

Comments of the GOJ to Preliminary Document No. 16

First of all, the Government of Japan would like to express appreciation for the work of the Drafting Committee in preparing this Draft Convention. The following are the comments of the GOJ to the Draft Convention. Please note, however, that the following comments are not intended to be comprehensive and we may change or add the comments subject to further review.

1. Article 6.2 h)

Article 6.2 h) stipulates that Central Authorities shall provide assistance in establishing parentage where necessary for the recovery of maintenance. Although we admit that, in some cases, establishing parentage is an integral issue as a prerequisite to the recovery of maintenance, we are of the opinion that the scope of this Convention should not, in principle, cover the question of establishing parentage itself, and that careful consideration should be given to whether or not it is reasonable to clearly stipulate the provision of such assistance as one of the functions of Central Authorities.

2. Articles 9, 10 and 11

The scope and addressee of the “application” in this Draft Convention should be clarified and drafted precisely for the following reasons: .

The “application” in Article 10 is considered to be an application seeking the decision of the courts of the requested State. Procedural matters regarding such applications, such as the form and language of the judicial documents, should be left to the treatment of the national law of each State and thus such applications should suffice procedural requisites in the requested State, even filed via the Central Authority of the requested State.

On the other hand, Articles 9 and 11 refer to the application forwarded by the Central Authority of the requesting State for administrative assistance to the Central Authority of the requested State.

Therefore, distinction should be made in the Draft Convention to indicate each situation. One way would be to use the word “request” instead of “application” for the situation described in Articles 9 and 11 (i.e., the administrative request to the Central Authority of the requested State through the Central Authority of the requesting State).

3. Article 10.1

(1) In a) there is a note (note 6) on the necessity of discussion on whether an application to recognise and enforce a decision in a requested State should extend to a decision made in a non-Contracting State. We understand that the purpose of such extension is to promote the recovery of maintenance by creditors, however, we believe that careful consideration should be given to this issue because such extension is questionable from the point of view of reciprocity, even if the substantive requirements of such recognition and enforcement were to be governed by the national law of the requested State.

(2) The scope of the application for “recognition or recognition and enforcement of a decision made in a Contracting State” in subparagraph a) should be clarified, i.e., whether subparagraph a) covers an application for recognition/enforcement of a decision made in a Contracting State that is filed directly to a competent authority (such as the courts) of another Contracting State when a creditor who has his/her (habitual) residence in a non-Contracting State.

(3) With regard to c), as stated above, because establishing parentage is merely a precondition for the recovery of maintenance and should not be included in a subject of application, we would propose to delete a phrase “including where necessary the establishment of parentage”.

4. Article 11

Usage of fixed forms would enable the exchange of precise standardized information between the Central Authorities. For such purpose, however, the forms do not need to be mandatory. We consider Option 1 (without a mandatory form) desirable from the point of view of flexibility in application of this Draft Convention and easiness in revising the form in cases where some deficiencies are found through practice.

5. Article 13

The criteria and contents of legal aid and exemption from the costs or expenses of the requested State depend on many factors, including the fiscal conditions of the requested State. Therefore, from the point of view that this Convention should be acceptable to as many States as possible, such criteria and contents should be left to the national law of each requested State, and

detailed provisions such as paragraphs 2, 3, and 5 should be deleted. In particular, we do not consider paragraph 5 reasonable in that even creditors who only receive partial legal aid or exemption in the requesting State would be entitled to the most favorable legal aid or the most extensive exemption in the requested State under this paragraph.

6. Article 14

This Article should be deleted from the following reasons:

1) In light of the discussions of the first and second special committees that it is impossible to provide for the jurisdiction of commencing proceedings (rule of direct jurisdiction), this Draft Convention does not provide for such and therefore it is incongruous to provide this Article, which limits the debtors on bringing proceedings in certain cases. And thus, the purpose of providing this Article is not clear; and

2) There is no need to provide this Article because in many States the cases would be treated in the same way even without this Article.

Having said the above, in the event of this Article remaining in the Draft Convention, at the very least, the phrase “in which the original decision can be recognized or enforced under the Convention” should be inserted after the terms “any other Contracting State” as stated in note 20, because this Article should apply only to such State.

7. Articles 15 and 25

We do not believe that authentic instruments should be included in the scope of this Draft Convention, because the national law governing such instruments varies from State to State, and there may be insufficient guarantee by the system in some States that the agreement in such instruments is in accordance with the true intent of the parties or of procedural fairness. If this Convention is to provide for “authentic instruments”, at the very least, it needs to be defined in order to clarify the scope of this Convention.

Private agreements should also be excluded from the scope of this Convention, as they are more problematic in terms of agreement and procedural fairness.

8. Article 16

(1) The aim of Article 16.1 f) seems to be the same as that of Article 8 in

the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. We consider that further discussion is needed on whether to stipulate this particular provision because it is inconsistent with the efforts of provisions a) to e) to individually enumerate the bases of jurisdiction, and because most of the cases in which an authority exercises its jurisdiction on family matters are already covered by provisions a) to e).

(2) Paragraph 3 appears to provide for the obligation of recognition and enforcement if the national law of Contracting States confers jurisdiction based on the theory of fact-based jurisdiction. However, even without such specific provision, the cases would be treated in the same way based on the theory. Therefore, the purpose and the reasons for stipulating this provision should be clarified.

(3) The purpose and reasons for providing paragraph 4 should also be clarified because, according to other related provisions in this Draft Convention, it is clear that assistance should be given to an applicant who applies for a new decision to the Central Authority of the State regardless of whether or not the State once denied the recognition.

