

The New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

Professor William Duncan *Deputy Secretary General of the Hague Conference on Private International Law*

On 23 November 2007 more than 70 States,¹ as well as the European Community,² successfully concluded at The Hague, after negotiations which spanned 4 years, the new global Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance,³ as well as its first Protocol on the Law Applicable to Maintenance Obligations.⁴ The new Convention holds the promise of a new era in the international recovery of maintenance – one in which cross-border procedures, particularly in child support cases, should be simplified, swift, accessible and cost effective.

The new Convention pursues these objectives by a combination of means:

- an efficient and responsive system of co-operation for the processing of applications between the Contracting States;
- the provision in Contracting States of procedures for establishment, as well as for recognition and enforcement and modification, of maintenance decisions;
- provisions which ensure effective access to cross-border maintenance procedures;
- a broadly based system for the recognition and enforcement of maintenance decisions;
- expedited and simplified procedures for recognition and enforcement; and
- a requirement of prompt and effective enforcement.

Moreover, the Convention pays particular attention to many of the matters of detail which in practice can affect the efficiency with which international claims are pursued, for example, language requirements, standardised forms and exchange of information on national laws. It also allows and encourages the use of new information technologies to reduce the costs and delays which have in the past plagued international claims.

The new Convention builds on the strengths of existing international instruments, in particular the existing Hague Conventions,⁵ the New York (United Nations) Convention of 1956 on the Recovery Abroad of Maintenance, as well as regional instruments.

It is hoped and expected that the new Hague Convention will provide the common global framework for international maintenance procedures – one which helps to reduce the confusing multiplicity of procedures which characterises the existing international set-up. At the same time, the Convention will not inhibit the operation or development of even more integrated

systems at regional or bilateral levels.

Scope

The whole Convention applies on a mandatory basis to child support cases.⁶ The Convention also covers spousal support, but its provisions on administrative co-operation (ie, the system whereby applications may be channelled through Central Authorities) will only apply to spousal support as between States which have made a positive declaration to that effect.⁷ Contracting States may also by declaration bring within the scope of the Convention (or any part of it) any other maintenance obligations arising from a family relationship, parentage, marriage or affinity. For example, a particular State may declare that the Convention, or any part of it, extends to certain obligations in respect of children who are over 21, or in respect of vulnerable adults, or in respect of parents or siblings, or in respect of certain forms of partnership where these are seen as 'arising from a family relationship'. Any such declaration will operate on a reciprocal basis, in the sense that mutual obligations between two States will only arise to the extent that their declarations correspond.

During the negotiations an effort was made by certain Latin American States to bring maintenance obligations in respect of vulnerable persons within the compulsory scope of the Convention. A move in this direction is made in Art 37(3), which covers direct requests (explained below) for recognition and enforcement of certain decisions granting maintenance to a vulnerable adult. The importance which States attach to this matter is further reflected in a recommendation made at the Diplomatic Session that the Hague Conference should in future consider the feasibility of developing a Protocol concerning the international recovery of maintenance in respect of vulnerable persons.⁸

It is important also to note that, as in the 1973 Hague Conventions, the role of public bodies acting in place of a creditor, or to whom reimbursement of maintenance is owed, is covered by the new Convention.

The processing of applications

Most applications for child support are likely to be processed through the system of Central Authorities established under the Convention. In many countries, the case-specific functions of the Central Authority will be carried out by child support agencies or authorities operating centrally or regionally.⁹ The primary role of such authorities will be to transmit and receive applications and to initiate or facilitate the institution of proceedings.¹⁰ Other functions¹¹ include assistance in

locating a debtor or creditor or obtaining information about the resources of either; encouraging amicable solutions with a view to voluntary payment; facilitating ongoing enforcement, as well as the collection and transfer of maintenance payments; assistance in establishing parentage where necessary for support purposes; and help in obtaining any necessary provisional measures. These functions will mostly be carried out in the context of a specific maintenance application, but certain services (eg, location of the debtor or assets) may be requested in order to determine whether it is worth bringing an application.¹²

The applications¹³ in respect of which Central Authority services are available to a creditor include recognition or enforcement of an existing decision, enforcement of a decision recognised in the requested State, establishment of a maintenance decision, or where necessary parentage, and modification. Establishment may be applied for where there is no existing decision (eg, if the creditor decides to make an international application in the country where the debtor resides), or where recognition of an existing decision is not possible. It is noteworthy that a debtor may also avail of Central Authority services in making an application for modification or to obtain recognition of an existing decision. Chapter III of the Convention also sets out documentary requirements as well as other procedural requirements which are designed to promote speed and efficiency in the processing of applications.

