Australian Government

Child Support Agency

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

AUSTRALIAN COMMENTS ON PRELIMINARY DOCUMENT 29
SEPTEMBER 2007

PRELIMINARY NOTE: These comments are not intended to be comprehensive and may be changed before the Diplomatic Session.

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 2 Scope

Article 2(3)

The text within square brackets should be retained. The draft Explanatory Report at paragraph 54 states that even if paragraph 3 is deleted, it is the overwhelming view of the Special Commission that the Convention applies to all children without discrimination. Paragraph 3 should be retained because it is preferable that it be overt that the Convention applies to all children without discrimination.

The difficulties for States that cannot accommodate this scope are acknowledged. The preferred approach is that these States rely on the "public policy" exception in Art 19 *a)* or an additional ground for refusing recognition and enforcement, as proposed in Working Document 51.

Article 3 Definitions

Articles 3 a) and b)

The definitions of "creditor" and "debtor" should be retained to make it clear that the Convention applies to persons who are seeking a maintenance decision for the first time, as well as persons who are already subject to a maintenance decision.

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 5 General functions of Central Authorities

Article 5 b)

The obligation in paragraph *b)* should be retained. It is important for the effective operation of the Convention. If Article 51 is accepted then paragraph *b)* could be deleted.

Article 6 Specific functions of Central Authorities

Article 6(1) b)

The draft Explanatory Report states that sub-paragraph *b)* is inspired by Article 7 of the 1980 Hague Child Abduction Convention, but the words "judicial or administrative" have been deleted before "proceedings". These additional words should be included in this Convention also, to avoid any doubt that appropriate proceedings may be of either a judicial or administrative nature.

Article 6(2) b)

The words "or the creditor" in sub-paragraph *b)* should be retained to ensure applications made by a debtor can be processed effectively.

Article 7 Requests for specific measures

Article 7(1)

There is uncertainty about the application of Article 7 in a case where an application under the Convention is not yet contemplated. For example, if a creditor in Australia seeks establishment of a maintenance decision by an Australian authority against a debtor living in the United Kingdom. At this stage it is not yet necessary to contemplate an application under the Convention because the debtor may pay voluntarily, but it would be very useful to be able to obtain accurate information about the income and other financial resources of the debtor for the purpose of establishment.

The above situation is not covered by the current wording of Article 7(1), because at the time of the request no application under Article 10 is contemplated. It would appear to instead fall within Article 7(2) as an internal case having an international element. However, the draft Explanatory Report is not clear on this point. Paragraph 199 identifies one situation in which a request for specific measures could be made by a Central Authority as "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" and implies that this situation does fall within Article 7(1). Paragraph 211 states that a request under Article 7(1) could be made to assist a person to decide if an Article 10 application "should *or could*" be made (emphasis added) and paragraph 212 refers to a "possible" Article 10 application. This also implies that a request under Article 7(1) could properly be made where no application under Article 10 is contemplated.

The wider application for Article 7(1) implied in the Explanatory Report is preferred because this would directly support the aim of the Convention to improve the international recovery of child maintenance. The wording of Article 7(1) could be clarified by amending the second sentence as follows:

"The Requested Central shall take such measures if satisfied that they are necessary to assist a potential applicant under Article 10."

This would also make clear the difference between Article 7(1) and 7(2).

The reference in Article 7(1) to Articles 6(2) g), h), i) and j) is supported.

Article 7(2)

Article 7(2) should be retained.

CHAPTER III - APPLICATIONS THROUGH CENTRAL AUTHORITIES

Article 10 Available applications

Article 10(1) d)

Sub-paragraph *d)* is currently limited to cases where the bases for refusing to recognise or enforce a prior decision are a lack of jurisdiction under Article 17 or the grounds specified in Article 19 *b)* or *e)*. This provision should also apply where the ground for refusal was Article 19 *a)* (recognition or enforcement of a decision is manifestly incompatible with the public policy of the State addressed). It is possible that recognition of a decision is refused on this basis, but a decision could be established in the State addressed for the same parties under different conditions.

