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EXTRAITS DU RAPPORT EXPLICATIF SUR L'AVANT-PROJET DE CONVENTION (ART. 8, 14 ET 20)

établis par Alegría Borrás et Jennifer Degeling

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EXTRACTS FROM THE EXPLANATORY REPORT ON THE PRELIMINARY DRAFT CONVENTION (ART. 8, 14 AND 20)

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à l'intention de la Commission spéciale de mai 2007
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envers les enfants et d'autres membres de la famille

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for the attention of the Special Commission of May 2007
on the International Recovery of Child Support
and other Forms of Family Maintenance

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This information document contains extracts from the draft Explanatory Report on the preliminary draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance. It has been compiled by the *Rapporteurs* in order to assist the discussions concerning "effective access to procedures" and "procedures for recognition and enforcement" which are to take place from 14-16 May during the Fifth meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance which will take place in The Hague from 8-16 May 2007. The extracts cover Articles 8, 14 and 20 of the preliminary draft Convention.

Article 8 Central Authority costs

1. 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.[1] 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 Articles 8, as well as Article 14: (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.

2. The subject of Article 8 is administrative costs of Central Authorities. Legal costs are dealt with in Articles 14(6) – Option 1, 14 *quater* - Option 2, 16(1) and 40. Article 14 Option 1 or 2 may refer to both types. Article 42 refers to translation costs (an administrative cost). Articles 8, 14, 16(1), 40 and 42 are inter-related and should be read in conjunction with the each other.

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

3. It is a basic principle that each Central Authority bears its own costs in applying the Convention. This provision derives from Article 26 of the 1980 Child Abduction Convention and Article 38 of the 1996 Child Protection Convention. The possibility is left open for States to enter into bilateral or regional arrangements under Article 45(2) to provide other cost free services on a reciprocal basis.

4. 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 limit the possibility of a Central Authority imposing charges on any other person or body apart from the applicant referred to in paragraph 2.

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

5. 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.

[1] These principles were proposed in Prel. Doc. 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", drawn up by William Duncan, Deputy Secretary General, with the assistance of Caroline Harnois, May 2004, at para. 41-44.

There was no support in the negotiations for making any distinction in the Convention, in relation to Central Authority services, between individual applicants and public bodies as applicants seeking reimbursement for welfare support payments made to creditors or children. 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.

6. 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 40 could 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.

7. 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. However, a body referred to in Article 6(3) must not charge for services if it is performing functions as the Central Authority.

8. In earlier drafts of the Convention,[2] 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.

9. 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.[3] 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.

10. The principle of effective access to procedures 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.

11. If the applicant 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.

12. The relationship between Articles 6, 8 and 14 needs further explanation. Article 14 (Effective access to procedures) only relates to applications under Chapter III. If a service or function listed in Article 6 is provided or performed by a Central Authority in response to an application under Article 10, the service must be provided free of charge (Art. 8(2)); but if a service is provided by a body that is not the Central Authority or is not performing the functions of the Central Authority, the service may be charged for, provided effective access to procedures is guaranteed. The procedures referred to may be administrative or legal.

[2] Prel. Doc. No 16, October 2005.
[3] Prel. Doc. No 23, p. 23.

13. The experts at the 2005 Special Commission were reminded that the ultimate goal of the Convention is to get child support for children, not to provide services. A creditor who gets no child support even if all services are provided free will consider that the Convention has failed in its purpose.

14. In summary, charges may not be imposed: (i) for Central Authority services, on an applicant who makes an application under Article 10 – this may be a creditor, a debtor or a public body (Art. 8(2)); (ii) on a Central Authority (Art. 8(1)).

15. A specific exception to the general rule is that an applicant may be charged for translation costs under Article 42.

16. Charges may be imposed on: (i) an applicant receiving a service provided by a body other than a Central Authority; (ii) a person for whom a request under Article 7 is made, if the costs or expenses are "exceptional".