Effective access to procedures

It was always recognised in the negotiations on the new Convention that even modest financial hurdles can often frustrate the bringing of applications for child support or other maintenance. Early on it was agreed that the services of Central Authorities should in general be provided without cost to the applicant.¹⁴ However, given the resource implications for States, many of which do not have systems of free legal aid in civil cases, discussions on the costs of providing legal assistance were prolonged and difficult and did not reach a conclusion until the final negotiating session.

The conclusion was in fact quite remarkable and a testimony to the strong wish of all the negotiating Parties to put in place international procedures which are genuinely accessible. The main elements of the agreed package of provisions are in broad terms as follows:¹⁵

- (1) All Contracting States will be under an obligation to provide effective access to procedures, including enforcement and appeal procedures, arising from the applications outlined above.
- (2) One way of doing this will be to provide procedures which are simple and which, with the assistance of the Central Authority, allow an applicant to proceed without the need for further legal assistance.
- (3) Where legal assistance is needed for a creditor in a child support case, it must be made available free, save in certain very exceptional circumstances. This applies both to applications for establishment of a decision and for recognition and enforcement.

A Contracting State may, as an alternative, in cases involving establishment of child support, declare that it will apply a 'child-centred' means test, ie, one based on the means of the child rather than the parent.

- (4) In the case of other applications under the Convention which are processed through Central Authorities (ie, all applications which do not concern child support or applications made by a debtor (eg, for modification) in respect of child support), the provision of free legal assistance may be made subject to a means or merits test.

These provisions are ground-breaking and are likely to be key to the successful operation of the Convention. They are also an encouragement for the introduction by States of simplified, cost-effective and user-friendly national child support systems.

Recognition and enforcement of existing decisions

The bases for recognising and enforcing maintenance decisions of other Contracting States under the Convention are broad.¹⁶ The habitual residence of either the respondent or the creditor in the State of origin when proceedings were initiated, are likely to be the principal bases in practice. However, basing recognition on creditor's jurisdiction remains a problem for some States, such as the USA, which insist on some nexus between the respondent and the State of origin. For this reason, a reservation in respect of creditor's jurisdiction is possible,¹⁷ but any State making such a reservation will in return be obliged to recognise foreign decisions made in factual circumstances which confer or would have conferred jurisdiction on its own authorities to award maintenance.¹⁸

This compromise has removed one of the barriers which in the past prevented more widespread ratification of the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. In many other respects the basic rules governing recognition and enforcement are similar to those set out in the 1973 Hague Convention, though some changes are made in the grounds for refusing recognition and enforcement.¹⁹

The detailed procedures set out in the new Convention regulating the procedure on an application for recognition and enforcement represent a considerable advance on the 1973 Hague Convention, in which this matter was left to be regulated largely by the law of the State addressed. It is by now well understood that cumbersome procedures at the stage of recognition and enforcement – including any extensive *ex officio* review – may cause serious delays and costs and place unjustified additional burdens on a creditor. The new procedures will not appear strange to those who are familiar with recent Brussels Regulations,²⁰ with the UIFSA system in the USA²¹ or with the Canadian Uniform Act.²² All adopt a similar approach, minimising *ex officio* review and for the most part placing the burden of raising objections to recognition and enforcement on the respondent. Given that most applications for

recognition and enforcement are likely to be uncontested, this leads to a much expedited procedure. The new procedure, which is set out in Art 23, limits *ex officio* review to the ground of public policy; it rules out submissions by the parties at the initial stage when the foreign decision is registered or declared enforceable; it allows for a challenge by either party to the decision on registration, but within a strict time period and on limited grounds; it also supports, as a general principle, the idea that any further appeal should not have the effect of staying enforcement.