For example, the laws of a Contracting State may permit marriage between same-sex persons and a maintenance decision of that state may be based on such a marriage. The Commonwealth laws of Australia do not provide for recognition of a maintenance decision that is based on a same-sex relationship. However, some State and Territory legislation provides for the establishment of a maintenance decision based on a de-facto relationship between the same parties.

A further example is a decision concerning a maintenance obligation towards a child born out of wedlock. At a previous Special Commission meeting it was suggested by one expert that a state may be unable to recognise and enforce such a decision, but this did not mean maintenance could not be obtained for the child by other means, for example if the debtor acknowledges the child. Provision for an application for establishment of a new decision may be useful in these circumstances.

Article 10(2)

Applications under Article 10(2) should be equally subject to the obligations to provide assistance in Article 6 and to provide effective access in Article 14.

Paragraph 2 should also provide for applications by "debtors" for establishment of a decision. This would create a greater equity between debtors and creditors and encourage debtors to accept responsibility for maintenance obligations. These applications would be subject to the jurisdictional rules of the requested state.

The following wording is proposed:

"The following categories of application shall be available to a debtor in a requesting State seeking to pay maintenance under this Convention or against whom there is an existing maintenance decision:
a) establishment of a decision in the requested State where there is no existing decision;
b) modification of a decision made in the requested State;
c) modification of a decision made in a State other than the requested State."

Article 11 Application contents

Article 11(1) e)

There is uncertainty about the precise 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 17, 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. However, the draft Explanatory Report at paragraph 312 suggests this term might refer instead to the grounds of the maintenance obligation in question, for example, parentage.

To clarify this the following amendment should be considered:

e) the [legal] basis of the maintenance obligation
f) the grounds upon which the application is based

Article 11(3)

There is no inconsistency between Article 11(3) and Article 14 (Option 1 nor Option 2). Documentation concerning the entitlement of the applicant to legal assistance must only be provided if it is "necessary". It would only be necessary in cases where [under Option 1] Article 14(3) or 14(5), or [under Option 2] Article 14 *ter* apply, and not otherwise.

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

Article 12(2)

The Transmittal Form referred to in Article 12(2) is supported. It is an important element of the improved procedural framework established within Chapter III.

Article 12(9)

It is important to reduce delays that could be associated with seeking additional documents or information. To achieve this the word "may" in the second sentence ought to be replaced by the words "shall promptly".

There is also uncertainty about the precise length of the period to be allowed. The current wording suggests that the requested Central Authority must allow the Requesting Central Authority a period of "at least" 3 months, and could allow a greater period. The draft Explanatory Report at paragraph 364 suggests that 3 months should be the maximum allowed. To resolve this uncertainty the words "at least" should be deleted from Paragraph 9.

The following wording is suggested:

"However, the requested Central Authority shall promptly ask the requesting Central Authority to produce these within a period of 3 months."

Article 14 Effective access to procedures

Option 2 is preferred.

These provisions should apply to public bodies. Free legal assistance should be given to public bodies under Article 14 (Option 2) *bis*.

Article 14(1)

"Applicant" should include a creditor, debtor or public body.

Article 14 bis(1)

Article 14 bis (1) must apply to both creditors and debtors. There is an important relationship between the obligation to provide effective access and Article 15 – limit on proceedings. Article 15 will operate to restrict the right of a debtor to seek modification of a decision in a convenient jurisdiction. This can only be justified if the Convention also creates a means for the debtor to bring an application for modification under the Convention (Article 10(2)) and a meaningful right for a debtor to effective access to procedures (Article 14).

Article 14 bis(2) b)

The words in square brackets regarding appeals should be reconsidered. Article 14 (Option 2) paragraph 1 refers to "...the procedures, including enforcement and appeal procedures, arising from applications...". This indicates that procedures arising from an application include appeals procedures. Thus the reference in paragraph 2 *b)* to "or any appeal" is incorrect. The words should either be deleted (and it would be implicit that this includes appeal processes), or be amended to: "including any appeal".

Article 14 bis (2) c)

Option C is preferred. The advantages of filtering out the few undeserving cases are outweighed by the burden of overly complex rules.

Article 14 ter b)

As the draft currently stands a debtor cannot apply for recognition and enforcement under the Convention, therefore this provision need apply only to creditors.

