REIO) to become a party to the Convention by providing it with the rights and obligations of a Contracting State. This clause appeared for the first time in the 2006 Hague Securities Convention (Art. 18) and it is also included in the 2005 Hague Choice of Court Convention (Art. 29).

**Paragraph 2 – The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.**

697. In view of the importance of this matter, the REIO is to notify the depositary in writing specifying the matters covered by the Convention in respect of which "competence has been transferred to that Organisation by its Member States". Thus, the notification should be made only where, as a result of the transfer of competence, the REIO has exclusive competence in relation to the specified matters and Member States no longer have independent authority to legislate concerning them. The notification has to be made at the time of signature or of the deposit of the instrument of acceptance, approval or accession; REIO must "promptly" notify the depositary of all changes, if any,

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[251] It was agreed by the Diplomatic Session of 2005 that "REIO" should have an autonomous meaning (not dependent on the law of any State) and that it should be interpreted flexibly to include sub-regional and trans-regional organisations as well as organisations whose mandate extends beyond economic matters.

[252] The absence of the term "ratify" is intentional, as only States ratify Conventions.

[253] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; and Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, of 10.1.2009.

[254] In this sense, see Art. 46 and comments under paras 637 *et seq.* of this Report.

to the distribution of competence and all new transfers, if any, of competence. These notifications under Article 59(2) are not to be considered as declarations covered by Article 63: notifications under Article 59 are compulsory, whereas declarations under Article 63 are not.

**Paragraph 3 – At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 63 that it exercises competence over all the matters governed by this Convention and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by this Convention by virtue of the signature, acceptance, approval or accession of the Organisation.**

698. Paragraph 3 is drawn from Article 30 of the 2005 Hague Choice of Court Convention. This paragraph is concerned with the case where the REIO alone becomes a Party as a consequence of the exclusive competence of the REIO on the matters governed by this Convention. Where this occurs, the REIO may declare that its Member States are bound by the Convention.[255]

**Paragraph 4 – For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation makes a declaration in accordance with paragraph 3.**

699. Unless paragraph 3 applies, any instrument of signature, acceptance, approval or accession by an REIO will not be counted for the purposes of the entry into force in accordance with Article 60.

**Paragraph 5 – Any reference to a "Contracting State" or "State" in this Convention shall apply equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a "Contracting State" or "State" in this Convention shall apply equally to the relevant Member States of the Organisation, where appropriate.**

700. This rule clarifies the reference to "State" in the Convention for two different situations. The first one, in any case in which an REIO is a Party to the Convention, a reference to a Contracting State includes "where appropriate" the reference to the REIO. The second one, when an REIO has made the declaration according to paragraph 3, its Member States are bound by the Convention, which will be applied by their internal authorities although the Member States in question are not Party to the Convention. This is why the reference to "State" in the Convention has to be applied "where appropriate" also to the Member States of the REIO.

### *Article 60 Entry into force*

**Paragraph 1 – The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance or approval referred to in Article 58.**

701. This Article is drawn from Article 19 of the 2006 Hague Securities Convention and from Article 31 of the 2005 Hague Choice of Court Convention and will facilitate the entry into force of the Convention.

**Paragraph 2 – Thereafter the Convention shall enter into force –**

**Sub-paragraph *a)* – for each State or Regional Economic Integration Organisation referred to in Article 59(1) subsequently ratifying, accepting or approving it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance or approval;**

[255] This would be the case, for example, under Art. 300(7) of the Treaty establishing the European Community.

**Sub-paragraph *b)* – for each State or Regional Economic Integration Organisation referred to in Article 58(3) on the day after the end of the period during which objections may be raised in accordance with Article 58(5);**

702. As for other States or REIOs which adhere to the Convention by accession, because it is possible that, according to Article 58(5) a Contracting State may raise an objection within a period of 12 months, it follows the Convention cannot enter into force for the acceding State before the end of this period.