17. Charges may be imposed by: (i) a body which is providing a service that is not a Central Authority function; (ii) a Central Authority which is providing a service under Article 7 which gives rise to "exceptional" costs or expenses.

18. In the context of paragraph 2, "exceptional costs or expenses" 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 or expenses" 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").

Article 14 Effective access to procedures[4]

19. 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.

20. 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:

– 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.[5]

[4] Prel. Doc. No 26, "Observations of the Drafting Committee on the text of the preliminary draft Convention", contains the following comment "Consideration should be given to whether these provisions should apply (in whole or in part) to direct applications or to applications by public bodies."

[5] Prel. Doc. 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", drawn up by William Duncan, Deputy Secretary General with the assistance of Caroline Harnois, Legal Officer at para. 39-40. See also para. 3.

21. “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.

22. Under this Convention, it will be necessary to ensure that accessibility of procedures in different countries is equivalent, 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 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 pay the costs for legal representation and legal advice (*i.e.* State assistance in relation to a more costly system). The special needs of foreign applicants, such as problems of distance and language, also need to be considered.

23. 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. For example, the European Community has minimum rules established through a directive issued to its States,[6] and Member States would continue to apply these “higher standard” rules among themselves, and if possible, to extend these to other Contracting States.

24. The Special Commission has not yet decided the question whether “effective access to procedures” must be provided to a public body. The current text supports a broad inclusive interpretation. Article 33 states that a creditor includes a public body for the purposes of Article 10(1) and that implies that a public body may be an applicant for all purposes of Chapter III applications. Article 2(4) of the Convention clearly intends to allow a public body to claim reimbursement for benefits provided to a creditor in place of maintenance. The important issue for public bodies is to ensure that they have access to the Central Authority route for applications and to the Central Authority services, free of cost to an applicant, as provided for in Article 8(2). This issue could potentially be more important for public bodies than the question of getting free legal representation, since as a matter of policy, some requested States may not provide free legal representation to a foreign public body and presumably a public body would be excluded under the means or merits test in paragraph 3.

25. Two options regarding effective access to procedures are presented in the draft Convention. In both options, the fundamental approach of effective access is generally accepted, and Articles 14(1), (2) and (6) in Option 1 are the same as Articles 14(1), (2) and 14 *quater* in Option 2. The drafting of Option 1 is based on the factors and principles referred to 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.[7] Option 2 was proposed by the Informal Group on Article 14 (formerly Art. 13) in Working Document No 94. The principal difference between Options 1 and 2 is that in Option 2 child support applications are privileged by qualifying generally for free legal assistance, subject to limited exceptions.

[6] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
[7] Prel. Doc. No 10, para. 45-47.

Option 1[8]

1. The requested State shall provide applicants with effective access to the procedures, including appeal procedures, arising from applications under Chapter III, where necessary by the provision of free legal assistance.

26. The phrase "legal assistance" is defined in Article 3 as including "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 factors included in that definition may be relevant. The phrase "legal assistance" is also explained and discussed at paragraphs XXX of this Report in relation to Article 6(2) *a)*. The explanation of "legal assistance" in paragraph 1 should therefore be read in conjunction with the explanation for Article 6(2) *a)*. The phrase "effective access to procedures" is explained in the general comments for Article 14, at paragraphs XX above.

27. 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" must therefore include a creditor, a debtor or a public body. The procedures in question may be administrative or judicial, and include appeal procedures. It appears also that the procedures include any separate procedures that may be required at the enforcement stage. Where "effective access to procedures" can only be guaranteed by providing free legal assistance, this must be provided in the form appropriate to the particular situation.

28. 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)).

29. 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.

30. 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 51(1) *c)*. This information can be included in the Country Profile, and in the information provided in accordance with Article 5 *b)*.

31. Countries which do not have a system of free legal representation may be able to establish a network of pro bono lawyers to assist foreign applicants.