(4) We consider the reasons for providing paragraph 5 unclear. This paragraph is inconsistent with paragraph 2 which allows Contracting States to deny recognition of a maintenance decision by virtue of a reservation. In other words, it seems theoretically difficult to allow any effect, namely, “establishing the eligibility of the creditor,” on a decision in a Contracting State when the Contracting State has denied recognition of the decision.

(5) Paragraph 6 should be revised so that the decision shall be enforced after the periods of challenge or appeal have passed without any challenge or appeal, or after the challenge (appeal) procedure has been concluded. Otherwise, if a decision is reversed in the State of origin after it was enforced in the State addressed, the debtor has to recover his/her damages across the border, which would be detrimental to the interests of the debtor.

In addition, the above proposed phrase would be necessary if a proviso of Article 18 e) were to be stipulated in this Convention since cases may arise where the debtor has no chance to state his/her opinion until the stage of the challenge or appeal proceedings.

9. Article 17

We consider it necessary to clarify what kinds of severable cases are being premised and what kinds of decisions are to be considered severable in this Article.

10. Article 19

(1) We would like to confirm “the procedures” governed by the law of the State addressed under Article 19.1 include the language and form of the judicial applications. As stated in above 2., the language and form of the applications and other related documents should suffice the requirements under the national law of the requested State, and thus be stated in the official language(s) of the requested State or any other language(s) which the requested State indicates. Please also refer to our comment regarding Article 39 below.

(2) Article 19.2 provides that in certain situations the requested Central Authority shall “refer” application to the competent authority. In case this provision means that the Central Authority should legally represent the applicant in making application to the competent authority for recognition or enforcement, such practice puts too much of a burden on the Central Authority, and it is inconsistent with Article 6.1 b) which requires the Central Authority to assist in the beginning procedures. Therefore, this provision should be construed to mean that it is sufficient for the requested Central Authority to forward an application by a creditor to the competent authority addressed (such as a court). Please be advised that a word “transmit” is used in other Articles where functions of Central Authority are described (cf. Articles 6.1a), 12.2, 33, and 35).

(3) Article 19.4 denies the right for the parties to state opinions at the proceeding of recognition or enforcement of decisions. However, careful consideration should be given to this provision since it could cause serious problems such as the possibility of the enforcement of decisions which were not proper and should not have been enforced, or further the possibility of the heavy burden of recovering damages across the border being placed on a party against whom an improper decision was enforced. Therefore, from the point of view that this Convention should be made acceptable to as many

States as possible, Article 19.4 should be modified to allow the Contracting States to follow domestic procedural rules, especially for those States which have confrontational procedural rules in their national laws for recognition or enforcement of decisions. In the same context, safeguard provisions should also be added to Article 19.4 giving the parties the right to state their opinion in the proceeding of execution, or alternatively decisions of enforcement should be made unenforceable until the periods of challenge or appeal have passed without any challenge or appeal, or the challenge or appeal procedure has been concluded.

Also, we believe that the reasons for refusal of recognition and enforcement should be the reasons specified in Articles 16 and 18, because if the reasons for refusal are limited to those in Article 18 a), the same problem of improper execution could occur when recognition or enforcement of the decisions is denied on grounds other than those provided for in Article 18 a).

(4) With regards to paragraph 5, the phrase, “An appeal shall be dealt with in accordance with the rules governing procedure in adversarial matters” should be reinserted (as inserted in Article 18.5 of Preliminary Document No.13) to ensure due process for parties.

(5) Paragraph 6 should be deleted. As this Convention is intended to be concluded by States which have great diversity in geographical or legal conditions, the periods for challenges or appeals should not be treated in a uniform way, but should be left to the national law of each Contracting State.

(6) Paragraph 8 should be deleted as a matter of course.

11. Article 20 b)

It would be practically difficult for the Central Authorities or other authorities of the requested State to examine whether such decisions satisfy the requirement under Article 15.3. Therefore, the brackets placed around the phrase “and, in the case of a decision by an administrative authority, that the requirements of Article 15(3) are met” should be removed.

12. Article 27.3

This Article should be deleted because this Article can be read as giving more effect to that in the requested State than in the State of origin. The

limitation period of arrears should be governed by an applicable law for the statute of limitations on maintenance and therefore should be left to the interpretation of the national law (private international law) of the requested State.

13. Article 29

As the enforcement measures of decisions should be left to the national law of the States, this Article is unnecessary. We may, however, accept this Article as long as enumerated items are provided as illustrations.

14. Article 31

The Central Authority of the State of origin should give assistance to applicants in order to ensure that necessary information and documents are attached to the applications (Article 12.1). We consider this Article to be of great importance and to be indispensable to this Draft Convention in ensuring that such assistance is effective and ensuring that the procedure of recognition and enforcement is rapid.

15. Article 37

In view of clarification of the scope of the power of representation and protection from future disputes, requiring the applicant to submit a power of attorney to the Central Authority when such Authority represents the applicant or chooses a representative for the applicant is proper practice, and such practice should not be denied by this Convention. Therefore, this Article should be replaced by such term as, "The Central Authority of the requested State may require applicants to attach a power of attorney authorising the Central Authority to represent the applicant or to choose a representative for the applicant."

16. Article 39

As stated above, the form and language of judicial application documents should be left to the treatment of the national law of the States. Therefore, this Article should be modified enabling States to limit the scope of this Article to requests for assistance to Central Authorities.