**Sub-paragraph *c)* – for a territorial unit to which the Convention has been extended in accordance with Article 61, on the first day of the month following the expiration of three months after the notification referred to in that Article.**

703. For a State with a non-unified legal system for which it is possible to extend the application of the Convention on a territory by territory basis, the Convention will enter into force for the territory to which the Convention has been extended on the first day of the month following the expiration of three months after the notification referred to in Article 61.

### *Article 61 Declarations with respect to non-unified legal systems*

**Paragraph 1 – If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 63 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.**

**Paragraph 2 – Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.**

**Paragraph 3 – If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.**

**Paragraph 4 – This Article shall not apply to a Regional Economic Integration Organisation.**

704. This rule is drawn from Article 28 of the 2005 Hague Choice of Court Convention. It permits a State which has two or more territorial units, in which different systems of law are applicable in relation to matters dealt with in the Convention, to declare that the Convention will extend only to some of its territorial units. Thus, for example, the United Kingdom could sign and ratify for England only or China could sign and ratify for Hong Kong only. Such a declaration may be modified at any time, always with notification to the depositary. This provision is particularly important for States in which the legislation necessary to give effect to the Convention would have to be passed by the legislatures of the units (for example, by provincial and territorial legislatures in Canada). If no declaration is made, the Convention applies to the whole State.

705. Paragraph 2 in Article 47 deals with the territorial extent of recognition and enforcement in non-unified legal systems while Article 61 concerns the territorial application of the Convention.

706. As in Articles 46 and 47,[256] this Article does not apply to REIOs.

### *Article 62 Reservations*

**Paragraph 1 – Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61, make one or more of the reservations provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3). No other reservation shall be permitted.**

[256] See *supra*, paras 640 and 643 *et seq.* of this Report.

**Paragraph 2 – Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.**

**Paragraph 3 – The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in paragraph 2.**

**Paragraph 4 – Reservations under this Article shall have no reciprocal effect with the exception of the reservation provided for in Article 2(2).**

707. Only five reservations are allowed under the Convention, the ones provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3).[257] No other reservations are permitted. The time at which one or more reservations can be made is no later than the time of ratification, acceptance, approval or accession; in the case of a non-unified legal system, at the time of making a declaration in terms of Article 61(1). The withdrawal of a reservation is possible at any time and has to be notified to the depositary. The withdrawal will take effect on the first day of the third calendar month after the notification (paras 2 and 3).

708. A rule has been introduced in paragraph 4 of this Article, according to which those reservations "shall have no reciprocal effect" with the exception of the reservation to Article 2(2). As a general rule, Article 21 of the 1969 Vienna Convention,[258] establishes what is called the "reciprocal effect" of reservations, which translates into a network of bilateral relations in the Convention, according to the reservations formulated by the States.

709. This matter has been discussed previously in the Hague Conference on Private International Law.[259] The conclusion was that certain reservations which are expressly provided for in Hague Conventions appear not to lend themselves to reciprocity as they are negotiated reservations.[260] The rules of the 1969 Vienna Convention are not applicable, whereas in this case a special rule is established in the Convention.

710. In this context, the Drafting Committee[261] discussed in relation to Article 44(3) if the reservation as to the use of either English or French has to produce a reciprocal effect and, in the same way, with regard to Article 20(2) in relation to the possible reservations on certain bases for recognition and enforcement on decisions on maintenance. Finally, the possible reservation to the amendment of a form, according to Article 55(3) was also discussed. The preferred position of the Drafting Committee, adopted by the Diplomatic Session, was that there is no reason to maintain in such cases the reciprocal effect of reservations. This is now expressly provided for in paragraph 4; reservations under Article 62 do not have a reciprocal effect. The only exception is for Article 2(2) (see para. 50 of this Report).