[8] Prel. Doc. No 26, "Observations of the Drafting Committee on the text of the Preliminary Draft Convention", p. 5, contains the following under Art. 14: "Consideration should be given to whether Article 14 should apply (in whole or in part) to "direct applications" and / or to applications by public bodies."

2. The requested State shall not be obliged to provide the legal assistance referred to in paragraph 1 where the procedures are designed to enable the applicant to make the case without the need for such assistance, and where the Central Authority provides such free services as are necessary.

32. Paragraph 1 states the general and overarching principle that Contracting States must provide applicants with effective access to procedures. Paragraphs 2 and 3 make it clear that the obligation to provide effective access does not always require the provision of free legal assistance for this purpose.

33. This may be the case under paragraph 2 where the procedures are "designed to enable the applicant to make the case without the need for" legal 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 to appear in person. However, if an administrative decision has to be appealed to a court, it is most likely that legal assistance or representation would be needed, and then the obligation referred to in paragraph 1 would apply. Paragraph 1 refers specifically to legal assistance for appeal procedures.

34. 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.

3. The provision of free legal assistance may be made subject to a means or a merits test. A Contracting State may declare in accordance with Article 58 that it will provide free legal assistance in applications concerning child support on the basis of the assessment of the child's means only, or without any means test at all.

35. 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 amount of income and assets of a person, to determine if their income is 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 their case for child support. 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 cases which have a good chance of success.

36. The second sentence was added following discussion of Working Document No 53 submitted by the European Community at the 2005 Special Commission. The proposal conforms to the European Union Directive on Access to Justice.[9] The provision means that in a child support case, States have the option to agree to provide free legal aid based on the means of the child, or to provide free legal aid without imposing any means test at all. An optional declaration system was preferred, as many States do not at present make such generous provision in child support cases.

[9] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

37. Some experts were opposed to the idea of completely free services for all children. In some systems it is necessary to take into account, not only the means and resources of the child, but also those of the child's household or family. Some countries cannot apply a means test to a child for the purposes of legal aid, unless the child lives apart from the family. Other countries offer free legal representation in any proceedings concerning a child. The system of declarations provided for in paragraph 3 takes account of such variations.

38. In some countries free legal aid is not, strictly speaking, free. 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.

39. 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.[10]

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

40. 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.

[5. A creditor, who in the State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in any proceedings for recognition or enforcement, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.]

41. Paragraph 5 applies exclusively to proceedings for recognition and enforcement brought by the creditor. Its purpose is to guarantee for the creditor, at the stage of recognition and enforcement, the same privileges which she / he enjoyed in the original proceedings. The creditor must have received the benefit before making the application for recognition and enforcement. The benefit in the State of origin is not one to which the creditor "is entitled" (*i.e.* at present or in the future) but one from which she / he "has benefited" (*i.e.* in the past). This interpretation could lead to injustice if the creditor has never needed or sought legal aid in the past, but needs it now for recognition and enforcement. Consideration might be given to substituting the words "is entitled to" for "has benefited from".

42. 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".

43. This paragraph is taken from Article 15 of the 1973 Hague Convention (Enforcement). It has not yet been approved by the Special Commission as no agreement was reached. Some experts supported paragraph 5 in its present form, others felt it was not needed as effective access was already provided through paragraphs 1 to 4 inclusive, and yet others felt more debate was needed. In any event, the rule in paragraph 5 remains subject to the overriding obligation which a Contracting State has to make procedures, including recognition and enforcement procedures, effectively accessible.

[10] Prel. Doc. 10, May 2004, at para. 20, 21, 24 and 25.

6. No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings brought by a creditor under the Convention.

44. Paragraph 6 protects the creditor 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 creditor is not faced with any financial obstacle or disincentive before being able to make application for the recovery of maintenance.

45. This article applies exclusively to any proceedings brought by the creditor under the Convention. It derives from similar provisions in Article 9 of the 1956 New York Convention and in Article 16 of the 1973 Hague Convention (Enforcement), although in those Conventions the provisions are not limited to proceedings brought by a creditor.