Because procedures whereby foreign decisions are registered for enforcement or declared enforceable are not familiar to certain States in which applications for recognition and enforcement go directly to the court for a decision, it proved necessary to provide in the new Convention an alternative procedure on an application for recognition and enforcement, which Contracting States may opt for by declaration.²³ This alternative procedure is also designed to ensure that procedures are expeditious and that the grounds on which the court addressed may review a foreign decision of its own motion are limited.

‘Decisions’ and ‘maintenance arrangements’

The definition of a decision for the purposes of recognition and enforcement includes a settlement or agreement concluded before or approved by a judicial or administrative authority. It may also include automatic adjustment by indexation, a requirement to pay arrears, retroactive maintenance, interest payable and a determination of costs and expenses.²⁴

Moreover, the Convention provides for the recognition and enforcement of ‘maintenance arrangements’,²⁵ which include agreements as to maintenance drawn up in the form of an authentic instrument or otherwise authenticated by, or concluded or registered or filed with a competent authority. However, to qualify, such an agreement must be enforceable ‘as a decision’ in the State of origin. This willingness to include within the scope of recognition a wide range of agreements which have in some way been formalised was motivated by a widespread consensus to accommodate and encourage within the international framework voluntary agreements in respect of maintenance matters. It accords also with the responsibility which Central Authorities will have to encourage amicable solutions with a view to the voluntary payment of maintenance.²⁶

Direct requests

Nothing in the Convention prevents an applicant from making an international application directly to the court or other competent authority in the requested State, assuming as is usually the case that the internal law of that State allows this. For example, an application for recognition and enforcement may be made, usually with the assistance of private counsel, without employing the mediating Central Authority procedures. The broad bases for recognition and the expedited procedure for recognition and enforcement outlined above will generally apply in such cases. However, the new

generous regime of free legal assistance in child support cases, as well as the more general principle of effective access to procedures, is confined to applications which are channelled through the Central Authorities.²⁷

Enforcement under internal law

Experience with other areas of international family law has shown that the best procedures may come to nought if they are not complemented by the effective enforcement of orders in the country where enforcement is needed. In fact, difficulties and delays with regard to enforcement under national law have been something of an ‘Achilles’ heel’ in the system of peremptory return provided for by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. In the area of maintenance, the problems of enforcement are well known within domestic law and have been the subject matter of radical thinking and reform in several jurisdictions. It has not been the practice for Hague Conventions to stray into what has been regarded as a preserve of national law. Nevertheless, the importance attached to this matter has led to certain innovations in the new Convention.²⁸ Enforcement is to be ‘prompt’ and the enforcement measures made available must be ‘effective’. The additional burden that is imposed on an applicant where a separate application for enforcement is required is removed. Moreover, the requirement of a Contracting State to provide effective access to procedures extends equally to enforcement procedures.

Specific measures of enforcement are not mandated. Nevertheless, the Convention takes the unusual course of providing an illustrative list of possible enforcement measures. This includes, as well as some of the more familiar techniques, tax refund withholding, credit bureau reporting and the denial, suspension or revocation of licenses including driving licenses. It will be interesting to see what impact this ‘educational’ provision has, particularly in countries where such methods raise Constitutional questions.

Information exchange

Another unusual feature of the new Convention is its provision for the exchange of information concerning the laws, procedures and services available in the different Contracting States.²⁹ The provision is designed to ensure that Central Authorities will have sufficient information about the laws of other States to be able to operate the Convention efficiently and give accurate advice to applicants. It also serves to supplement certain provisions of the Convention, such as those which set out the functions of Central Authorities, which are somewhat flexible, by requiring States to indicate with more precision how they will meet their broadly expressed obligations. The provision of information is required of a Contracting State at the time of ratification or accession. Already considerable work has been carried out to prepare a standardised form in which this information may be made available (a ‘country profile’ form), to be posted on the Hague Conference website.