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[257] Possibility included in Art. 19 *b)* of the 1969 Vienna Convention. In the Draft Guidelines on reservations to treaties provisionally adopted so far by the International Law Commission, after defining in 1.1 "reservation" as "a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization", guideline 3.1.2 defines as "specified reservations" the reservations "that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects", International Law Commission, *Report of the 58th Session* (2006), document A/61/10, pp. 293-361.

[258] Art. 21 (Legal effects of reservations) says: "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23: *(a)* modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and *(b)* modifies those provisions to the same extent for that other party in its relations with the reserving State".

[259] "Note on reservations and options in the Hague Conventions", drawn up by the Permanent Bureau, June 1976, *Proceedings of the Thirteenth Session,* Tome I*, Miscellaneous matters,* pp. 102-104. On the question as a whole, the study of G.A.L. Droz, "*Les réserves et les facultés dans les Conventions de La Haye de droit international privé*", *Revue critique de droit international privé,* 1969, pp. 381 *et seq*.

[260] As stated by the Secretary General in the Special Commission of June 2006.

[261] In November 2006.

711. As an example of the non-reciprocal effect of a reservation, if State A makes a reservation in respect of recognition of decisions given in the State of the habitual residence of the creditor, but State B makes no such reservation, a decision given in State A where the creditor has his or her habitual residence will be entitled to be recognised and enforced in State B.

### *Article 63 Declarations*

**Paragraph 1 – Declarations referred to in Articles 2(3), 11(1) *g)*, 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1), may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.**

**Paragraph 2 – Declarations, modifications and withdrawals shall be notified to the depositary.**

**Paragraph 3 – A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.**

**Paragraph 4 – A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.**

712. By contrast with reservations, declarations may be made not only at the time of signature, ratification, acceptance, approval or accession but also at any time thereafter. They may also be modified or withdrawn at any time.

713. This is a flexible solution that allows States Party to the Convention to make, modify or withdraw a declaration according to the circumstances. For example, if a State initially applies the Convention only to the maintenance obligations of Article 2(1), it can later extend the application of the Convention to other maintenance obligations arising from other family relations, by making a declaration in accordance with Articles 2(3) and 63.

### *Article 64 Denunciation*

**Paragraph 1 – A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies.**

**Paragraph 2 – The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.**

714. This rule is taken from Article 58 of the 2000 Hague Adults Convention and from Article 33 of the 2005 Hague Choice of Court Convention. Article 64 provides that a Contracting State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

***Article 65 Notification***

**The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 58 and 59 of the following –**

**Paragraph *a)* – the signatures, ratifications, acceptances and approvals referred to in Articles 58 and 59;**

**Paragraph *b)* – the accessions and objections raised to accessions referred to in Articles 58(3) and (5) and 59;**

**Paragraph *c)* – the date on which the Convention enters into force in accordance with Article 60;**

**Paragraph *d)* – the declarations referred to in Articles 2(3), 11(1) *g)*, 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1);**

**Paragraph *e)* – the agreements referred to in Article 51(2);**

**Paragraph *f)* – the reservations referred to in Articles 2(2), 20(2), 30(8), 44(3) and 55(3), and the withdrawals referred to in Article 62(2);**

**Paragraph *g)* – the denunciations referred to in Article 64.**

715. Article 65 requires the depositary, the Ministry of Foreign Affairs of the Netherlands, to notify the Members of the Hague Conference on Private International Law, and other States and REIOs which have signed, ratified, accepted, approved or acceded to the Convention of various matters relevant to the Convention, such as signatures, ratifications, entry into force, reservations, declarations and denunciations.

**In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.**

**Done at The Hague, on the 23rd day of November 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session and to each of the other States which have participated in that Session.**

716. It is important to note that the text, being drawn up in English and French, both texts being equally authentic, allows, where necessary, for cross-interpretation where one version of the text may not be clear.