46. The question of who would pay costs where the creditor loses the case is addressed by Article 40(2) which permits recovery of costs from the unsuccessful party.

[7. A Contracting State may declare under Article 58 that it will provide free legal assistance in applications concerning child support on the basis of reciprocity with any other Contracting State that makes the same declaration.]

47. Paragraph 7 is a reciprocity provision which guarantees free legal assistance in any applications concerning child support (whether made by the creditor or debtor) between Contracting States which make the same declaration under Article 58.

48. This provision has not yet been approved by the Special Commission as the system of declarations referred to has not yet been discussed.

49. It is evident that an imbalance may develop between States in relation to legal and administrative costs between administrative systems with no or fewer legal proceedings and court-based systems with frequent legal proceedings and the associated costs. Bilateral arrangements may assist some States in addressing this imbalance.

Option 2 (Art. 14 to 14 quater*)*[11]

50. Article 14 (formerly Art. 13) Option 2 was proposed in Working Document No 94 by the Informal Group on the former Article 13. There has not yet been an extensive discussion of Option 2 as it was submitted towards the end of the Special Commission of June 2006.

Article 14 Effective access to procedures

51. See the general explanation under Option 1.

1. The requested State shall provide applicants with effective access to the procedures, including enforcement and appeal procedures, arising from applications under Chapter III, where necessary by the provision of free legal assistance.

See explanation for Option 1, Article 14(1).

2. The requested State shall not be obliged to provide the legal assistance referred to in paragraph 1 where the procedures are designed to enable the applicant to make the case without the need for such assistance, and where the Central Authority provides such free services as are necessary.

See explanation for Option 1, Article 14(2).

[11] Prel. Doc. No 26, "Observations of the Drafting Committee on the text of the Preliminary Draft Convention", p. 5, contains the following under Art. 14: "Consideration should be given to whether Article 14 should apply (in whole or in part) to "direct applications" and / or to applications by public bodies."

Article 14* bis *Free legal assistance for child support applications

1. Subject to paragraph 2 of this Article, free legal assistance shall be provided in respect of all applications under Chapter III concerning child support.

52. Paragraph 1 establishes a general rule that free legal assistance must be provided in all child support applications made under Chapter III. "Legal assistance" is defined in Article 3 *c)*.

53. This provision assures Contracting States that there will be a common approach to this aspect of the treatment of child support cases. A means or merits test will not apply to child support cases, as it currently may in Option 1, Article 14(3).

54. The general rule will not apply to direct applications concerning child support, as they are not made under Chapter III. Other exceptions to the rule are stated in Article 14 *bis*(2).

2. The requested Central Authority may –

***a)* impose reasonable charges for the costs of genetic testing when such testing is necessary in order to establish a maintenance decision in that State; or**

55. Paragraph 2 *a)* establishes the first exception to the general rule in paragraph 1. In cases where genetic testing must be undertaken to determine parentage prior to the establishment of a maintenance decision, the requested Central Authority may impose reasonable charges. This is also an exception to the rule established in Article 8(1) that Central Authorities must bear their own costs in applying the Convention.

b) if it considers that, on the merits, the application is manifestly unfounded, refer the application to the appropriate body in the requested State, for a determination of the eligibility for free legal assistance under Article 14 *ter* (1); or, if after a decision has been made on the substance of an application, the competent authority determines that the application was frivolous, seek reimbursement of costs and reasonable legal fees;[12]

56. The exception in paragraph 2 *b)* is necessary to protect Central Authorities and competent authorities in the requested State from the burden of processing applications which are "manifestly unfounded" or "frivolous". At present, the only basis on which a requested Central Authority may refuse to process an application is where it is "manifest that the requirements of the Convention are not met" (Art. 12(8)). If the requirements of the Convention are met, the application must be accepted. According to the first part of Article 14 *bis*(2) *b)* if the requested Central Authority believes an application for child support is "manifestly unfounded", it need not provide free legal assistance immediately. Instead, the Central Authority will seek a determination on whether the applicant is eligible for free legal assistance. The effect of such determination is not that the application itself must be refused, but that free legal assistance must be refused. According to the second part of Article 14 *bis*(2) *b*), if free legal assistance is provided and it is established during proceedings that the application is "manifestly unfounded" or "frivolous", a financial penalty may be imposed on the applicant by the competent authority, *i.e.* the reimbursement to the requested Central Authority of its costs and reasonable legal fees.