The future

The negotiations for the new Convention throughout the 4 years were conducted with vigour and commitment by States from all regions of the world. This work was supplemented by the continuing efforts of a standing committee on administrative co-operation which has already put in place some of the building blocks for the establishment of an effective network of Central Authorities. A great deal of thought has also already been given by the negotiators, as well as the Permanent Bureau, to the measures that are needed to ensure the effective and rapid implementation of the Convention, as well as for the eventual monitoring and review of its operation.

The Explanatory Report on the Convention is in preparation. A Guide to Good Practice is to be drawn up on implementation of the Convention, as well as a handbook for case workers on its practical operation. Work, which is already advanced, will continue on the development of standardised forms for applications under the Convention, and on the country profile mentioned above. Work will also continue on the development of an automated case-management system which will further assist co-operation, efficiency and consistency in the processing of applications. All of this work is being carried out with a view to exploiting to the maximum the opportunities presented by new technologies.

The signing of the Convention by the USA on 23 November 2007, the day on which the text was established, was an extraordinary event and one which reflected a general spirit of optimism among the States, the Organisations and the individuals³⁰ involved. The new Convention does not solve all the problems; for example, further work will be necessary, by means perhaps of a Protocol, on uniform standards of jurisdiction, in order to tackle the problems that may arise from multiple decisions, and work needs to be done to develop efficient methods for the cross-border transfer and conversion of maintenance payments. Nevertheless, a major first step has been taken towards creating an international system which will be efficient, fair and accessible.

¹ The following Members of the Hague Conference have signed the Final Act: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, , Croatia, Czech Republic, Denmark, Ecuador, Egypt, Estonia, European Community, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Morocco, Norway, Netherlands, New Zealand, Peru, Poland, Portugal, Republic of Korea, , Romania, Russian Federation, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Ukraine, UK, USA, Uruguay and Venezuela. The following Observers (non-Member States) have also signed the Final Act: Algeria, Burkina Faso, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, India, Indonesia, Iran, Philippines and Vietnam. The following intergovernmental organisations attended: Commonwealth Secretariat and Mercosur. The following non-governmental organisations attended: International Society of Family Law, International Association of Women Judges (IAWJ), International Bar Association (IBA),

Defence for Children International (DCI), National Child Support Enforcement Association (NCSEA), International Social Services (ISS), and the International Union of Latin Notaries (UINL).

² The new Convention is, in terms of the respective competences of the European Community and its Member States, a 'mixed' Convention.

³ The text of the Convention can be found on the HCCH website under Conventions at: http://www.hcch.net/index_en.php?act=conventions.text&cid=131.

⁴ The Protocol on the Law Applicable to Maintenance Obligations can be found on the HCCH website under Conventions at: http://www.hcch.net/index_en.php?*act=conventions.text&cid=133. The Protocol is not discussed in this article.

⁵ The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations and the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

⁶ Ie, in accordance with Art 2(1) a), 'to maintenance obligations arising from a parent-child relationship towards a person under the age of 21'. A Contracting State may by reservation reduce the age to 18 (Art 2(2)).

⁷ The provisions on administrative co-operation, however, apply automatically to applications for the recognition and enforcement of spousal support when the application is made with a claim for child support.

⁸ See the Final Act of Twenty-First Session, para C.9.

⁹ Article 4.

¹⁰ Article 6(1).

¹¹ For the full list see Art 6(2).

¹² Article 7.

¹³ Article 10.

¹⁴ See Article 8.

¹⁵ For the details, see Arts 14–17.

¹⁶ For the full list of bases, see Art 20.

¹⁷ Article 20(2).

¹⁸ Article 20(3).

¹⁹ Compare Art 22 of the new Convention with Art 5 of the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.

²⁰ See particularly the 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 (2001) OJ L 12/1).

²¹ Uniform Interstate Family Support Act (USA) 1996.

²² The Interjurisdictional Support Orders Act 2003.

²³ See Art 24.

²⁴ Article 19(1).

²⁵ Article 30.

²⁶ Article 6(2)(d).

²⁷ See Art 37.

²⁸ See Chapter VI.

²⁹ Article 57.

³⁰ 269 delegates were involved in the final round of negotiations.