## ANNEXE 1

## LISTE DES DOCUMENTS PRÉLIMINAIRES

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## ANNEX 1

## LIST OF PRELIMINARY DOCUMENTS

**LIST OF PRELIMINARY DOCUMENTS**
**PUBLISHED BY THE PERMANENT BUREAU**

**INTERNATIONAL RECOVERY OF CHILD SUPPORT**
**AND OTHER FORMS OF FAMILY MAINTENANCE**

***1995***

***Preliminary Document No 1*** Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance – *September 1995*

***1998***

***Preliminary Document No 1*** Questionnaire on maintenance obligations – *November 1998*

***1999***

***Preliminary Document No 2*** Note on the desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation – *January 1999*

***Preliminary Document No 3*** Extracts from the Responses to the November 1998 Questionnaire on Maintenance Obligations – *April 1999*

Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999 – *December 1999*

***2002***

***Preliminary Document No 1*** Information Note and Questionnaire concerning a new global instrument on the international recovery of child support and other forms of family maintenance – *June 2002*

***2003***

***Preliminary Document No 2*** Compilation of responses to the 2002 Questionnaire concerning a new global instrument on the international recovery of child support and other forms of family maintenance – *April 2003*

***Preliminary Document No 3*** Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance – *April 2003*

***Preliminary Document No 4*** Parentage and International Child Support Responses to the 2002 Questionnaire and an Analysis of the Issues – *April 2003*

***Preliminary Document No 5*** Report on the first meeting of the Special Commission on the international recovery of child support and other forms of family maintenance (5-16 May 2003) – *October 2003*

***2004***

***Preliminary Document No 6*** Additional questionnaire concerning a new global instrument on the international recovery of child support and other forms of family maintenance + Responses – *February 2004*

***Preliminary Document No 7*** Working draft of a Convention on the international recovery of child support and other forms of family maintenance – *April 2004*

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| ***Preliminary Document No 8*** | Procedures for recognition and enforcement abroad of decisions concerning child support and other forms of family maintenance – *May 2004* |
| ***Preliminary Document No 9*** | Transfer of funds and the use of information technology in relation to the international recovery of child support and other forms of family maintenance – *May 2004* |
| ***Preliminary Document No 10*** | Administrative and legal costs and expenses under the new Convention on the international recovery of child support and other forms of family maintenance, including legal aid and assistance – *May 2004* |
| ***Preliminary Document No 11*** | Application of an instrument on the international recovery of child support and other forms of family maintenance irrespective of the international or internal character of the maintenance claim – *May 2004* |
| ***Preliminary Document No 12*** | Questionnaire relating to the law applicable to maintenance obligations – *September 2004* |

***2005***

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| ***Preliminary Document No 13*** | Working draft of a convention on the international recovery of child support and other forms of family maintenance – *January 2005* |
| ***Preliminary Document No 14*** | Proposal by the Working Group on the Law Applicable to Maintenance Obligations – *March 2005* |
| ***Preliminary Document No 15*** | Report of the Administrative Co-operation Working Group of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance – *March 2005* |
| ***Preliminary Document No 16*** | Tentative draft Convention on the international recovery of child support and other forms of family maintenance – *October 2005* |

***2006***

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| ***Preliminary Document No 17*** | Report of the Forms Working Group of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance – *May 2006* |
| ***Preliminary Document No 18*** | Co-ordination between the maintenance project and other international instruments + Appendices – *June 2006* |
| ***Preliminary Document No 19*** | Report of the Administrative Co-operation Working Group of the Special Commission of June 2006 on the international recovery of child support and other forms of family maintenance – *June 2006* |
| ***Preliminary Document No 20*** | Form of the rules on applicable law and possible final clauses – *June 2006* |
| ***Preliminary Document No 21*** | Issues arising under the tentative draft Convention on the international recovery of child support and other forms of family maintenance – *June 2006* |
| ***Preliminary Document No 22*** | Report of the Working Group on Applicable Law – *June 2006* |
| ***Preliminary Document No 23*** | Comments on the tentative draft Convention – *June 2006* |