[12] This is set up as an alternative. A State could use the first part, if it is available, or the second part. Perhaps the report can help explain further. In the first situation, if there's a determination that there is no eligibility for free legal assistance, the requested central authority should notify the requesting central authority. In that case, the applicant may want to file directly with the Competent Authority under Art. 15(5) or outside of the Convention.

57. Note: the reference in sub-paragraph *b)* to Article 14 *ter* (1) is incorrect as no such provision exists. Furthermore, Article 14 *bis* refers to applications for child support. Article 14 *ter* refers to applications by other family members. Therefore a determination of eligibility for legal assistance under Article 14 *bis* could not be resolved under Article 14 *ter.*

c) **where it considers that the economic situation of the applicant is disproportionate to the requirements under which legal assistance applicants are deemed able to bear the costs of proceedings, so inform the requesting Central Authority. If the requesting Central Authority determines that, in the requesting State, the applicant would be entitled in an international case under the same circumstances to free legal assistance, the requested Central Authority shall provide free legal assistance. If the requesting Central Authority determines that the applicant would not be entitled to free legal assistance in the requesting State, it shall so notify the requested Central Authority. With prior authorisation of the applicant, the requested Central Authority shall proceed upon the application and may charge for legal assistance.**

58. Paragraph 2 *c)* states the third exception to the general rule concerning free legal assistance in child support cases. The purpose of this provision is to establish some balance in cases where an applicant in a child support case has significant financial resources and would not be disadvantaged by paying for his or her own legal expenses. If in the requesting State, such an applicant in an international case would receive free legal assistance, regardless of his or her economic situation, then on the basis or reciprocity, the applicant must receive free legal assistance in the requested State.

59. If, on the other had, the wealthy applicant would not receive free legal assistance in an international case in the requesting State, the applicant must be notified that charges may be imposed. In such cases, only if the applicant gives his or her authorisation to the requested Central Authority can that authority proceed with the application and impose the charges for legal assistance. An applicant who is notified that charges will be imposed may prefer to make a direct application or pursue some other remedy under the law of the requested State.

60. It may be necessary to consider how useful this rule could be when it will only apply in a limited number of cases.

Article 14 *ter* Free legal assistance for applications for other forms of maintenance

61. Article 14 *ter* applies to applications for maintenance by spouses and other family members with the exception of children. It will therefore only apply between Contracting States which make the declaration referred to in Article 2(2) concerning maintenance orders “arising from a family relationship, parentage, marriage or affinity”.

In cases other than applications under Chapter III concerning child support –

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

See explanation for Option 1, Article 14(3) – first paragraph concerning means and merits.

b) entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

See explanation for Option 1, Article 14(4).

c) a creditor, who in the State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in any proceedings for recognition or enforcement, to benefit from the same legal aid or exemption from costs or expenses provided for by the law of the State addressed under the same circumstances.[13]

62. See explanation for Option 1, Article 14(5). However, this provision differs from Article 14(5) by stating that the creditor who received legal aid benefits in the requesting State is entitled to the same legal aid or exemption from costs or expenses in the requested State which would be provided under the law of the requested State under the same circumstances. At first this may appear to be a more generous provision than Article 14(5), but it is not clear how this provision would work in practice, especially if the requested State had no provision in its law for any legal aid or exemption from costs.

Article 14 quater *Security for costs*

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings brought by a creditor under the Convention.[14]

See explanation for Option 1, Article 14(6).