CHAPTER V – RECOGNITION AND ENFORCEMENT

Article 19 Grounds for refusing recognition and enforcement

Article 19 e)

There has been discussion in the Special Commission meetings about whether the assessment of whether a respondent has had "proper notice" is to be made in accordance with the law of the state of origin or the law of the state addressed. The draft Explanatory Report is not clear on the question. At paragraph 517 the report states that it is not necessary for the defendant to have been "duly served" and further that the term "proper notice" accommodates both judicial and administrative systems. However, paragraphs 519-520 of the report suggest that if notice of a decision is not served in accordance with the internal law of the States of civil law tradition, the decision will not be entitled to recognition and enforcement under the Convention. This question should be clearly resolved in the Convention.

Article 20 Procedure on an application for recognition and enforcement

Article 20(4)

The grounds on which the relevant authority in the requested State may review *ex officio* an application for recognition and enforcement should exclude Article 17, but include Articles 19 *a)*, *c)* and *d)*. In Australia the competent authority for recognition and enforcement is likely to be aware, even without submissions by the applicant or respondent, that the circumstances in paragraph *c)* or *d)* apply. If the competent authority cannot refuse to make a declaration or registration at this point, the authority will be forced to register a decision that is incompatible with a prior decision that is also registered for enforcement.

Article 20(6)

There is a typographical error in paragraph 6 – it should read: "notification under paragraph 5".

Article 20(8)

Recognition and enforcement might be applied for in respect of payments that fell due in the past as well as payments due in the future. If the debt for past payments has been fulfilled, a challenge or appeal should be allowed against recognition and enforcement of that part of the decision only.

The following wording is suggested:

"A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt regarding recognition and enforcement in respect of payments that fell due in the past."

Article 20(11)

The Drafting Committee has raised the question whether there are any provisions in Article 20 from which Contracting States should not be able to derogate. The requirements to notify the applicant and the respondent under paragraphs 5 and 9 are important protections and should be guaranteed.

Article 21 Documents

Article 21(1) b)

The documents listed in paragraph *b)* must be provided in all circumstances. However, for applications between some states a document stating that the requirements of Article 16(3) are met will never be necessary. Article 21 should provide flexibility for these states to operate on this basis and in accordance with the spirit of trust and cooperation underpinning the Convention.

The following wording is suggested:

...

b) a document stating that the decision is enforceable in the State of origin;

c) in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met, save where the requested State has made a declaration in accordance with Article 58 that such a document is not required.

Article 21(1) f)

The wording of paragraph f may need to be amended if Article 14 *ter* b) (Option 2) is amended as suggested in paragraph 441 of the Explanatory Report.

The following wording could be considered:

" f) where necessary, documentation showing the extent to which the applicant is entitled to free legal assistance in the State of origin."

CHAPTER VI – ENFORCEMENT BY THE REQUESTED STATE

Article 28 Enforcement under national law

Article 28(3)

Paragraph 3 contains a very important principle for Australia. Where a decision has been declared enforceable or registered for enforcement under the Convention, the competent authority in the State addressed must proceed to take enforcement measures, in accordance with the law of the State addressed.

The suggestion by the Drafting Committee in Preliminary Document 27 for the inclusion of wording to the effect that in the case of applications through Central Authorities enforcement should be without further cost to the applicant is strongly supported.

Article 29 Non-discrimination

There is a significant inter-relationship between Article 29 and the other provisions of Chapter VI that should be noted. For those States with well developed enforcement infrastructure and a wide range of enforcement methods, Article 29 will create an obligation to extend their system to benefit international creditors. This will be at a significant cost burden to those states. For other states lacking extensive systems for enforcement, Article 29 does not impose any great burden at all. The other provisions in Chapter VI, such as Articles 28 and 30, are essential to address this imbalance. Those provisions encourage all Contracting States to make available effective measures for enforcement of decisions.

Article 30 Enforcement measures

Article 30(2)

Paragraph 2 is an important provision for Australia. Article 30 requires Contracting States to make available effective measures for enforcement of decisions and paragraph 2 notes some measures that have proven to be effective in Member States. As noted above with respect to Article 29, this provision is intended to reassure States that already have effective systems for enforcement and will be obliged to apply these to cases under the Convention.