***2007***

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| ***Preliminary Document No 24*** | Working Draft on Applicable Law – *January 2007* |
| ***Preliminary Document No 25*** | Preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *January 2007* |
| ***Preliminary Document No 26*** | Observations of the Drafting Committee on the text of the preliminary draft Convention – *January 2007* |
| ***Preliminary Document No 27*** | Report of the Working Group on Applicable Law – *April 2007* |
| ***Preliminary Document No 28*** | Working draft on applicable law – draft additional provisions – *May 2007* |
| ***Preliminary Document No 29*** | Revised preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *June 2007* |
| ***Preliminary Document No 30*** | Preliminary draft Protocol on the law applicable to maintenance obligations – *June 2007* |
| ***Preliminary Document No 31-A*** | Report of the Forms Working Group – Report – *July 2007* |
| ***Preliminary Document No 31-B*** | Report of the Forms Working Group – Recommended Forms – *July 2007* |
| ***Preliminary Document No 32*** | Draft Explanatory Report on the preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *October 2007*[*] |
| ***Preliminary Document No 33*** | Preliminary draft Protocol on the law applicable to maintenance obligations – Explanatory Report – *August 2007* |
| ***Preliminary Document No 34*** | Report of the Administrative Co-operation Working Group – *October 2007* |
| ***Preliminary Document No 35*** | Comments on the revised preliminary draft Convention (Prel. Doc. No 29) and the preliminary draft Protocol (Prel. Doc. No 30) – *October 2007* |
| ***Preliminary Document No 36*** | Consolidated list of comments on the revised preliminary draft Convention on the international recovery of child support and other forms of family maintenance – *October 2007* |

[*] Please note that a provisional version in English only, dated August 2007, was made available that month.

## ANNEXE 2

## LISTE DES RÉUNIONS DE LA COMMISSION SPÉCIALE ET AUTRES COMITÉS DE LA COMMISSION SPÉCIALE (COMITÉ DE RÉDACTION, GROUPE DE TRAVAIL SUR LA LOI APPLICABLE, GROUPE DE TRAVAIL SUR LA COOPÉRATION ADMINISTRATIVE ET GROUPE DE TRAVAIL CHARGÉ DES FORMULAIRES)

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## ANNEX 2

## LIST OF MEETINGS OF THE SPECIAL COMMISSION AND COMMITTEES OF THE SPECIAL COMMISSION (THE DRAFTING COMMITTEE, THE APPLICABLE LAW WORKING GROUP, THE ADMINISTRATIVE CO-OPERATION WORKING GROUP AND THE FORMS WORKING GROUP)

**LIST OF MEETINGS OF THE SPECIAL COMMISSION AND COMMITTEES OF THE SPECIAL COMMISSION (THE DRAFTING COMMITTEE, THE APPLICABLE LAW WORKING GROUP, THE ADMINISTRATIVE CO-OPERATION WORKING GROUP AND THE FORMS WORKING GROUP)**

*Special Commission meetings*

The Special Commission met on the following occasions:

– 5 to 16 May 2003
– 7 to 18 June 2004
– 4 to 15 April 2005
– 19 to 28 June 2006
– 8 to 16 May 2007

*Drafting Committee meetings*

The Drafting Committee was chaired by Jan Doogue (New Zealand) and had the following members: Mmes Denise Gervais (Canada), Namira Negm (Egypt), Katja Lenzing (European Commission), Mária Kurucz (Hungary), Stefania Bariatti (Italy), María Elena Mansilla y Mejía (Mexico), Mary Helen Carlson (United States of America) and Cecilia Fresnado de Aguirre (Inter-American Children's Initiative) and Messrs James Ding (China), Jin Sun (China), Lixiao Tian (China), Antoine Buchet (European Commission), Miloš Hatapka (European Commission), Jérôme Déroulez (France), Edouard de Leiris (France), Paul Beaumont (United Kingdom) and Robert Keith (United States of America). The co-*Rapporteurs* Alegría Borrás (Spain) and Jennifer Degeling (Australia) and the members of the Permanent Bureau were *de facto* members of the Committee.