Article 20 Procedure on an application for recognition and enforcement

63. This Article governs certain aspects of the procedure to be followed for recognition and enforcement of a foreign decision when both recognition and enforcement are asked for. 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 existing international procedures – 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.[15] Nevertheless, for many States the development of a streamlined and partially harmonised procedure at the international level is 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 maintain concerns about undue interference with domestic laws and procedures. It is for this reason that, at the meeting of the Special Commission in May 2007, time is to be set aside for further discussion of this Article.

64. Important features of the new 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. …), 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.

65. In the unusual 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.[16] The application will be accompanied by the documents specified in Article 21. 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.

66. The terms "procedure on an application for recognition and enforcement" include all the possibilities existing in the different States: registration for enforcement, declaration of enforceability, *exequatur*, etc.

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[13] This may be subject to a declaration or reservation.
[14] This may be subject to a declaration or reservation for non child support cases.
[15] See, for example, Brussels / Lugano, UIFSA and Canadian regimes.
[16] See comments to Art. 12.

67. 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 34 and paragraph 76 below.

Paragraph 1

68. The most common international maintenance case is one where the creditor seizes the authorities of the country of his residence. This underlines the importance of the enforcement procedure in the country of the debtor, which must be fast, cheap and simple. But, given that the Convention is not designed to harmonise all aspects of the procedure, a reference is made to the law of the requested State, whose law will govern the procedure on an application for recognition and enforcement of a foreign decision on maintenance insofar as it is not otherwise covered in the Convention.

69. This Article is not to be confused with Article 28, which refers to enforcement measures, which means enforcement *stricto sensu* and does not mean the intermediate procedure to which a foreign decision is submitted before being enforced under national law.

70. As to the contents of the application, see *supra,* Article 11.

Paragraph 2

71. 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.

72. 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 is not possible for the Central authority to make this determination and, in those cases, the Central Authority must refer the application to the competent authority in the requested State. In both cases, the authorities must act "*promptly*".

Paragraph 3

73. A special rule has been included for the case of a direct application in accordance with Article 16(5). As Central authorities are not involved in such a case, paragraph 3 establishes that the competent authority that has received the application has to declare the decision enforceable or register the decision for enforcement "*without delay"*

74. 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]*" 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.[17] But it is the internal law of the State addressed which determines the practical effect of this expression.

75. "Without delay" in paragraph 3 and "promptly" in paragraph 2 have the same meaning.

76. It should be noted that, if Article 34 is accepted, Article 20(3) would involve unnecessary repetition and could be deleted. See Observations of the Drafting Committee, Preliminary Document No 26, under Article 34.

[17] Art. 14 of the *Choice of Courts Agreement Convention*.

Paragraph 4

77. The objective of achieving a rapid procedure is further underlined by the rule in paragraph 4 clarifying that it is possible for Contracting States to put in place simpler or more expeditious procedures. Some doubts were expressed on the inclusion of this rule in addition to the rule in Article 46 *b)* (most effective rule). There does appear to be some overlap. The rule in Article 20(4) allows a Contracting State unilaterally to introduce simpler or more expeditious procedures. The rule in Article 46 *b)* allows this to be done unilaterally or under an international agreement between the requesting State and requested State.

Paragraph 5

78. This paragraph specifies the grounds on which the relevant authority in the requested State may review *ex officio* the application for recognition and enforcement. Two possibilities remain open at this stage of the negotiations. According to the first one, the grounds are those specified in Articles 17 and 19. According to the second one, the only ground is that specified in Article 19 *a)*. It is an important decision to be taken.

79. No doubt exists as to Article 19 *a)*, which specifies incompatibility with public policy of the requested State as ground for refusing recognition and enforcement. This approach limits the possibilities of examination by the competent authority. The other possibility is to extend the grounds for review to all those included in Article 19 and to Article 17 (bases for recognition and enforcement).

80. 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 a great majority of cases, no further submissions will be made.