In addition to Special Commission meetings, the Drafting Committee met on the following occasions:

– 27 to 30 October 2003
– 12 to 16 January 2004
– 19 to 22 October 2004
– 5 to 9 September 2005
– 11 to 15 February 2006
– 16 to 18 May 2007
– 28 November and 7 December 2006 (via conference call)
– and during the Diplomatic Session.

*Applicable Law Working Group (WGAL)*

The Applicable Law Working Group was chaired by Andrea Bonomi, (Switzerland, *Rapporteur*) and had the following members: Mmes Nádia de Araújo (Brazil), Tracy Morrow (Canada), Patricia Albuquerque Ferreira (China), Marta Zavadilová (Czech Republic), Michèle Dubrocard (France), Angelika Schlunck (Germany), Sarah Khabirpour (Luxembourg), Dorothea van Iterson (Netherlands), Åse Kristensen (Norway), Raquel Correia (Portugal), Maria del Carmen Parra Rodriguez (Spain) and Gloria DeHart (IBA) and Messrs Lixiao Tian (China), Antoine Buchet (European Commission), Edouard de Leiris (France), Rolf Wagner (Germany), Alberto Malatesta (Italy), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Robert Spector (United States of America) and David McClean (Commonwealth Secretariat). The co-*Rapporteurs* Alegría Borrás (Spain) and Jennifer Degeling (Australia) and the members of the Permanent Bureau were *de facto* members of the WGAL.

The WGAL met at The Hague on the following occasions:

- 27 to 28 May 2004
- 15 June 2004
- 7 to 8 February 2005
- 14 to 16 July 2005
- 9 to 11 March 2006
- 17 to 18 November 2006

Otherwise, the proceedings were conducted by means of an electronic discussion list.

*Administrative Co-operation Working Group*

The Administrative Co-operation Working Group was structured as a working group, and decisions were reached by group consensus. Members of the Hague Conference Permanent Bureau served as facilitators, and Mária Kurucz (Hungary), Mary Helen Carlson (United States of America) and Jorge Aguilar Castillo (Costa Rica) were appointed as co-convenors of the Working Group.

The Administrative Co-operation Working Group held teleconference calls between the 2004 Special Commission and the 2007 Diplomatic Session and also communicated via e-mail and a listserv.

*Forms Working Group*

The Forms Working Group was co-chaired by Zoe Cameron (Australia) and Shireen Fisher (IAWJ) and had the following members: Mmes Katie Levasseur (Canada) (Civil Law), Tracy Morrow (Canada) (Common Law), Christina Wicke (Germany), Hilde Drenth (Netherlands), Helena Kasanova (Slovakia), Anna Svantesson (Sweden), Meg Haynes (United States of America), Ana-Sabine Boehm (DIJuF), Patricia Whalen (IAWJ), Kay Farley (NCSEA), Sandrine Alexandre (Permanent Bureau) and Jennifer Degeling (*Rapporteur*) and Messrs Jorge Aguilar Castillo (Costa Rica), Edouard de Leiris (France), Hans-Michael Veith (Germany), Philip Ashmore (United Kingdom), William Duncan (Permanent Bureau) and Philippe Lortie (Permanent Bureau).

The Forms Working Group met by conference calls on 23 occasions: 27 January, 3, 9, 17 and 23 February, 3 March, 25 May, 8 June, 6 and 20 July, 28 September, 26 October and 23 November 2005; 24 January, 15 March, 26 April and 30 August 2006; 22 March, 12 and 26 April, 31 May, 5 and 19 July 2007. It met in person on four occasions: 15 April 2005, 28 June 2006 and 6-7 and 13 May 2007.