81. It is to be noted that at the time of the *ex officio* review, the competent authority for registration of the decision for enforcement or for a declaration of enforceability in the State addressed could ask either directly, in accordance with Article 21(3), or through its Central Authority, in accordance with Article 12(2), from the Central Authority of the requesting State for a complete copy certified by the competent authority in the State of origin of any document specified under Article 21(1) *a)*, *b)* and *d)* [and 26(2)]. In the case of a "direct application", the competent authority may ask the applicant directly to produce the complete certified copy of these documents.

Paragraph 6

82. The declaration of enforceability or the registration made according to paragraph 1 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. As to the distinction between notice and service, see supra, Article 19 *e)*.

83. The rule in paragraph 6 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 8 or 9 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 23 and 24.

84. 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.

85. Two terms are employed in this and following paragraphs: “challenge” or “appeal”. The objective is to ensure that the applicant and respondent have the opportunity to challenge the decision whether made in an administrative or judicial procedure, depending on the system operating in the State addressed. It is not a review of the merits or a new finding of facts, prohibited by Articles 23 and 24. The challenge or appeal may only be on grounds set out in paragraph 8 or, in the case of the respondent, also in paragraph 9.

86. 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” or “*contradictoire*” must not, under any circumstances, be equated with “contentious”. In some States the term means contentious as well as adversarial, whereas this is not the case in others. 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 7

87. An important improvement in this Convention is the establishment of a time-limit in which the respondent 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.

88. Since a grant of *exequatur* will be the normal outcome of an application for recognition and enforcement, it is logical that the time allowed for appeal should be brief, 30 days from the date of notification of the decision.[18] 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.

89. The time-limit is the same for both parties, applicant and respondent. But the applicant has always the possibility to introduce a new application.

Paragraph 8

90. The aims of the Convention and the limitations on the right to appeal in paragraph 6 result in the only grounds for appeal being those set out in paragraph 8. These are in sub-paragraph *a)*, the grounds for refusing recognition and enforcement set out in Article 19, and in sub-paragraph *b)*, the bases for recognition and enforcement under Article 17. Finally, and using a medium-neutral language, another ground for challenge or appeal refers to the authenticity, veracity and integrity or the required documents. Article 21, paragraph 3, sets out the procedure for obtaining a complete certified copy of any document which is subject of a challenge or appeal ground. The term “authenticity” in this context should be understood as meaning the identity of the sender.

Paragraph 9

91. Paragraph 9 adds a ground of challenge or appeal only applicable 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.

[18] For the moment, the time periods in this paragraph are taken from Work. Doc. No 67 (International Association of Women Judges).

Paragraph 10

92. 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 11 where this is possible. The notification may be effected directly or through the Central Authority. The Convention does not specify the method to be used.

Paragraph 11

93. Paragraph 9 addresses the question of any possible further appeal by the applicant or respondent.[19]

94. The text only accepts further appeal if it is permitted by the law of the State addressed, which seems unnecessary, given the existence of Article 20, paragraph 1[20]. The question remains open whether there should be any further elaboration of this provision, taking into account 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, consideration may be given to further provisions such as a prohibition on stay or suspension of enforcement while an appeal is pending, or limiting appeals to points of law. See further the Observations of the Drafting Committee, Preliminary Document No 26, under Article 20(11).

[19] The right of double instance is only for criminal procedures, as is recognised by Art. 14.5 of the international pact and civil and political rights of 1966 and, in Europe, Art. 2 of the Protocol number 7, of 22 November 1984 to the Rome Convention of 1950. This rule having been examined by the European Court of Human Rights in the decision of 13 February 2001, Krombach case, para. 93 ss, as Krombach, has not had the opportunity to appeal in France as he did not entered in appearance. It may be noted that the principle of double instance is required by the European Court of Human rights only for criminal questions and no similar decision on civil matters has been given.

[20] See European Community, Work. Doc. No 86. During the meeting of the Special Commission in June 2006, working documents on this point were presented by China and Japan (Work. Doc. No 93) and Israel (Work. Doc. No 96).